JPP

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

APPEAL NO. 236 OF 2018
in
COMPANY PETITION NO. 340 OF 2014
in
NOTICE OF MOTION NO. 513 OF 2018
in
APPEAL NO. 236 OF 2018

Vaibhav Agarwal,
Ex-Director of Nimbus Communications Ltd.
(In Liquidation) … Appellant.

V/s.

Union Bank of India & Anr. ... Respondents.

With
APPEAL NO. 381 OF 2016
in
COMPANY PETITION NO. 340 OF 2014

Nimbus Communications Ltd. … Appellant.

V/s.

Union Bank of India & Anr. ... Respondents.

Mr. A.V. Anturkar, Senior Advocate a/w. Mr. Hemant Prabhulkar and Mr. Yogesh Bhoge i/b. Jurisperitus for the Appellant.

Mr. V.R. Dhond, Senior Advocate a/w. Ms. Sheetal Chaturvedi and Mr. Prakash Shinde i/b. MDP & Partners for the Respondents.

Ms. Rita Yadav for Official Liquidator.

CORAM : NARESHH. PATIL,C.J. &
N.M. JAMDAR, J.

DATE : 8 January, 2019.

P.C. **:-**

Parties in both these Appeals are common, and the Appeals arise from the same subject matter and are disposed of by this common order.

2. The Respondent – Union Bank of India is a financial institute. The Appellant is in the business of advertisement, publicity, entertainment through music, movie and telecasting sports on television. The Appellant, by Appeal No. 381 of 2016, has challenged the order passed by the learned Company Judge dated 17 February 2016 admitting the Company Petition No. 340 of 2014 filed by the Respondent – Bank. The Appellant has filed the Appeal No. 236 of 2018 challenging the order dated 1 March 2018, ordering winding up the Appellant – Company and allowing the Company Petition.

3. The Appellant had entered into certain commercial transactions with the Board of Cricket Control of India (BCCI) in respect of broadcasting bilateral cricket series in Indian Media by an agreement dated 15 October 2009. The rights were granted to the Appellant for four years. As a part of this transaction, the BCCI sought a bank guarantee of Rs.2000 crores. The bank guarantee of Rs.2000 crores was given by three banks, i.e. Indian Bank, Panjab National Bank, and the Respondent – Bank. The Respondent – Bank gave a total of nine Banks Guarantees of Rs.750 crores. The Respondent – Bank while granting the Bank Guarantee of Rs.750 crores kept margin amount of Rs.82.50 crores invested in the Respondent – Bank.

4. In a different transaction between the Appellant and the Respondent, the Respondent-Bank, in the year 2011 sanctioned a Short Term Loan of Rs.75 crores to the Appellant. The Appellant did not repay the amount. The Appellant requested adjustment of the arrears of this loan with the Rs.82.50 crores in respect of the margin money of Bank Guarantee of Rs.750 crores. The Respondent – Bank acceded to this request and adjusted an amount of Rs.26.40 crores and Rs.9 crores.

5. The BCCI terminated the contract of broadcasting the media rights on 12 December 2011. The Bank Guarantees were

invoked on 13 December 2011. The Appellant filed an Arbitration Petition No. 103 of 2012 under Section 9 of Arbitration and Conciliation Act, 1996. The BCCI also filed an Arbitration Petition against the Appellant and the Respondent – Bank seeking injunction not to adjust the amount. The adjustment of the margin money was permitted by the learned Single Judge. The BCCI filed a Summary Suit No. 3131 of 2011 against the three banks including the Respondent – Bank. By order dated 20 December 2012, a conditional leave was granted by the learned Single Judge and the Respondent – Bank was directed to deposit Rs.150 crores as a conditional leave to defend. The BCCI filed a Special Leave Petition in the Supreme Court. The Supreme Court dismissed the Special Leave Petition, however, permitted the BCCI to withdraw the amount. The Respondent – Bank deposited the amount of Rs.150 crores in April 2013 as on 31 December 2013 the amount due and payable under the short term loan sanction was Rs.33,18,81,296/-. A statutory notice was issued and waived and thereafter since the amount was not repaid, the Respondent-Bank filed a Company Petition No. 340 of 2014 for winding up. The Appellant advanced various submissions as regards the amount of Rs.32,03,95.159. The primary submission was that the amount needs to be adjusted against the margin money of Rs.82.50 crores. The learned Company Judge dealt with it *in-extensio* and also referred to the general financial health of the Appellant and admitted the Company

Petition by order dated 1 March 2018. Before issuance of advertisement, the learned Company Judge gave an opportunity of four weeks to the Appellant to deposit the amount within four weeks, failing which the Petition was to be advertised.

6. The Appellants have filed an Appeal No. 381 of 2016 challenging the order of admission. In this Appeal, the Appeal Bench by order dated 27 October 2016 directed the Appellants to deposit an amount of Rs.10 crores to show its bonafides and the Appeal was adjourned. The Appellants did not deposit any amount and the Appeal Bench by order dated 29 November 2016 noted the non-compliance of deposit and permitted the Respondent – Bank to proceed with the matter before the Company Court directing that the matter to come up in regular course. At the joint request, we have taken up this Appeal for consideration which is not on board.

7. The matter before the learned Company Judge proceeded. Before the Company Judge, the Appellants reiterated their contention regarding adjustment of the amount. The learned Company Judge noted the contentions and observed that they were already dealt with and decided. The learned Company Judge also took note of the order passed by the Division Bench. The learned Company Judge observed that the short term loan has nothing to do with the margin money of Rs.82.50 crores in respect of Bank Guarantees of Rs.750 crores. Accordingly, the learned Company

Judge allowed the Company Petition and directed that the Company be wound up. Thereafter, the order of final winding up has been challenged in Appeal No. 236 of 2018.

8. We have heard Mr. Anturkar, learned Senior Advocate appearing for the Appellant and Mr. Dhond, learned Senior Advocate appearing for the Respondents.

9. Appeal No. 381 of 2016 which is not on board is taken on board at the joint request of the Counsel.

10. Mr. Anturkar the learned Senior Advocate firstly submitted that the learned Single Judge has merely reproduced the order of admission and has passed the final order without noticing the distinction between the order of admission and the final order. He submitted that there were various issues which ought to have been considered while passing the final order and the parameters while passing the final order is different while admitting the Company Petition. We find no merit in this submission. The argument regarding adjustment of arrears of the Short Term Loan with the margin money of 82.50 crores was advanced at the time of admission of the Company Petition, and it was dealt with. The learned Single Judge observed that the Short Term Loan and the margin money in respect of the bank guarantees are different and there cannot be an adjustment as sought for by the Appellants. If

the Appellants chose to make the same argument again, it would have met with the same reasoning and decision. Therefore, the learned Company Judge rightly pointed out that the same argument has been already dealt with and referred to his discussion and findings in the order. Considering the consequences of an admission of the Company Petition; the Company Court is careful while admitting the Company Petition and ordering advertisement. Therefore, invariably, the Company Court, while admitting the Company Petition deals with the arguments of the Company threadbare . The argument advanced is one of form and not of substance.

11. As far as the liability is concerned, it is not argued before us that the Appellant did not owe the amount referred to in the statutory notice. It was also not so contended before the Company Judge. The main ground has referred to above is about the adjustment. According to Mr. Anturkar, there was an understanding between the parties that the arrears of the short term loan would be adjusted against the margin money of Rs.82.50 crores. He submitted that twice the Respondent – Bank adjusted the amount accordingly. Mr. Dhond pointed out that the Respondent - Bank not only have exposed themselves to a substantial risk by giving a bank guarantee of Rs.750 crores but is also out of pocket of Rs.150 crores. Given the conditional leave granted in the Summary Suit, he submitted that merely because the Respondent granted indulgence –

Bank earlier, it cannot be demanded by the Appellants that the admitted dues will have to be adjusted against the margin loan.

12. The Appellants admittedly owe an amount of Rs.32,03,95,159/- to the Respondent – Bank. The Respondent – Bank gave a Bank Guarantee of Rs.750 crores and exposed themselves to substantial financial risk. To safeguard its interest, the Respondent-Bank asked the Appellants for margin money of Rs.82.50. This is the safety value that the Respondent – Bank has in respect of Bank Guarantee of Rs.750 crores. The Respondent – Bank may have granted an indulgence of adjustment of some part of the term loan. However, no rights therefrom flow to the Appellants to demand such an adjustment. No provision of law is shown to us that the that a debtor is entitled as a right to demand adjustment of Short Term Loan as against the margin money of Bank Guarantees in respect of another transaction. Apart from this position, the BCCI had invoked the Bank Guarantee and has filed Summary Suit against the Respondent – Bank. In this Summary Suit the Respondent – Bank has deposited an amount of Rs.150 crores. In these circumstances, the Respondent-Bank has refused to extend any indulgence to the Appellant. Therefore, neither as a matter of law nor as a matter of equity that the Appellant could claim adjustment of the arrears. The learned Company Judge was therefore right in rejecting the primary defense.

13. Mr. Anturkar then submitted that after the Company Petition was admitted on 17 February 2016, there was a subsequent development whose importance has not been noticed and dealt with by the Company Judge while allowing the Company Petition. He submitted that the Respondent – Bank had moved the Debt Recovery Tribunal and an application was filed for an injunction. He submitted that in this injunction application the Debt Recovery Tribunal had observed that the liability is not an existing liability and is a contingent liability. He submitted that the Company Judge had not considered this aspect.

14. We have perused the order passed by the Debt Recovery Tribunal. It is an interim order dated 13 January 2017 in the injunction application. In this order, the Debt Recovery Tribunal has observed that the *prima-facie* claim is not an existing liability. However, this observation is being made in the context of the proceedings in the Summary Suit and the deposit. The Debt Recovery Tribunal has also observed that because of the Summary Suit that the liability claimed is a future contingent liability, however, it does not mean that the claim does not exist. All that the Tribunal has *prima-facie* observed that it does not exist at this point and therefore, an interim injunction was not warranted. This observation according to us cannot be a sole ground for dismissal of the Company Petition. Therefore, based on this *prima-facie* observation by the Debt Recovery Tribunal in the interim

injunction, the Appellants cannot succeed.

15. From the perusal of the record, it is more than clear that the Company is in financial crisis and its substratum is lost. The Auditors report, balance sheet and financial statement of the Company are on record. This shows that the Tax Deducted at Source, Income Tax, and Service Tax have not been regularly deposited. This shows that there were dues of service tax ,the Tax Deducted at Source and on investors education and protection fund . There were substantial dues of service tax, income tax; the accumulated loses of the Company were shown for the relevant financial year had exceeded 50% of the net worth. The Company had incurred cash loses. The Company continuously defaulted in repayment of its account. The Auditors even observed that the Company has sought to window dressing his balance-sheet. In the order passed in other proceedings by the learned Single Judge of this Court that the Company did not deposit the amount of Rs.390 crores and no Appeal was filed. The learned Company Judge is therefore right in taking note that the Company was in financial crisis.

16. The Company was directed to deposit an amount of Rs.10 crores by the Appeal Bench to show its bonafides even that the Appellants have not complied with. There is no error in the orders passed by the learned Company Judge. The Company has lost its

substratum, and it is unable to pay its debts and is commercially not solvent.

17. There is no merit in these Appeals which are accordingly dismissed.

N.M. JAMDAR, J. ***CHIEF JUSTICE***