IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.631 OF 2014

SICOM Ltd. .. Petitioner
Vs.
Hiran Orgochem Ltd. .. Respondent

Mr.Raj Patel i/by Mr.Prakash Panjabi for the petitioner.
Mr.Sanjay Dubey i/by Mr.Omar Shaikh for the respondent.

CORAM : R.D. DHANUKA, J.
DATE : 11th April 2017

P.C. :

. By this petition, the petitioner seeks winding up of the respondent-company on the ground that the respondent is unable to pay its debts.

2. On 9th December 2010, the petitioner sanctioned a Medium Term Loan of Rs.1500 lakh on the terms and conditions contained in the said sanctioned letter. The said terms and conditions were modified by the petitioner's letter dated 31st December 2010. The parties thereafter entered into a Loan Agreement dated 21st December 2010. The petitioner disbursed the loan amount to the respondent which was repayable in 25 monthly installments of Rs.60 lakh each commencing at the end of 12 months from the date of disbursement of the said loan.

3. By letter dated 31st December 2010, Clause 7(iv) of the sanctioned letter was modified and it was agreed that the respondent shall submit an undertaking to the petitioner to the effect that it had complied with directions of the Gujarat Pollution Control Board (GPCB) and

would file an undertaking to obtain the GPCB clearance certificate within three months from the date of disbursement failing which the respondent company shall arrange for repayment of the loan of the petitioner along with interest.

4. Mr.Patel, learned counsel appearing for the petitioner invited my attention to the undertaking filed by the respondent on 31st December 2010 by which the respondent undertook to obtain and submit the clearance from GPCB to the satisfaction of the petitioner within three months. It was clearly mentioned in the said undertaking that in the event of failure to adhere to the said undertaking by the respondent, the petitioner would be entitled to recall the said loan and to take necessary action to protect its interest.

5. Learned counsel also invited my attention to the last undertaking rendered by the respondent on 2nd April 2011 while obtaining extension of time. Pursuant to the said undertaking, the respondent had undertaken to obtain and submit the required clearance from GPCB within the stipulated time till 31st March 2011. In the said undertaking, the respondent also undertook to honour the post-dated cheque for Rs.15 crore issued by the respondent. The respondent also agreed that in the event of failure to adhere to the said undertaking, the petitioner would be entitled to recall the said loan and to take necessary action to protect its interest.

6. It is not in dispute that the said post-dated cheque issued by the respondent to the petitioner was dishonoured upon presentation with

remark “insufficient funds.” The petitioner, thereafter, issued a notice under the provisions of Section 138 read with Section 141 of the Negotiable Instruments Act. The petitioner vide its letter dated 6th July 2011 issued a Recall Notice to the respondent calling upon the respondent to pay the said amount with interest. The respondent replied to the said notice vide its advocate's letter dated 22nd July 2011 and informed the petitioner that clearance certificate from GPCB in respect of Unit I was expected in due course. The respondent called upon the petitioner to withdraw the said recall notice.

7. The petitioner, thereafter, issued a statutory notice upon the respondent on 20th September 2013 calling upon the respondent to pay a sum of Rs.23,02,78,473/- with further interest thereon. There was neither any payment in respect of the statutory notice nor any response thereto. According to the petitioner as on the date of filing the petition, the respondent is liable to pay the sum of Rs.24,78,30,908/- with further interest @17.25% p.a. from 10th March 2014 till payment/realisation. During the pendency of the petition, the petitioner has exercised its rights to sell one of the immovable properties by issuing a notice dated 23rd January 2012 under Section 13 (2) of Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 (for short “the SARFAESI Act”) and has already sold the said property. The said sale is challenged by the respondent by filing an application before the Debt Recovery Tribunal and the said application being S.A.No.117 of 2012 impugning the legality and validity of the notice dated 23rd January 2012 under Section 13(2) of the SARFAESI Act and the action taken by the bank under the provisions of Section 13 (4) of the SARFAESI Act is pending before the Debt Recovery Tribunal.

8. Learned counsel appearing for the petitioner invited my attention to various annexures to the petition and would submit that the respondent had rendered various undertakings from time to time in favour of the petitioner to obtain and submit GPCB clearance certificate to the petitioner within three months from the date of disbursement. Though the petitioner had granted extension for submission of such clearance, the respondent has not obtained such clearance. Under the terms of the agreement as well as the undertaking rendered by the respondent, the petitioner was entitled to recall the entire loan. The respondent, however, refused to pay any amount on recall of loan by the petitioner. The respondent had also given an undertaking to honour a cheque for Rs.15 crore which cheque was bounced upon presentation by the petitioner with its bankers. There is no response to the statutory notice.

9. Mr.Dubey, learned counsel appearing for the respondent, on the other hand, invited my attention to the public notice dated 29th November 2013 issued by the petitioner for auctioning the immovable property which was mortgaged by the respondent in favour of the petitioner. He submits that the said sale effected by the petitioner was not in compliance with the SARFAESI Act and was contrary to the principles of law laid down by the Supreme Court. He submits that the petitioner did not allow the respondent to avail of One Time Settlement facility before effecting the sale of the property in question. He submits that if the said property would have been sold by following an appropriate and agreed procedure and for appropriate amount, the entire loan of the respondent would have been cleared from the sale proceeds of the said property.

10. Mr.Patel, learned counsel for the petitioner in rejoinder invited my attention to some of the averments made in the affidavit-in-reply and would submit that even according to the respondent, the respondent is heavily indebted. The electricity connection of the respondent is already disconnected. He submits that the respondent has admitted that for want of adequate and timely working capital, the respondent could not go ahead in full steam, resulting into heavy losses which mounted to approximately Rs.83 crore during the year 2011.

11. A perusal of the record clearly indicates that the respondent has admitted that the sanctioned amount was disbursed by the petitioner to the respondent. The respondent had undertaken to obtain and submit clearance certificate from GPCB within the time prescribed. Inspite of various extensions granted by the petitioner at the request of the respondent, the respondent could not obtain such clearance. Under the terms of the undertaking rendered by the respondent, the petitioner was entitled to recall the entire loan which the petitioner did in this case. The respondent, however, did not make any payment. The respondent had also given an undertaking that the post-dated cheque for Rs.15 crore issued by the respondent would be honoured on presentation but the same was dishonoured. There is no response to the statutory notice.

12. In so far as the submission of the learned counsel for the respondent that the sale of the property effected by the respondent under the provisions of the SARFAESI Act is contrary to the provisions of the SARFAESI Act and is contrary to the principles of law laid down by the Supreme Court is concerned, I do not propose to go into the said issue in view of the fact that the challenge to the said sale effected by the

respondent is pending before the Debt Recovery Tribunal. It is, however, clear that the respondent is not even agreeable to the petitioner appropriating the sale proceeds against the dues of the respondent to the petitioner but has challenged the sale effected by the petitioner.

13. A perusal of the affidavit-in-reply clearly indicates that the respondent is heavily indebted. The respondent has not disputed the liability of the petitioner. Even according to the respondent, there was a loss approximately to the tune of Rs.83 crore during the year 2011 suffered by the respondent. Machineries of the respondent are not utilised to its full extent capacity. There is want of adequate and timely working capital.

14. In so far as the submission of the learned counsel for the respondent that the petitioner did not offer One Time Settlement to the respondent is concerned, a perusal of the affidavit filed by the respondent itself indicates that the petitioner had offered One Time Settlement to the respondent on 28th January 2014 by letter dated 3rd January 2014 which is annexed at Exhibit 'B' to the affidavit-in-reply. The respondent did not avail of the said offer made by the respondent and thus cannot make any such grievance while opposing the company petition for winding up. The defence raised by the respondent is totally moonshine and is frivolous. In my view, the respondent is unable to pay its debts and is commercially insolvent.

15. I therefore pass the following order :-

(a) Company petition is made absolute in terms of prayer clauses (a) and (b);

(b) In view of disposal of the company petition, company application pending, if any, does not survive and is disposed of.

(c) There shall be no order as to costs.

16. The official liquidator to act on the authenticated copy of this order.

R.D. DHANUKA, J.