

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

COMPANY PETITION NO.104 OF 2013

Wazir Financial Services Pvt. Ltd.Petitioner

Vs.

Birla Cotsyn (India) LimitedRespondent

Mr. Siddharth Murarka for petitioner.

Mr. Mayur Khandeparkar I/b. T.R. Yadav for respondent.

CORAM : K.R.SHRIRAM, J.

DATE : 22nd OCTOBER 2018

P.C.:

1 This petition is for winding up of respondent company - Birla Cotsyn (India) Limited (the company) under the provisions of the Companies Act, 1956 on the ground that the company is indebted to petitioner, unable to discharge its debts and is commercially insolvent.

2 Petitioner is in the business of rendering financial services, which include placing Inter Corporate Deposits (ICD's). Petitioner had placed various ICD's with the company of different amounts. Amounts of deposit with interest under four ICD's have not been returned by the company. The subject matter of this petition is restricted to two ICD's of Rs.3 Crores and Rs.2 Crores placed on 6th March 2012 and 7th May 2012, respectively. The company had also issued three cheques towards interest against the ICD's and these cheques were dishonoured due to insufficient funds. Petitioner has commenced proceedings under Section 138 of the Negotiable Instruments Act, 1881 which are still pending.

3 It is the case of petitioner that against the ICD's, respondent had secured petitioner's claim by giving a promissory note of Rs.3 Crores for the amounts of ICD's duly stamped and executed, a post dated cheque for Rs.3 Crores, three post dated cheques for interest and also given shares held by respondent company's group companies in respondent company as security with an undertaking to continue to hold these securities with a lien marked in favour of petitioner against the ICD's. It is also petitioner's case that if at anytime the security value fell below 150% of the loan amount, the company had agreed to provide additional securities to match the difference.

4 Mr. Murarka, counsel for petitioner submitted that after this petition was filed, petitioner had also filed a summary suit in this Court with respect to one ICD of Rs.3 Crores and petitioner has obtained a summary decree against respondent company. Mr. Khandeparkar submitted that the invocation of pledge was post the decree and hence his case is that the decree has been satisfied. I am not going into or opine on that aspect in this petition as that will be decided by the Court while executing the decree and petitioner has already filed execution proceedings. It is petitioner's case that even to the statutory notice dated 12th December 2012 issued on behalf of petitioner, the company did not even reply. Therefore, the company is deemed to be unable to pay its debts and requires to be wound up.

5 The company has filed an affidavit in reply denying the liability. According to the company, the entire amount as payable under the two ICD's have been paid and it is quite clear that petitioner has recovered more money than what it was entitled to. According to the company, under the terms and conditions of the ICD's, petitioner could not have sold all the shares which were held by petitioner as security because it was a lien granted and not a pledge and by illegally selling the shares, petitioner has recovered more money than it was entitled to. In the rejoinder, at one point, petitioner has stated that it has sold about 5 Crores shares of respondent which has fetched Rs.73,13,017/- with regard to two other ICD's which is not the subject matter of this petition. This is what is stated in paragraph 7 (iii) of the affidavit in rejoinder. In paragraph (iv) at page 119 of the affidavit in rejoinder, it is stated that "as on date petitioner has not sold any shares pledged against these loans, which form part of the petition and as on date petitioner holds 8,97,13,389 shares of respondent company". To the affidavit in rejoinder, is also annexed a copy of confirmation of creation of pledge form dated 9th May 2011 filed by petitioner with Axis Bank Limited. Also annexed is, a copy of invocation of pledge form dated 12th November 2013 filed by petitioner with Axis Bank Limited. The amount of pledge value in both are same, i.e., the date on which confirmation of creation of pledge has been filed and the date on which the pledge has been invoked. If pledge has been invoked, I would expect it has been invoked to sell the shares or

appropriate the same to itself and give credit to the value thereof to the company. No correspondence to that effect was brought to my notice.

6 Mr. Khandeparkar, counsel for respondent submitted that even if the Court proceeds on the basis that respondent company had pledged these shares and it was open to petitioner to sell these shares, still petitioner has recovered more money by selling these shares. Mr. Khandeparkar also submitted that as per the terms and conditions of placing the ICD's, it was the obligation of petitioner to call upon respondent company to provide additional security to match the difference, if the security value fell below 150% of the loan amount. Admittedly, no such notice has been given though Mr. Murarka submitted that under the terms and conditions, it was the obligation of respondent company to, on its own, provide additional security to match the difference. I am not inclined to accept this submission of Mr. Murarka because it is the responsibility of petitioner to inform the company that the value of security has fallen below 150% of the loan amount and call upon the company to provide additional security to match the difference and if respondent company does not comply, then to invoke the pledge and then sell the shares. No such notice has been given by petitioner and petitioner could not show any document to the contrary.

7 In the additional affidavit that is filed on behalf of petitioner, a statement is annexed at Exhibit "D" giving details of the security given by

respondent company and number of shares sold. Curiously against Rs.1 Crore ICD's, the company has given security of 2 Crores worth shares of the company through its subsidiary – Adarsh Finvest Private Limited but petitioner is showing that Adarsh Finvest Private Limited has created security of Rs.5 Crores worth shares and petitioner has sold those Rs.5 Crores worth shares. There is clearly a mismatch.

Mr. Murarka stated that none of the pledged shares though invoked have been sold and petitioner is ready to return those shares. The company, has, however, attached the demat certificates issued to pledgers by its depository participants where the shareholding position is shown as nil.

Therefore, we are unable to make out how much petitioner has actually recovered. Therefore, I cannot accept that there was a debt. The onus is on petitioner to prove that there is a debt.

8 Petitioner has come to Court seeking winding up of the company on the grounds that the company is indebted to petitioner. Petitioner has to come with a very clear case. There is no statement also annexed in detail as to how much has been sold, for what price and how much is the outstanding. The principle that will be applied in a winding up petition is similar to the principle that the Court will apply while hearing a summons for judgment in a summary suit. The Court has to only consider whether defendant's case can be dismissed as moonshine or bogus or

afterthought or whether it raises disputed questions of fact which requires evidence to be led. In my view, this is one such case where I cannot dismiss defendant's defence as moonshine and bogus. If one reads the petition, the documents and the further affidavits filed, many other transactions have also been brought in to explain the case of petitioner. If this was in a summary suit, I would have certainly granted unconditional leave to defend applying the same yardstick. I cannot gather myself to come to a conclusion that the defence raised by the company are moonshine and bogus.

9 Petition dismissed. Company application no.183 of 2013 also stands accordingly dismissed.

(K.R. SHRIRAM, J.)