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

COMPANY PETITION NO. 1173 OF 2015

Shriram City Union Finance Limited .. Petitioner
Vs.
Super Rubber Engineering Company Private Limited .. Respondent

Mr.Pramod Bhosle a/w. Ms.Disha Karambar-Mulgaonkar and Ms.Priya Rita I/b Disha Karambar Associates for petitioner.

Mr.Sumanth Achan I/b Hemant Ghadigaonkar for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 27TH AUGUST 2018

P.C.

1. The petition is filed for winding up of respondent company – Super Rubber Engineering Company Private Limited (the company) on the grounds admittedly debt is owed to the company and the company is unable to discharge its debt and is commercially insolvent.

2. On 26th April 2017, when the petition was taken up for admission, the following order came to be passed :-

> *"1] Mr. Bhosale, learned counsel appearing for the petitioner states that the respondent is served. Affidavit of service dated 1st January, 2016 is already on record. None appeared for the respondent when the matter is called out.*
>
> *2 It is the case of the petitioner that at the request of the respondent, petitioner had granted finance facility for the working capital and allied business activities. The parties entered into a loan agreement dated 31st March, 2013 under which the petitioner granted loan of Rs.1 crore to the respondent which was repayable with finance charges of Rs.66,84,164/- in 84 equated monthly*

installments.

3 Learned counsel for the petitioner also invited my attention to the application form duly signed by the respondent. A copy of the balance sheet of the respondent is also annexed to the said application form. The learned counsel invited my attention to the sanction letter annexed to the petition and also the loan agreement. The respondent has also executed various documents.

4 Since the respondent did not repay the entire amount, the petitioner issued a notice dated 16th July, 2015 calling upon the respondent to pay a sum of Rs.1,64,88,543/- with further interest thereof. The respondent through its advocate's letter dated 7th August, 2015 raised various issues and denied the claims made by the petitioner in toto and called upon the petitioner to withdraw the said notice unconditionally.

5 The petitioner vide letter dated 20th August, 2015, filed its reply to the said letter dated 7th August ,2015 of the respondent and denied the allegations made therein and once again called upon the respondent to pay the amount due under the contract. There was no response to the said letter.

6 A perusal of the documents annexed to the petition clearly indicates that the respondent had availed of the loan from the petitioner and had executed various documents. The respondent had agreed to repay the entire amount in 84 equated monthly installments. In my view, the response to the statutory notice issued by the respondent is ex-facie contrary to the loan documents signed by the respondent which are on the record. In my view, the defence raised in the reply to the statutory notice is ex-facie moonshine and not bonafide. None appeared for the respondent when the matter is called out. No affidavit in reply is filed. The averments made in the petition are deemed to have been admitted by the respondent.

7 In my view, the respondent is unable to pay its debts and is commercially insolvent.............”

4. Subsequently, the company has filed two affidavits in reply and the grounds of defence stated are rather interesting. The company does not deny the fact that petitioner has sanctioned a loan of Rs.1 crore which was

paid to the company and this amount was to be repaid in 84 equated monthly installments at 16% per annum interest. It is also admitted that on 5th May 2015, the company repaid the first installment. Unfortunately, on 9th May 2015, one of the Director of the company-Mr.Rakesh Agarwal, who was the promoter of the company, who is the husband of one of the director and father of the another director, committed suicide. Thereafter, everything went for a toss and petitioner issued statutory notice dated 16th July 2015 under Section 433(e), 434 and 439 of the Companies Act, 1956 calling upon the company to pay a sum of Rs.1,64,88,543/-.

5. The company replied to the statutory notice stating that the amount as claimed was not payable. The directors of the company have stated that it was late Mr.Rakesh Agarwal who had signed all the documents and the other directors have not signed the documents and therefore, any winding up proceedings by petitioner will be illegal and unauthorized. Of course, there are issues regarding the signatures of the present directors as guarantors where the present directors have signed or whether the documents or signatures have been forged but admittedly the company has received a sum of Rs.1 crore.

6 I have to note that the Hon'ble High Court of Madras in an application filed by petitioner against the company and the two directors,

in its order dated 11th January 2017, has come to a conclusion that there is an admission qua the fact that the sum of Rs.98,09,322/- was credited to the account of the company on 4th May 2015. Therefore, there cannot be any dispute that the company has received money as loan through petitioner and this amount with interest has not been repaid.

7 The defences of the company are as under :-

(i) petitioner has already commenced arbitration proceedings and therefore this petition is not maintainable;

(ii) the mortgaged documents are all forged;

(iii) the amount claimed as outstanding in this petition differs from the amount mentioned under Section 13(b) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);

(iv) in the winding up notice, the company has threatened to refer their dispute to arbitration, however, there is a dispute on the admissibility of the amounts due;

(v) Under Section 434 (i) of the Companies Act, 1956, the deeming fiction of inability to pay the debts arises when the recipient of the notice fails to pay or provide reasonable security. In this case, the loan advanced was secured by way of mortgage of four flats and therefore, having created as reasonable security in favour of petitioner, the question of failure to pay does not arise.

(vi) In paragraph 22 of the petition, petitioner has stated that it will be just and proper if the company is ordered to be wound up and Section 443 of the Companies Act, 1956 in particular sub-section 2 requires the Court to arrive at a subjective satisfaction to entertain the petition for winding up when there are other alternative remedies available for petitioner. Petitioner cannot use the winding up provisions as a recovery action. Petitioner having waited to initiate SARFAESI proceedings and now is seeking winding up of the company, which is not permissible.

8 As regards defence that petition is not maintainable, as petitioner has already commenced arbitration proceedings, [point (i) and (iv) above], it is settled law that winding up proceedings could not be postponed on the ground of pendency of arbitration proceedings as the subject matter of the arbitration was a dispute over the amount being claimed. The same is applicable to the instant case as the amount being claimed is the subject matter of the arbitration proceedings, and does not have any bearing on the winding up petition. Defences available in winding up petition are well known and in absence of such defences, the petition must be prosecuted

further. [***Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd.]*** [1]. So far as the defence noted in (iii) above, difference in the amounts, it is settled law that only when the Court feels that whether the company owes any amount itself is in doubt, then an order of winding up will be refused. In this case, there is no such doubt and admittedly the amount is payable by petitioner to company and therefore, this defence is unsustainable.

9 So far as the defence that there is security given of four flats, it is stated in the affidavit in reply that only on 31st March 2015 the four flats had also been mortgaged by the original owner of the flat with Muslim Co-operative Bank, Pune. Even if I accept for a moment that this is a valid defence, still the flats are not available for petitioner to recover its amount. Further it is settled law that a secured creditor can maintain a petition for winding up. The Hon'ble Calcutta High Court in ***Calcutta Safe Deposit Co., Ltd. Vs. Ranjit Mathuradas Sampat*** [2], *inter-alia,* observed the following :-

> *"26. The last point which has been raised by Mr. Mitter is that a secured creditor unless his security is insufficipnt, has no right to present a winding up petition. Mr. Mitter contends that there is no averment that the security is insufficient. Mr. Mitter has relied on the case of Karnatak Vegetables Oils & Vegetable Refineries Ltd. Vs. Madras Industrial Investment Corporation, where the Division Bench of the Madras High Court held that the winding up would not be ordered where the security was rather an ample security and there was no averment that the security was insufficient.*
>
> *27. That was a case which was decided under the provision of the*

1 (1999) 5 SCC 688
2 AIR 1971 Cal. 78

Indian Companies Act, 1913. Under the Companies Act, 1956 the definition of the word 'creditor' has undergone a radical change so as to include therein a secured creditor as well and such right has been provided under Sub-section (2) of Section 439 of the Companies Act, 1956 by virtue of which a secured creditor shall be deemed to be a creditor within the meaning of Clause (b) of Sub-section (1) of Section 439 of the Companies Act, 1956.

....

30. Mr. Mitter argued that if the sum so due is already secured does this sub-section reauire further security within the period of the said three weeks? He contends that it cannot be the intention of the legislature to get a further security from the company if the creditor is already secured. If Mr. Hitter's contentions are accepted as correct it would amount to this that the secured creditor has no right to present a winding up petition. If that was the intention of the legislature then how could the new Sub-section (2) be enacted under the Act of 1956 so as to recognise the right of the secured creditor and also of the debenture holders including debenture stock-holders to present a winding up petition as creditors for non-payment of the dues by the company?

In my opinion, if a secured creditor would serve a notice under Section 434 then within the period of the said three weeks the company must take action in the matter and satisfy the creditor that his claim would either be paid or that his security is intact. He must in such a case, come to some arrangement with such creditor so that the creditor would be satisfied that there would not :be any difficulty in his obtaining payment at some point of time as would be agreed upon by and between the creditor and the company.

Moreover, in ***Kotak Mahindra Bank Ltd. Vs. Eastern Spining Mills & Industries Ltd.***[3] , the Court, *inter-alia,* observed that,

"We are not aware of any law that would debar the creditor from applying for winding up although they have taken resource to other civil action to realise their dues. The creditor has to show they would have a debt more than Rs 500/- that the comp any failed or neglected to pay or otherwise unable to pay the debts because of its precarious financial condition that would make it just and equitable to pass an order of winding up. Neglect to pay is a fiction that would depend upon the notice to be served under section 434 (1) (a) that would permit the creditor to claim deemed insolvency as a fiction. However, that would

3 (2013) 177 Comp. Case 15

> *not take away the creditor's right to claim, the company is also commercially insolvent or otherwise unable to pay its debt. If we give a close look to section 433 (e) and (f) we would find, the company may be wound up if it is unable to pay its debt and the court is of the opinion, it is just and equitable that it should be wound up. These two provisions could be invoked by the creditor as we find from section 439. Section 439 (1) (b) would permit any creditor to maintain the winding up petition. Sub section (2) would also include a secured creditor as a creditor within the meaning of sub section (1)(b)."*

10 So far as defence at point (vi) is concerned, petitioner's case is that the company requires to be wound up because it is unable to pay its debt due to petitioner. Petitioner has averred that the company is commercially insolvent and is unable to pay its debts and in Paragraph 22 petitioner has stated that it will be just and proper that the company is ordered to be wound up under Section 433 of the Companies Act, 1956. Petitioner has approached this Court under Section 433(e) and not under any further provision.

Section 433(e) as it reads, deals with the cases wherein the Company Court may wind up a company who is unable to pay its dues. The refusal of the Company Court to wind up the company as premised in Section 443(2) is provided the petition is presented exclusively under Section 433 (f) on the ground that it is just and equitable to wind up the company as has been observed by this Court, in ***Advent Corporation Pvt. Ltd.***[4]

4 (1969) 39 Comp.Case 463

> *“14.................Mr. Bhabha also relied on the provisions of section 443(2) of the Companies Act. Sub-section (1) of that section lays down the various orders which the court can make at the hearing of a winding-up petition. Sub-section (2) thereof, however, enacts that where the petition is presented on the ground that it is just and equitable that the company should be wound up, which is the ground mentioned in section 443(1), the court can refuse to make a winding-up order if it is of opinion that some other remedy was available to the petitioners and the petitioners were acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. Mr. Bhabha sought to contend that section 443(2), therefore, shows that the making of a winding-up order is a matter resting in the discretion of the court. I am afraid section 443(2), far from supporting Mr. Bhabha in that contention, goes against him, for it says that the discretion to refuse a winding-up order is conferred on the court only in cases falling within clause (f) of section 433, by clear implication, it negatives discretion in cases falling within any of the other clauses of section 433. There is good reason why that should be so. The reason is that clauses (a) to (e) of section 433 lay down grounds which are specific in nature. When those grounds are made out, clause (f) of section 433, on the other hand, is a residuary clause of an "elastic" nature and it is for that reason that section 433 (2) confers an equally "elastic" discretion on the court. I must, therefore, reject this contention of Mr. Bhabha also.”*

Moreover, upon reading of Section 433(2) which, *inter-alia,* states that, *“the Court may refuse to make an order of winding-up, if it is of opinion that some other remedy is available to the petitioners and the petitioners are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy,”* it appears that the power of the Court in refusing to wind up the company is based upon the fact that :

> (a) Whether petitioner is acting unreasonably in seeking to have the company wound up? and;
>
> (b) Whether petitioner has not exhausted the other available remedies and “instead” pursuing winding up exclusively?

However, petitioner has sought the winding-up remedy as well as initiated proceedings under SARFAESI Act as the security given for four flats have been mortgaged by the original owner of the flats with Muslim Co-operative Bank, Pune and hence, are not available for petitioner to recover its amount. Therefore, the recourse to winding up is not unreasonable.

11 So far as the defence of delay is concerned that petitioner has waited for 2½ years to initiate proceedings under the SARFAESI Act, hence this petition is not maintainable, it is unacceptable. Petitioner is entitled to take any proceeding at any time so far as it is not barred by limitation.

12 Despite repeatedly asking the counsel for the company, he was not able to come up with any proposal as to meet the company's dues including to repay petitioner's dues. Counsel stated that the factory premises has been attached by Seva Vikas Bank. Shri Achan stated that the company's plant is shut and no production is going on. Counsel also submitted that if the Court permits the company to commence with the production, then the company will produce, try to sell and the profit made therefrom would be used to settle the claims of petitioner. These are all ifs and buts and highly speculative. Even the Annual Returns, Profit & Loss statement and balance-sheet of the company has not been produced to show financial solvency.

13 In these circumstances, I am satisfied that the company is unable to discharge its debts and requires to be wound up. The company department has placed on record a report dated 29th May 2017 confirming service under Rule 28 of the Companies (Court) Rules, 1959. On record is an affidavit of one Vishal Wankhede affirmed on 23rd March 2018 confirming advertising the petition in Free Press Journal and Navshakti on 6th April 2018 and another affidavit of the same person dated 7th June 2018 confirming advertising the petition is Maharashtra Government Gazette on 26th April 2018 for the period April 26-May, 2, 2018, at Sr.No.M-1824. No objection has come forward apart from the company opposing the winding up order. Therefore, the petition is allowed in terms of prayer clauses (a) and (b) which read as under :-

> *"(a) That the Respondent company, viz., M/s. Super Rubber and Engineering Company Private Limited, be ordered to be wound up by and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956.*
>
> *(b) That the Official Liquidator attached to this Hon'ble Court be appointed as Liquidator of the Respondent Company M/s. Super Rubber and Engineering Company Private Limited with all powers under the provisions of the Companies Act, 1956 including the power to take charge of all the assets, papers, vouchers and bank accounts of the Respondent Company."*

14 Petitioner's advocate, within two weeks, to forward an authenticated copy of this order to the official liquidator who shall take immediate steps without waiting for any notification.

15 Upon receipt of the authenticated copy from petitioner's advocate, the official liquidator shall forthwith cause notice to all concerned directors calling upon them to file their respective statement of affairs strictly in consonance with the provision of law. All directors of respondent company, now in liquidation, are hereby directed to file their respective statements of affairs as required under Section 454 of the Companies Act, 1956, failing which, the official liquidator shall proceed further and lodge criminal complaint against the erring directors, without seeking prior sanction of this Court for initiation of criminal prosecution.

16 The company petition accordingly disposed.

17 Notwithstanding disposal of the petition, I am still giving an opportunity to the company to come out of this situation. The company to deposit a sum of Rs.1 crore with the Prothonotary and Senior Master, High Court, Bombay within four weeks. If this amount is deposited, then the petition will be listed for directions on the first Monday after the deposit. If the amount as directed above is not deposited withing the time granted then the order of winding up shall come into operation after expiry of time

granted for depositing the amount, i.e., four weeks.

(K.R. SHRIRAM, J.)