

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.09.2016

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

C.P.No.308 of 2013

Kotak Mahindra Bank Ltd.,*
Mount Road Branch,
II Floor, No.185, Anna Salai,
Chennai - 600 006
represented by its Power of Attorney
Area Recovery Manager
Mr.V.V.Sriramamurthy ... Petitioner

* Amended as per order dated 26.07.2016
in C.A.No.638 of 2016

Vs.

1. M/s.Orchid Pharma Limited, **
Orchid Towers,
313, Valluvar Kottam High Road,
Nungambakkam,
Chennai - 600 034.
2. State Bank of India,
CAG Branch, 3rd Floor,
Sigapi Achi Building,
18/3, Rukmani Lakshmipathi Salai,
Egmore, Chennai-600 008. ***
3. Hospira Healthcare (India) Private Limited,
Plot No.133, SIPCOT Industrial Park,
Irungattukottai,
Sriperumbudur - 602 117. ***.. Respondents

** Amended as per order dated 01.09.2016
in C.A.No.799 of 2016

*** Respondents No.2 and 3 impleaded as per
order dated 02.07.2014 in C.A.Nos.680 and
682/2014 and amendment carried out as per
order dated 01.09.2016 in C.A.Nos.797 to 799/2016

(a) and 439(1) (b) of the Companies Act, 1956 that (a) the respondent company, namely, M/s.Orchid Pharma Limited having its registered office at Orchid Towers, 313, Valluvar Kottam High Road, Nungambakkam, Chennai-600 034, with CIN Number L24222TN1992PLC022994 be ordered to be wound up by and under the orders of this Hon'ble Court under the provisions of the Companies Act, 1956.

* * *

For Petitioner : Mr.Karthik Seshadri
for M/s.Iyer and Thomas

For Respondents : Mr.T.K.Bhaskar for R1
Mr.Senthil Kumar for R2
Mr.Udayakar Rangarajan
for R3

O R D E R

1. This is a petition filed under Section 433 of the Companies Act, 1956, by the predecessor-in-interest of the petitioner bank.

1.1. The predecessor-in-interest was an entity going by the name : ING Vysya Bank Limited. Pursuant to order dated 26.07.2016, passed in Company Application No.638 of 2016, the petitioner bank was substituted in place of ING Vysya Bank Limited.

2. This petition is based on the non-repayment of loans granted to the respondent company. The respondent company, which is in the business of developing, manufacturing and marketing Active Pharmaceutical Ingredients (in short "API") and formulations, sought working capital facility from the predecessor-in-interest

of the petitioner bank to the tune of Rs.40 Crores. Accordingly, vide sanction letter dated 02.09.2011, working capital limit to the tune of Rs.40 Crores was approved qua the respondent company.

2.1. It is the petitioner bank's case that the sanction of the said working capital facility was based on the following broad terms:

- **"Facility 1** : Sales Bill Discounting (with recourse to Orchid Chemicals & Pharmaceuticals Ltd.)
- **Amount** : INR 400 Mio. (INR Four Hundred Million Only)
- **Purpose** : Working Capital
- **Tenor** : Max. Tenor of 90 Days, Revolving
- **Margin** : 10%
- **Rate of Interest** : To be mutually agreed upon at the time of drawdown, subject to minimum IVBR, IVBR as on date is @ 10.20%. Will be collected upfront.
- **Security** : Unsecured
- **Validity period of facility** : 31-July-2012"

2.2. Furthermore, it is the case of the petitioner bank that an irrevocable Power of Attorney was executed in its favour, authorising it to receive the moneys against bills discounted vis-a-vis prospective purchasers, such as Hospira Health Care India Private Limited (in short "HHIPL").

2.3. The petitioner bank, in order to secure the

financial facility extended to the respondent company, had various undertakings and security documents executed in its favour. These documents, amongst others, included a Demand Promissory Note; an Agreement of Bills Finance ; an Agreement For Unsecured Funds-Based Loan ; an Undertaking For End Use ; and a Letter of Indemnity, etc. All of these documents were executed on the same day i.e., on 06.01.2012.

2.4. It was based on these documents that the petitioner bank sets up the case that it was the obligation of the respondent company not to divert HH IPL's receivables and to refrain from entering into any amalgamation, demerger, merger or corporate reconstruction or, even bring about any change in status in the constitution, control, ownership or in the nature of its business, which would materially affect its interest, without prior written consent.

2.5. The petitioner bank states that not only the advance payments received by the respondent company from HH IPL, but also funds given by it, contrary to the arrangement between them, were diverted by the respondent company.

2.6. Apart from anything else, it is also the case of the petitioner bank that in order to secure its interest, it had obtained a cheque in the sum of Rs.43 Crores from the respondent company. The cheque was a

security against a possible failure of the respondent company in repaying the amounts received against bills discounted by the petitioner bank. The record shows that the cheque furnished by the respondent company, did indeed bounce, which propelled the petitioner bank to take out the proceedings under Section 138 of Negotiable Instruments Act, 1881.

2.7. Furthermore, the petitioner bank, evidently, is aggrieved by the fact that a part of the business was being hived off in favour of HHPL, contrary to the terms of engagement, agreed to between the parties.

3. It is, in this background, the petitioner bank issued a statutory demand notice dated 06.07.2013. Admittedly, the respondent company did not liquidate the debt claimed by the petitioner bank within the time stipulated in the notice.

3.1. Resultantly, the petitioner bank instituted the present petition, in this Court, on 23.08.2013.

4. Upon notice being issued, the respondent company has filed its reply.

4.1. A perusal of the reply would show that the respondent company is, concededly, involved in litigation with the petitioner bank both before the Debt Recovery Tribunal as well as in the concerned criminal court, with regard to its alleged failure to honour the cheque furnished to the petitioner bank.

4.2. Furthermore, a perusal of the reply would also show that the respondent company has also made a reference to a Corporate Debt Reconstructing (CDR) mechanism having been put in place under the aegis of State Bank of India (in short "SBI"). According to the respondent company, SBI is the monitoring institution, which has consented to the CDR, with a cut off date, as 01.04.2013.

4.3. It is the respondent company's case that the CDR proposal submitted was, admitted, only upon receipt of consent of the minimum majority, both in number and value, stipulated under the relevant regulations. According to the respondent company, a CDR proposal can be admitted, only if, a minimum of 75% of the creditors (in value) and 60% of the creditors (in number) consent to reconstructing.

4.4. Insofar as transfer of business to HH IPL is concerned, the respondent company has taken the stand that the said transfer is taking place under a Business Transfer Agreement, and, that, this transfer of business is part of the Debt Reconstructing package, which is to be implemented, as per the Technical, Economic, Viability Study Report generated in that behalf.

4.5. The respondent company also has brought to fore the fact that it is a running company, which has on its rolls, 2785 employees, as on 31.12.2013.

4.6. It is further stated by the respondent company that it is the listed company with 84,811 shareholders within its fold.

5. Arguments, in the matter, on behalf of the petitioner Bank were advanced by Mr.Karthik Seshadri, Advocate, while submissions on behalf of the respondent company were made by Mr.T.K.Bhaskar, Advocate.

5.1. Both counsels, in support of their submissions placed reliance on their respective pleadings.

6. Having heard the learned counsel for the parties and perused the record, according to me, the present petition is not sustainable for the reasons set out herein below:

6.1. While there is no doubt that the respondent company owes a substantial amount to the petitioner Bank, most of which, is not in dispute; if, however, one were to go ahead with petition, the restructuring scheme put in place by the secured creditors, which is being monitored by SBI would be put in jeopardy. The stakes of the secured creditors in the success of the restructuring scheme are substantial. Admittedly, on the other hand, the respondent company is an unsecured creditor, having an exposure, which is, admittedly, much less.

6.2. I may only point out that during the course of arguments, Mr.Seshadri, had laid stress on the fact

that the petitioner bank was not part of the reconstructing scheme, and hence, any decision arrived at, by the creditors under the CDR system could not be binding on it. The reason advanced by Mr.Seshadri for taking this stand, was that, the petitioner bank had not entered into a Debtor-Creditor Agreement.

6.3. In support of this submission, Mr.Seshadri, sought to draw my attention to paragraph D of the Inter-Creditor Agreement, dated 07.05.2012.

6.4. In response to this submission, Mr.Bhaskar contended that this submission of Mr.Seshadri was untenable, as the petitioner bank was part of the Lender Group, and, that, once the Lender Group had approved a reconstructing mechanism by a "Super Majority", then, the reconstructing scheme put in place by the Lenders would be binding even on those lenders, who had not given their consent to the said scheme.

6.5. Mr.Bhaskar also stressed the fact that an appeal mechanism, under the Inter-Creditor Agreement, is made available, to a dissenting lender; a remedy to which recourse was not taken by the petitioner bank.

6.6. In order to appreciate the arguments advanced by both sides in this behalf, it would be necessary to cull out the relevant provisions of the Inter-Creditor Agreement. These being : Clause D of the

recitals; Clause 1.1. (aa) of Section 1; Section 8; Clauses 9.11 and 9.23 of Section 9; Clause 10.1. of Section 10; and Clauses 11.1. and 11.2 of Section 11.

"....

(D) The Participating Financial Institutions and Banks and the Eligible Borrower shall in each case enter into a legally enforceable agreement (hereinafter referred to as "Debtor-Creditor Agreement") providing for various modalities relating to the Workouts, stand-still provision etc., in such form and manner as the CDR Core Group may prescribe. Execution of the Debtor-Creditor Agreement by the Eligible Borrower will be a condition precedent to the applicability of this Agreement to avail of the benefit of CDR System.

Section 1. Definitions :

1.1. For the purpose of this Agreement :

....

(aa) **"Super-Majority Vote"** shall mean votes cast in favour of a proposal by not less than sixty percent (60%) of number of Lenders and holding not less than seventy-five (75%) of the aggregate Principal Outstanding Financial Assistance.

Section 8. Standstill Provision

The Participating Financial Institutions and Banks agree and undertake that from the Commencement Date of consideration of

Reference for the first time by the CDR Empowered Group at its meeting, the Lenders shall not commence any civil action and/or make best efforts not to proceed with any civil action, if already initiated, against the Eligible Borrower for recovery of their dues in respect of the Financial Assistance. However, the aforesaid standstill provision will be operative for a period of 90 days but may be extended up to 180 days, with the specific approval of CDR Core Group, from the Commencement Date. This however, shall not preclude the Participating Financial Institutions and Banks from initiating or continuing any action against the Eligible Borrower or its promoters/directors or its officials for criminal offences. During this period, outstanding foreign exchange forward contracts, derivative products etc. can be crystallized, provided such crystallization is permitted under the Agreement with the Eligible Borrower or the Eligible Borrower is agreeable to such crystallization.

Explanation : For the purpose of this clause, the term "civil action" shall mean such legal action or proceeding against the Eligible Borrower, or against individual(s) extending personal guarantee(s) in respect of the Financial Assistance provided by the Lenders to the Eligible Borrower and includes enforcement of securities created in favour of any Lender by the Eligible Borrower.

Notwithstanding the aforesaid, if legal

remedies in respect of any claim of a Lender are likely to become barred by law of limitation and the Eligible Borrower or the individual (s) extending personal guarantee (s) fail, refuse or omit to provide confirmation of debt or acknowledgment of liability in respect of it to extend the period of limitation, the Lender shall have the freedom to take such action as may be considered necessary to preserve its claim against the Eligible Borrower and/or the individual(s) extending personal guarantee (s) and keep the CDR informed about such action.

9.11. The lenders who wish to exit from the package would have the option to sell their existing share either to the existing lenders or fresh lenders, at an appropriate price, which would be decided mutually between the existing lender and the taking over lender. The new lender shall rank on par with the existing lenders for repayment and servicing of the dues since they have taken over the existing dues to the existing lender.

9.23. Each of the Participating Financial Institutions and Banks is fully aware that the Restructuring Schemes approved by the CDR Empowered Group shall be implemented within 4 months from the date of Letter of Approval (LOA) issued by CDR Cell, as per the RBI Guidelines. Any non-action/inaction on the part of any of the

Lenders shall be considered as non-compliance and would be liable for action under Section 13 hereof.

Section 10. Decisions Process

10.1. A decision of the CDR Empowered Group relating to prima facie feasibility and/or final approval of a Restructuring Scheme shall be taken by a Super-Majority Vote at a duly convened meeting, after giving reasonable notice, to the Lenders and to the Eligible Borrower.

Section 11. Appeal to the CDR Core Group

11.1. An appeal against the decisions of the CDR Empowered Group shall lie to the CDR Core Group.

11.2. The appeal shall be referred within a period of fifteen (15) days from the date of receipt of a letter of the CDR Cell communicating the decision of the CDR Empowered Group and shall contain the grounds on which the decision of CDR Empowered Group is challenged."

7. A reading of the aforesaid clauses would clearly show that once the participating lenders sign the Inter-Creditor Agreement, every lender is bound by the restructuring scheme approved by the CDR Empowered Group, which in turn, is taken up for approval by a Super

Majority. Super Majority in terms of Clause 1.1.(aa) of Section 1 of the Inter-Creditor Agreement means votes cast in favour of the proposal for re-structuring by a majority of lenders which are not less than 60% in number and having an exposure of not less than 75% of the aggregate Principal Outstanding.

7.1. The lenders, who do not agree with the decision taken by the Super Majority, have the option to sell their existing share either to the existing lenders or fresh lenders at an appropriate price, which is required to be decided mutually between the existing lenders and the taking over lenders. A dissenting lender, in addition, also, has the right to file an appeal against the decisions of the CDR Empowered Group to the CDR Core Group. This appeal, however, has to be filed within 15 days from the date of receipt of the letter of CDR Cell communicating the decision of the CDR Empowered Group.

7.2. It is not disputed before me by Mr. Seshadri that the petitioner Bank, via its predecessor-in-interest, had not only signed the Inter-Creditor Agreement, but had also participated in the meetings of the secured creditors forum apart from those of the Corporate Debt Restructuring Standing Forum. Therefore, once, the Super Majority approved the respondent company's CDR proposal, it would be binding on the

petitioner bank as well, subject to their right to sell their share of the debt to an existing lender or a fresh lender.

7.3. Furthermore, if the petitioner bank was aggrieved, as indicated above, it could have also filed an appeal. Neither of these routes were, admittedly, taken by the petitioner bank.

8. Furthermore, the argument of Mr.Seshadri that Clause D of the recital would give the petitioner bank a right to contend that the restructuring scheme was not binding on it, is completely untenable. As would be evident, Clause D is part of the recitals and not a term of the Inter-Creditor Agreement, and therefore, it can only have limited utility. The only purpose, perhaps, it would serve, would be to explain the contours of the Inter-Creditor Agreement.

8.1. Assuming without accepting, even if, I were to treat Clause D as a term of the Inter-Creditor Agreement, it would still not help the cause of the petitioner bank. A close perusal of Clause D would show that all that it provides for, is that, the Participating Financial Institutions and/or Banks are required to enter into a legally enforceable agreement with the eligible borrower to work out the fine details of the terms, which may be prescribed, by the CDR Core Group. It does not follow, as has been rightly argued by Mr.Bhaskar, that

the Creditor-Debtor Agreement should precede the Inter-Creditor Agreement in order to bind down a lender. The recital clarifies this position, as it goes on to state that the execution of the Debtor-Creditor Agreement by an eligible borrower will be a condition precedent for enabling the eligible borrower to avail of the benefit of "the CDR System".

8.2. Therefore, the submission of Mr.Seshadri that the restructuring scheme formulated under the CDR system was not binding on the petitioner bank, and therefore, the instant petition should be sustained, is, in my view, completely untenable.

9. That apart, I am told that the status quo order granted by the Debts Recovery Tribunal on 17.06.2014 has been partially vacated, broadly, keeping in mind the factum of formulation of a restructuring scheme. Though, an appeal against the said order has been preferred by the petitioner bank, which is pending adjudication before the Debts Recovery Appellate Tribunal, that, to my mind, dilute the argument put forth, on behalf of the respondent company that now is not the stage to trigger winding up proceeding against it.

9.1. I may only note that it is emphasised by Mr.Bhaskar that a similar stand was taken by the petitioner bank before the Debts Recovery Tribunal, as

well. For the sake of convenience, the relevant extract of the order dated 17.06.2014, passed by the Debts Recovery Tribunal vacating the interim order is set forth below only to demonstrate that the stand of the respondent company as against that of the petitioner has found resonance with, at least, one forum, for the moment :

"17. Having considered the submissions made by the Ld.Sr. Counsel Mr.P.S.Raman for the petitioner/Defendant Company, Mr.Shankar Narayanan for the 3rd Respondent and Mr.AR.L.Sundaresan for the Respondent/Applicant Bank, this Tribunal is of the view that as on the date of passing interim directions on 21.06.2013 directing the Respondents to maintain status quo till the repayment of the entire OA claim as directed therein, no doubt on the said date there was no such CDR Package sanctioned by the CDR (EG). Mr.L.Chandrasekar, Executive Vice President of Petitioner/Defendant Company is aware of a reference to CDR but suppressed the same before this Tribunal. The Applicant Bank is also a part of the CDR system and also attending various meetings of joint lenders from time to time. This Tribunal also recorded that objections raised by the Applicant Bank in such meeting as per the said OA. The applicant has also informed this

Tribunal that when the counter was filed in IA 114 and 115 of 2013 the Executive Vice President of the Defendant Company was award that the Company has approached the State Bank of India for a reference to the CDR system, but the counter was silent in that aspect. The petitioner is also aware that the 3rd respondent has taken away right of the Applicant Bank in respect of unpaid vendor's right when the bill discount facility was allowed and discounted bills were sent to the 3rd respondent instead of making payment to the Applicant Bank for reasons not known to this Tribunal, the same was allowed to be paid to the Defendant Company which was used to clear the FCCB liabilities as admitted by the Defendant Company. The Tribunal is also aware that the Applicant Bank has not taken measures to declare the Defendant Company as willful defaulter so that the same will make the company ineligible for any reference under the CDR system. Even though they are engaged in correspondences with the Defendant Company since the system under CDR Scheme, where ICA is signed by the Applicant Bank along with the CDR group members as per the guidelines issued by the Reserve Bank of India, the applicant is entitled to raise issues in respect of disagreement and the package under Section 11 of ICA and at the same time the Applicant Bank is also bound by the

decision of the super majority as per Section 1.1(aa), the final approval given by the CDR (EG) is well within the knowledge of the Applicant Bank, but during the course of arguments it was not brought to the knowledge of this Tribunal that the Applicant Bank has preferred any Appeal as per Section 11 of the ICA. As substantial amount out of sale consideration is going to be utilized by the lenders mechanism to pay the members the pre-decided amount to various lenders as per the decision of the CDR mechanism, this Tribunal has no jurisdiction to question the same. At the same time, the Tribunal is also concurs with the view of Id.Sr.Counsel Mr.Shankar Narayanan in his repeated submissions informed that the Applicant Bank cannot hold the entire scheme to ransom so as to stall the benefit available to all the CDR secured lender and CDR unsecured lenders including the non CDR lenders and cannot be ignored."

10. The respondent company, as it appears, is seeking to rehabilitate itself by restructuring its debt. Major lenders, who have secured debts, have agreed to the restructuring proposal.

10.1. In these circumstances, in my view,

continuing with the company petition will not be in the interest of the creditors at large, which includes the

secured creditors, the unsecured creditors, the workmen and/or the employees, as also, the shareholders of the respondent company. The respondent company has a huge number of workers are on its rolls; the number runs to 2785 workmen/employees. Furthermore, the respondent company is a listed company, with as many as 84,811 shareholders. This apart the restructuring scheme involves participation of 21 banks and financial institutions, besides the petitioner bank. As indicated above, the petitioner bank is an unsecured creditor. It has, I am told, an exposure of less than 2% of the total debt owed by the respondent company. Therefore, any precipitative action in these proceedings could derail, at this juncture, the interest of a whole lot of stakeholders.

11. Thus, having considered the overall circumstances, I am not inclined to continue with the company petition, at this point in time. It is, accordingly, dismissed.

12. Needless to say, any observations made above will not come in the way of the petitioner bank having its contentions adjudicated before the relevant forums, including, before the forums, whereat, it is presently embroiled in litigation.

13. For the reasons above, the company petition is dismissed, leaving the parties to bear their own costs.

sd/.R.S.A.J

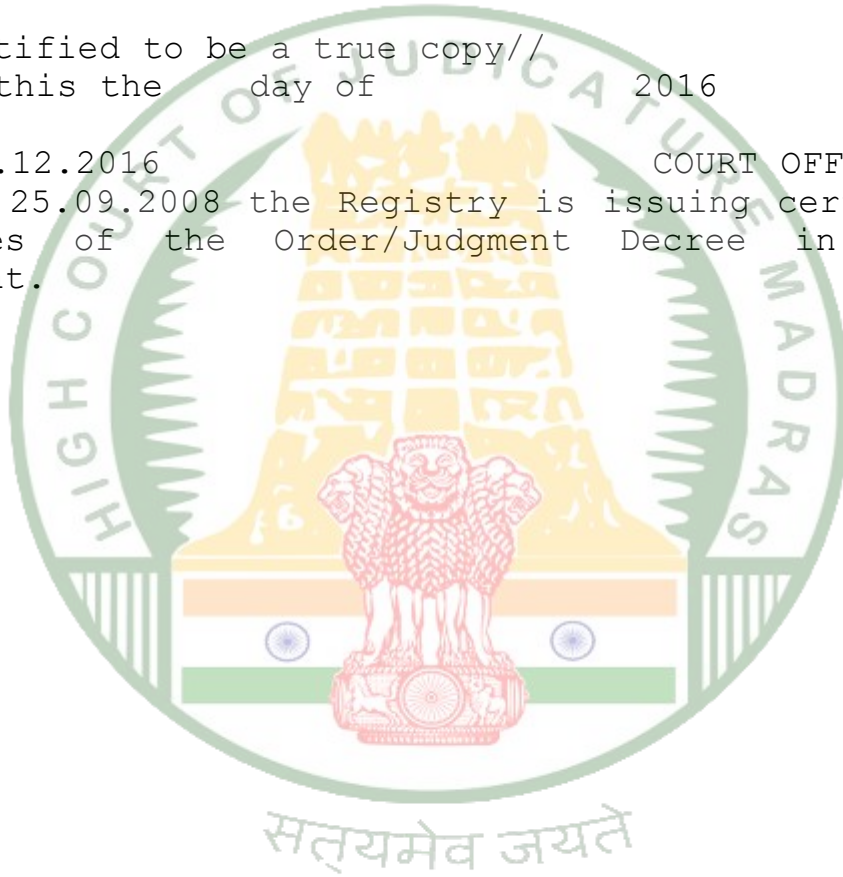
26.09.2016

//Certified to be a true copy//
Dated this the day of 2016

R.s/07.12.2016

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