

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO. 554 OF 2018
IN
COMPANY PETITION NO. 104 OF 2013

WAZIR FINANCIAL SERVICES PVT LTD.,

a company duly registered under the provisions of Companies Act, 1956 having its office at 805/806, Hallmark Business Plaza, Guru Nanak Hospital Road, Bandra (East), Mumbai 400 051.

... **APPELLANT**

versus

BIRLA COTSYN (INDIA) LTD.,

a company duly registered under the provisions of Indian Companies Act, 1956, having its registered office at Dalamal House, 1st Floor, J.B. Marg, Nariman Point, Mumbai 400 021.

... **RESPONDENT**

APPEARANCES

FOR THE APPELLANT

Mr Rohan Sawant, *with Mr Akshay Puranik, Mr Amol Bavare, Krishna Baruah, i/b Pragnya Legal, for Appellant.*

FOR RESPONDENT

Mr S Das, *i/b Krishna Murthy & Co, for Respondent.*

**CORAM : S. C. DHARMADHIKARI
&
G.S. PATEL, JJ**

RESERVED ON 19th June 2019

PRONOUNCED ON 01st July 2019

JUDGMENT: (*Per G.S. Patel, J.*)

1. Heard Mr Sawant for the Appellant.
2. The appellant, Wazir Financial Services Pvt Ltd (**“Wazir Financial”**) was the original Petitioner before the learned Single Judge in Company Petition No. 104 of 2013. It sought the winding up of the Respondent, Birla Cotsyn (India) Ltd (**“Birla Cotsyn”**) on the basis that there was, firstly, an ascertained and liquidated debt demonstrably due, owing and payable by the Respondent to the Appellant; secondly, that Birla Cotsyn had failed and neglected to pay the amount; and thirdly, that on account of its failure to reply to the statutory notice issued by Wazir Financial, Birla Cotsyn must be deemed to be unable to pay its debts. Having heard both sides, the learned Single Judge passed the order under challenge on 22nd

October 2018, a copy of which is annexed from page 17 of the Appeal paper-book.

3. We have perused the Petition and the record of the Appeal, Appeal memo and the impugned order.

4. Shortly stated, the facts were that Wazir Financial placed periodic Inter Corporate Deposits or ICDs with various companies, including Birla Cotsyn. It alleged that the amounts under four ICDs that it placed with Birla Cotsyn were not repaid. The Petition was restricted to two ICDs of Rs. 3 crores and Rs. 2 crores placed on 6th March 2012 and 7th May 2012 respectively. Birla Cotsyn issued three cheques towards interest due on the ICDs. These were dishonoured for insufficiency of funds. Wazir Financial took proceedings under Section 138 of the Negotiable Instruments Act.

5. On behalf of the Wazir Financial, it was argued that its claim was secured *inter alia* by promissory note of Rs. 3 crores, a post-dated cheque in that amount, three post-dated cheques for interest and by security created over shares held by Birla Cotsyn in corporate

companies with an undertaking that these would be under a lien in favour of Wazir Financial. Birla Cotsyn was, Wazir Financial alleged, obliged to maintain a security value of 150%, or in other words, there was a top-up clause. It is undisputed that Wazir Financial obtained a summary decree against Birla Cotsyn. Wazir Financial also invoked its pledge of the shares deposited as security. Birla Cotsyn argued that the summary decree was fully satisfied. According to it, the entire amount under the two ICDs was paid. In fact, the argument was that Wazir Financial had recovered amounts in excess.

6. This was the controversy before the learned Single Judge. It is noted in paragraphs 5 to 7 of the impugned order. The learned Single Judge also noted that in its Affidavit in Rejoinder, Wazir Financial stated that while it had invoked the pledge, it had not actually sold the shares.

7. Before us, Mr Sawant argues that there is an error apparent in the sense that the learned Single Judge allegedly mistook the number of shares for the amounts of shares or vice versa. This will

make no difference. The question is not of that kind of detail but whether it can fairly be said there is an undisputed (or indisputable) liquidated and ascertained debt due and payable to the petitioning creditor.

8. What the learned Single Judge, on a careful consideration of the rival contentions, held finally was that it would not be possible on this basis to ascertain how much Wazir Financial had actually recovered. Consequently it was not possible to hold there was a deemed debt or liquidated sum shown to be due.

9. We are in complete agreement with the observations of the learned Single Judge in paragraph 8. The proposition that he sets out is indeed well-settled and does not require reiteration. The company court is a court of discretion and of equity. The test, as the Supreme Court tells us in *IBA Health (India) Pvt Ltd vs Info-Drive Systems*,¹ is whether the company shows substantial grounds of defence that is not dishonest, illusory, speculative, spurious or specious.

1 (2010) 10 SCC 553

10. In our considered view, what is argued before the learned Single Judge and what Mr Sawant in substance attempts to argue before us, though with no success, is that in winding up Petition it matters not that there are disputed questions of facts or that the Court will have to engage in a complex enquiry requiring evidence. This, in our view, is not even a stateable principle in this branch of law. As the learned Single Judge correctly observed, summary suit and winding up petition share a broadly similar approach. In both, the Respondent or Defendant must be shown to have no tenable or plausible defence. Unless that defence is moonshine, an order could not be passed. A conditional order may be possible, but it is not inevitable.

11. In our view, in the present case no conditional order was possible either. There is no manner of doubt that there is indeed an invocation of a pledge. Whether or not there is a realization pursuant to that pledge invocation is entirely immaterial. The Petitioner cannot possibly attempt to realize security, and then claim the whole of the amount and not just the shortfall is the debt due. If

there was indeed a shortfall, then it will have to be examined whether Wazir Financial ever called upon Birla Cotsyn to furnish additional security. All these are disputed questions of fact arising from a bona fide defence. Balancing the rival contentions, we cannot conclude that the Petitioner has shown unequivocally or unambiguously that there is an ascertained liquidated debt due to it from the Respondent.

12. The Appeal is entirely without substance. It is dismissed with no order as to costs.

(S. C. DHARMADHIKARI, J)

(G. S. PATEL, J)