

(2008) 03 BOM CK 0024

Bombay High Court

Case No: Notice of Motion No. 4689 of 2007 in Company Petition No. 986 of 1997 and With Appeal (Lodging) No's. 921, 922, 923, 924, 925, 926, 927, 928, 929, 930 931, 932, 934 and 939 of 2007 with Notice of Motion No's. 4690, 4691, 4692, 4693, 4694, 4695, 4696, 46

Heat Shrink Technologies
Limited, earlier known as REPL
Engineering Limited

APPELLANT

Vs

IIT Capital Services Limited

RESPONDENT

Date of Decision: March 13, 2008

Acts Referred:

- Companies Act, 1956 - Section 433, 434
- Negotiable Instruments Act, 1881 (NI) - Section 138
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 22

Citation: (2008) 3 BomCR 580

Hon'ble Judges: Swatanter Kumar, C.J; J.P. Devadhar, J

Bench: Division Bench

Advocate: R.M. Vasudeo, for the Appellant; Smita Rampise, instructed by S.K. Srivastav and Co. in Appeal (L) Nos. 921, 922 and 927 of 2007, A.R. Verma, instructed by Tejpal and Co. in Appeal (L) No. 932 of 2007 and Durgesh Khanapurkar, instructed by M.K. Ambalal and Company in Notice of Motion Nos. 4692 and 4696 of 2007, for the Respondent

Final Decision: Dismissed

Judgement

Swatanter Kumar, C.J.

IIT Capital Services Limited, a company incorporated under the provisions of the Companies Act, 1956, with its registered office at 61, Bombay Samachar Marg, Bombay, filed a petition under Sections 433 and 434 of the Companies Act, 1956, hereinafter referred to as "the Act", praying for winding up of REPL Engineering Limited, also a Company registered under the Companies Act, hereinafter referred to as "the Company". The relief was sought on the premise that for valuable consideration Avon Plastics Private Limited drew the bills of exchange aggregating

to Rs. 1,00,50,644/- in favour of the petitioners during the period 14th March, 1997 to 19th June, 1997. The presentment, protest and notice of dishonour were waived by the parties. The said bills of exchange were drawn in connection with the sale of goods which were accepted by the Company. The Company duly accepted and confirmed that they would honour the said bills of exchange on due date vide letters exchanged between the parties dated 14th March, 1997 and 19th March, 1997. They had also agreed and undertook to pay overdue interest of 3 per cent per month, if for any reason the said bills of exchange were not paid on the due dates. The Company issued four cheques drawn on Union Bank of India, Homi Mody Street, Bombay, between 12th June, 1997 and 17th June, 1997 but all these cheques aggregating for the above sum were dishonoured on presentation and returned with the remarks "funds insufficient".

2. The petitioner Company issued notice to the said Company by its Advocates letters dated 1st September, 1997, filed proceedings u/s 138 of the Negotiable Instruments Act in the Court of competent jurisdiction at Bombay and filed petition for winding up of the Company on the ground that the Company was unable to pay its debts which were admitted. Notice of the Company Petition was issued to REPL Engineering Limited.

3. During the pendency of the Company Petition, a reference was filed by the Company on 30th April, 1998 before the Board for Industrial and Financial Reconstruction ("BIFR"), being Reference No. 98 of 1998 which came to be dismissed vide order dated 28th June, 2000. Still another reference was filed being Reference No. 231 of 2000 which again was dismissed vide order dated 12th June, 2002 passed by the BIFR. This did not deter the Company from preferring another reference being Reference No. 295 of 2002 on 30th July, 2002 which also came to be dismissed. Against the order of rejection in Reference No. 231 of 2000, an appeal was filed being Appeal No. 173 of 2002 on 29th October, 2002. In the meanwhile, the third reference of the Company viz. Reference No. 295 of 2002 was also dismissed by the BIFR vide order dated 10th January, 2003 against which an appeal was filed being Appeal No. 109 of 2003 on 25th March, 2003 before the Appellate Authority for Industrial and Financial Reconstruction ("AAIFR"). Company Petition No. 16 of 1998 was admitted by the Company Court on 1st July, 2005. Vide order dated 8th August, 2007, the AAIFR is stated to have partially accepted the appeal. The AIFR, while setting aside the order passed in Reference No. 295 of 2002, referred the matter back to BIFR.

4. On 13th September, 2007, the Company Petition was allowed by the learned Company Judge primarily on the ground that no defence was offered by the Company. The present appeal has been filed against the order of the learned Company Judge dated 13th September, 2007. The said order reads as under:

Heard learned Counsel for the parties.

2. These company petitions are pending for admission since 1997. Company Petition No. 16 of 1998 was admitted on 1.7.2005 in view of the order dated 3.11.1998 passed by the learned Single Judge admitting Company Petition No. 94 of 1998. These all petitions are directed against the very same company. After admission of the petition, it was directed to be advertised and since advertisement was not given, on the last occasion, that is on 19.7.2007, the Official Liquidator was directed to advertise the petition in two local newspapers. Accordingly, an affidavit dated 30.8.2007 has been filed by the Official Liquidator placing on record copies of the advertisements published in two local newspapers. Mr. Shaikh, learned Counsel for the respondent company, submits that he has no instructions from the respondent company. He submits that the respondent company is not in touch with him and they do not respond to his letters. The company department has received on-line communication from BIFR to the effect that case No. 295 of 2002 against the respondent company, has been dismissed and the respondent-Company M/s. Heat Shrink Technologies Ltd. has been ordered to be wound up. The company has been served. The company has entered appearance. In the absence of any defence, the allegations in company petition No. 16 of 1998 would have to be accepted. The petition is accordingly made absolute in terms of Clauses (a) and (b). The Official Liquidator, High Court, Bombay, is to take charge of all the assets of the company and to conduct affairs of the company in the course of winding up of the company and distribute its assets in accordance with law.

3. In view of the order passed in Company Petition No. 16 of 1998, all other company petitions also stand disposed of with liberty to all the petitioners to lodge their claims with the Official Liquidator"

5. The principal ground raised on behalf of the appellant, while taking exception to the above order passed by the learned Company Judge, is that as reference was pending before the BIFR, the Company Court had no jurisdiction to pass the winding up order as the proceedings before the Company Court would be deemed to have been stayed in view of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, hereinafter referred to as "the SICA". It is also pleaded that the learned Judge ought to have directed the department concerned while relying upon online communication from BIFR whether any BIFR reference was pending before the BIFR or not.

6. Before we proceed to discuss the merits or otherwise of these contentions, it is necessary for us to notice that against this Company several petitions had been filed before the Company Judge. The learned Judge, while passing the order of winding up in Company Petition. No. 986 of 1997, also noticed that all other Company Petitions stand disposed of with liberty to the Petitioners to lodge their claim with the Official Liquidator in accordance with law. Secondly, it may also be noticed that it appears from the record that during the pendency of the winding up petition, the Company, REPL Engineering Limited, changed its name to Heat Shrink Technologies

Ltd., with registered office at the same place. During the course of hearing, a copy of the letter dated 26th November, 2007 was placed on record which supports this fact. In this very letter, certain allegations were made against the Counsel whom the Company had engaged earlier and that the Advocate should have brought to the notice of the Court that the matter is pending before the BIFR.

7. No doubt, if a valid reference is pending before the BIFR, normally all the other proceedings need to be stayed. This position of law is of hardly any advantage to the Company on facts of the present case and particularly keeping in mind the conduct of the Company before the Company Court as well as before the BIFR. The Company Petition was admitted by the order of the Company Court dated 1st July, 2005 and the petition remained pending before the Company Court for a considerable time. The final order of winding up against the Company was passed on 13th September, 2007. There is not a whisper in the entire appeal as to what the Company was doing for all this period. It is nowhere stated that it was brought to the notice of the Company Court that a reference before the BIFR was pending and, therefore, the proceeding should be stayed, despite the fact that the appellant company had received notice from the Official Liquidator in furtherance to the order passed by the Court. The only document shown during the course of arguments in the appeal is the letter dated 26th November, 2007 which is of no consequence inasmuch as it is written after the order of winding up was made by the Court on 13th September, 2007. Even after writing this letter, the Company has taken no effective steps except casually filing the present appeal. In four paragraphs of the grounds of appeal, no material grounds have been stated except the vague ground that the proceedings before the BIFR were pending. The contention of the appellant company that it was obligatory upon the Company Court to find out as to whether the proceedings were pending before the BIFR or AAIFR and at what stage is unacceptable in law. This is strange for the appellant company to even raise such an argument. If the appellant company desired that the proceedings before the Company Court should be stayed because of the pendency of the proceedings before the BIFR or AAIFR it was obviously the obligation of the appellant company to bring due material on record before the learned Company Judge. The onus to prove this fact was obviously upon the appellant company which it miserably failed to discharge and now it cannot be permitted to take advantage of its own wrong.

8. Furthermore, it may also be noticed that at all material time no proceedings were pending before the BIFR/AAIFR. The appellant company was desperate to have its proceedings continued before BIFR at any cost. As already noticed, it filed as many as four references between the period 30th April, 1999 and 13th June, 2006 but all these references came to be rejected. Strangely, the learned Counsel appearing for the appellant during the course of hearing made a vague argument that the AAIFR had referred back the proceedings to BIFR in Appeal No. 109 of 2003 vide order dated 8th August, 2007. What happened thereafter the counsel was unable to inform the Court. This is the conduct of the appellant Company. In any case, we had

directed the Registry to check from the internet and place a report before the Court as to whether any proceedings were pending before the BIFR in Reference No. 295/2002 which, according to the appellant, was referred back by AAIFR vide its order dated 8th August, 2007. The report put up by the Registry before us reads as under.

As per online status provided by the Board for Industrial and Financial Reconstruction, there are total four references so far preferred by the Appellants' Company as per the particulars given hereunder.

I respectfully submit that AAIFR's reports are not available on web site and therefore, the status of Appeal No. 109 of 2003 before the AAIFR is not available.

9. From the above, it is seen that no reference was pending before the BIFR when the Company Petition was admitted on 1st July, 2005. By that time, all the first three references filed by the Company right from 1998 to 2003 had already been dismissed even in appeal by AAIFR. The Company was ordered to be wound up on 13th September, 2007. Again at that time no reference was pending before the BIFR and none appears to be pending from the record. The appellant company in fact has abused the process of law not only before the Company Court but even before BIFR/AAIFR. In the present appeal, again no effort was made by the appellant to bring on record anything to the contrary than what we have noticed.

10. Before the learned Company Judge, no defence was put forward when the company was ordered to be wound up. Even in the grounds of appeal, nothing has been stated on merits of the claim of the respondent Company. There is no dispute to the fact that the cheques were issued by the appellant company and/or under its former name. The funds were insufficient in the bank accounts. No defence has been offered even in appeal before the Court. We are unable to find any error in the judgment of the learned single Judge either in law or on facts. Appeal (Lodging) No. 927 of 2007 is consequently dismissed. However, in the facts of the case, we leave the parties to bear their own costs.

11. In view of the above order, all other connected appeals stand dismissed with liberty to the respondents in those Company Petitions to file their respective claims before the Official Liquidator and/or to revive the petition, in the event the Respondent Company in Appeal (L) No. 927 of 2007 withdraws or settles the matter resulting in recalling of the order of winding up. All the Notices of Motion are also disposed of.