(2003) 03 CAL CK 0029

Calcutta High Court

Case No: C.P. No. 526 of 1999

Daulatram Rawatmull Pvt. Ltd.		APPELLANT
	Vs	
Peerless General Finance and Investment Co. Ltd.		RESPONDENT

Date of Decision: March 21, 2003

Citation: (2005) 2 CHN 265 : (2006) 66 SCL 364

Hon'ble Judges: Ashim Kumar Banerjee, J

Bench: Single Bench

Advocate: Abhijit Chatterjee, for the Appellant;Bimal Chatterjee and Raj Ratna sen, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

A sum of Rs. 50.00 lakhs was lent and advanced by the petitioner to the company at an agreed interest. The said deposit was rolled over from time to time. Initially the company could not make payment of the interest as well as the principal amount. Ultimately, a sum of Rs. 25.00 lakhs was paid on account of principal leaving a balance sum of Rs. 25.00 lakhs together with interest. The petitioner through its advocate raised a statutory notice of demand dated 3rd April, 1999 inter alia demanding Rs. 25.00 lakhs on account of balance of the principal amount and Rs. 11,69,353.27 on account of balance of the interest payable during the period 20th December, 1994 to 31st March, 1999. The company through its Advocate denied its liability as according to them the liability was a premature one and asked for withdrawal of statutory notice. In the affidavit-in-opposition such consistent stand had been taken by the company. To elaborate such stand reliance was placed on a letter dated 11th November, 1994 being Annexure A to the affidavit-in-opposition appearing at pages 12 and 13 thereof. The contents of the said letter is relevant and is quoted below:

"We refer to the discussion we had with you and would like to inform you that Shree Hanuman Sugar & Industries Ltd., has its sugar factory on lease at an annual rent of Rs. 75.00 lacs with M/s. Gobind Sugar Mills Ltd. the lease is now due to expire. They have made a fresh lease in favour of Eastern Sugar & Industries Ltd., who is now going into public for raising the funds for expansion.

Shree Hanuman Sugar & Industries Ltd., have to take over the assets of around of Rs. 400.00 lacs from Gobind Sugar Mills Ltd., and sell or lease out the same to Eastern Sugar & Industries Ltd. Accordingly, they have approached us to organize the funds of Rs. 100.00 lacs jointly with M/s. Nopany Marketing Co. Pvt. Ltd.

We now request you to kindly sanction and disburse us a Term Loan of Rs. 50.00 lacs against the security of property at premises No. 12, Government Place East, Calcutta - 700069 which is owned by us jointly with Nopany Marketing Co. Pvt. Ltd. The title of this property is already with you and has been cleared by your and our solicitors.

The funds will be utilized for taking over the assets from Gobind Sugar Mills by Shree Hanuman Sugar & Industries Ltd. and lease them out to Eastern Sugar & Industries Ltd.

We shall pay your loan in four years after a moratorium of one year in 16 quarterly installments"

2. Short question before me raised by the company was whether the said letter created an obligation on the petitioner not to claim back the amount of loan unless and until the same was repaid by M/s. Eastern Sugar and Industries Ltd. for whom the loan was taken. According to the company, since the amount was not repaid by Eastern Sugar & Industries Ltd. they were not liable to make payment of the loan amount to the petitioner.

3. On the plain reading of the contents of the said letter quoted(supra) it would appear that the proposal for taking over the sugar mill was the cause for obtaining the loan. In short the company by the said letter justified their need. However, the repayment schedule suggested in the last paragraph of the said letter was unequivocal and did not attach any pre-condition. Apart from the aforesaid letter the company had not been able to demonstrate either from any document or from the conduct of the parties that the said amount was not payable and would became payable only when they would receive payment from Eastern Sugar Mills.

4. There is another salient feature which I would like to point out. Contemporaneous correspondence annexed to the pleadings would show that from time to time the company prayed for restructuring the instalment and had issued various post-dated cheques which were dishonoured for non-payment. Had there been any intention of the parties that the amount would only became payable as and when those were paid by Eastern Sugar, the company would not have issued post-dated cheques or would not have assured payment unequivocally as would appear from the

correspondence.

5. Mr. Bimal Chatterjee, learned counsel appearing for the company, while opposing the winding up petition, raised the following points:

(i) The claim was premature in view of the agreement between the parties recorded in the said letter dated 11th November, 1994. Hence, winding up petition was not maintainable being premature.

(ii) The claim was secured by the collateral security i.e. by deposit of title deeds as such winding up petition was not maintainable.

(iii) From the aforesaid facts it would appear that there had been a bona fide dispute which need to be adjudicated upon in a pending suit filed by the company.

6. To elaborate his submission Mr. Chatterjee submitted that the company merely acted as a conduit pipe. The company only acted as a commission agent between Eastern Sugar and the petitioner. Since the money was not paid by Eastern Sugar the company did not and could not pay the same to the petitioner. This would amount to, according to Mr. Chatterjee, bona fide dispute and could not be adjudicated upon in the instant proceeding. Mr. Chatterjee, further submitted that the claim, if any, was secured as the company created an equitable mortgage by deposit of a Title Deed which was still lying with the petitioner. Since the claim was secured the winding petition was not the proper remedy. Lastly, he contended that the aforesaid facts would show that there existed a bona fide dispute and the company had already filed a suit in this Court being Civil Suit No. 444 of 2000. Hence, the petitioner should be directed to raise their claim, if any, in the said pending suit and this winding up petition was liable to be dismissed.

7. On the bona fide dispute Mr. Chatterjee cited a host of decisions. Those decisions on bona fide dispute are well-settled proposition of law and need no repetition. I, however, do not find any scope for applying those decisions in the instant case.

8. Short question before me was whether the claim raised by the petitioner was a just debt due to them. To decide such issue I have to find out on the well-settled principles of law as to whether the disputes raised by the company was a bona fide one or not.

9. In the instant case the amount was not in dispute. Only defence raised by the company was that the amount was not payable so long it was not paid by the Eastern Sugar. As I have discussed hereinbefore that no contemporaneous document except the letter dated 11th November, 1994 which has been quoted hereinbefore could be produced by the company in support of their contention. Hence, to find out as to whether there was any dispute or not I have to interpret the said letter dated 11th November, 1994 and the said letter itself. On a plain reading of the said letter it would clearly appear, as I have observed hereinbefore, that the amount was to be paid by instalment without any pre-condition and/or

eventualities. As I have said earlier, further correspondence between the parties annexed to the pleadings also did not support such contention of the company. Hence, amount was due and payable on the date of the presentation of the petition.

10. Since the amount was admittedly due and payable there could not be any bona fide dispute for which I should relegate the parties to suit.

11. Mr. Chatterjee also submitted that since the petitioner''s claim was secured by collateral security, winding up petition was not maintainable. Such submission of Mr. Chatterjee is not tenable in view of the fact that any creditor who has a just claim can apply for winding up. If a creditor''s claim is secured he can opt to remain outside the scope of winding up. However a collateral security for the claim can not operate as a bar in presenting a winding up petition. In this regard this Court in the case of Calcutta Safe Deposit Co. Ltd., reported in **** (4), Company Cases, Page 1063 decided that presenting a winding up petition is a statutory right given to a creditor irrespective of his right to enforce security. In the said case before this Court a debenture holder, although a secured creditor, applied for winding up of the company which was held to be maintainable. Hence, such contention of Mr. Chatterjee is also not tenable.

12. Hence, the petition succeeds.

13. The petition is admitted for the said principal sum of Rs. 25.00 lakh together with accrued interest @22% on and from 1st April, 1999 till the date of the presentation of the petition and thereafter @10% per annum until realization. The petitioner would also be entitled to balance of the accrued interest for period 20th December, 1994 to 31st March, 1999 aggregating to Rs. 11,69,353.27.

14. The petitioner would at liberty to publish advertisement once in "The Statesman" and once in "Ananda Bazar Patrika". Publication in the Calcutta Gazette is dispensed with. The returnable date of the winding up petition is fixed on the expiry of six weeks from the date of publication.

15. There would be, however, a stay of operation of this order for a period of two weeks from date.