Jeevan Diesels and Electricals Vs The Hongkong and Shanghai Banking Corporation Limited

Court: Calcutta High Court

Date of Decision: Dec. 2, 2014

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 8
Companies Act, 1956 â€" Section 433, 433(e), 434, 439, 442
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 â€" Section 13, 17, 18, 19, 19(22)

Citation: (2015) 1 CHN 92 : (2015) 125 CLA 58 : (2015) 188 CompCas 451 : (2015) 2 WBLR 206

Hon'ble Judges: Ashis Kumar Chakraborty, J; A.K. Banerjee, J

Bench: Division Bench

Advocate: Ratnanko Banerjee, Sr. Advocate, Siddhartha Banerjee, P.B. Bhaumik and S.K. Samanta, Advocate for the Appellant; Meena Venugopal, Sushmita Banerjee and Sanjib Dawn, Advocate for the Respondent

Judgement

Ashis Kumar Chakraborty, J.
This is an appeal against an order passed by a learned Single Judge on June 19, 2014 admitting the winding

up petition against the appellant company for a sum of Rs. 7,00,29,142/-. By the said order the learned Single Judge, however, granted

opportunity to the appellant company for liquidating their dues to the respondent in twelve monthly installments; in the event of failure one of such

installment, there would be advertisement of the winding up application.

2. The essential facts of the case including the receipt of notice under Section 434 of the Companies Act, 1956 by the appellant company, is

recorded in the order passed by the learned Single Judge. While assailing the aforesaid order of admission of winding up application, the appellant

company could not dispute any finding of the learned Single Judge on the factual score, far less the appellant could raise any bona fide dispute with

regard to the claim of the respondent. Mr. Ratnanko Banerjee, learned Senior Advocate assisted by Mr. Siddhartha Banerjee assailed the order

under appeal only on points of law.

3. Mr. Banerjee first urged, the respondent was a secured creditor and it held various immovable properties of the appellant as security and as

such the learned Single Judge should have exercised discretion not to admit the winding up petition. In support of such contention Mr. Banerjee

relied on a decision of a learned Single Judge this Court in the case of In Re: Eastern Spinning Mills and Industries Limited and Kotak Mahindra

Bank Limited, . In the said decision, after considering the relevant provisions contained in the Companies Act, 1956 particularly Sections 433, 434

and 439 thereof the learned Single Judge of this Court held, although the secured creditor was entitled to maintain an application for winding up of

its debtor Company under the Companies Act, 1956 the Court had a discretion not to admit the winding up application, if the security of the

secured creditor was efficacious and adequate. The second ground of challenge urged by Mr. Banerjee touches the jurisdiction of the Company

Court to deal with a winding up application filed by a bank or non-banking financial institution having a remedy to take recourse before the Debt

Recovery Tribunal for realization of debts. According to Mr. Banerjee, in view of express provision contained in Section 17 of the Recovery of

Debts due to Bank and Financial Institution Act, 1993 (hereinafter referred to as the RDB Act) it is the Debt Recovery Tribunal that has exclusive

jurisdiction to entertain, try and adjudicate all claims of any bank or financial institution against its borrower, including the borrower Company bank

and as such the Company Court does not have the jurisdiction to entertain any winding up application of any bank or financial institution. In

support of such contention, Mr. Banerjee placed reliance on the decision of the Supreme Court in the case of Allahabad Bank v. Canara Bank and

Anr. reported in (2008) 4 SCC 406.

4. The learned Judge considered all the relevant records and pleadings of the parties and found, the securities held by the petitioning creditor were

subject to the charge held by other creditors of the company and even if the petitioning creditor was directed to sell its securities, the petitioning

creditor would not be able to sell the securities without the consent of the other charge holders. Elaborating his first ground of challenge that in the

case of winding up application filed by the secured creditor, Mr. Banerjee first relied on the said decision of the learned Single Judge in the case of

Kotak Mahindra Bank (Supra). He, however, pointed out, in appeal, the Division Bench of this Court, by an order dated February 13, 2013 set

aside the said decision of the learned Single Judge which has been reported in Kotak Mahindra Bank Ltd. Vs. Eastern Spinning Mills and

Industries Ltd., . On an enquiry from us, Mr. Banerjee further informed us the decision of the Division Bench in the said case, Kotak Mahindra

Bank Ltd. (supra) was carried to Supreme Court of India and although on the first date of hearing of the said special leave petition the Supreme

Court directed stay of all proceedings of the company petition after hearing all the parties at some length, by subsequent decision dated September

1, 2014, the Supreme Court dismissed the said special leave petition.

5. Mr. Banerjee, however, submitted, by the said order dated September 1, 2014, the Supreme Court made it clear that it would be open for the

company to raise all issues and objections with regard to the applicability of Section 433(e) and (f) of the Companies Act to the present

proceeding and on that basis the learned Single Judge will decide such objections before issuing any direction as regards the admission or

advertisement. In view of this observation of the Supreme Court in the said order, according to Mr. Banerjee, we should not construe that the

decision of the Division Bench in the said case of Kotak Mahindra Bank Ltd. Vs. Eastern Spinning Mills and Industries Ltd., has been upheld by

the Supreme Court and as such we should once again give our fresh decision on the first contention raised by Mr. Banerjee relying on the said

decision of the learned Single Judge in the said case of In Re: Eastern Spinning Mills and Industries Limited and Kotak Mahindra Bank Limited, .

Mr. Banerjee argued, since in the instant case the respondent/petitioning creditor held the security provided by the company, the learned Single

Judge committed an error in admitting the winding up application. However, as already noted, Mr. Banerjee could not dispute the finding of the

learned Single Judge that a sum of Rs. 7,00,29,142/- was due and payable by the appellant company to the respondent/petitioning creditor on

account of principal or that the securities held by the respondent were not efficacious. In any event, from the said order dated September 1, 2014

passed by the Supreme Court, we find that the said order dated February 13, 2013 passed by the Division Bench of this Court in the case

reported in Kotak Mahindra Bank Ltd. Vs. Eastern Spinning Mills and Industries Ltd., holding that all secured creditors can file winding up

application against its debtor company and obtain order of admission of such application, has not been interfered with and as such we have no

scope to hold anything contrary to the said earlier Division Bench decision. Thus, the counsel for the respondent/creditor was not called upon to

make any submission on this issue.

6. In support of his second contention, that since the respondent is a bank and it has already initiated proceeding against the appellant before the

Debts Recovery Tribunal for realization of its dues, the company Judge lacked the jurisdiction to entertain the winding up application Mr. Banerjee,

the learned senior counsel placed reliance on Sections 17, 18, 19 and 34 of the Recovery of Debts due to Banks and Financial Institutions Act

(hereinafter referred to as ""RDB Act, 1993). Mr. Banerjee, learned senior counsel also relied on the decision of the Supreme Court in the case of

Allahabad Bank Vs. Canara Bank and Another, .

7. Mr. Banerjee, placed reliance on paragraph 22 of the said decision in the case of Allahabad Bank (supra) where the Supreme Court held that

the provisions of Sections 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of liability of a borrower to its bank is

concerned. He also placed reliance on paragraph 23 of the said decision of the Supreme Court where after considering the provisions of Section

34(1) of the RDB Act, the Court held that RDB Act overrides other laws to the extent of ""inconsistency "" and the prescription of an exclusively

tribunal, both for adjudication and execution, is a procedure clearly inconsistent with realization of these debts in any other manner.

8. According to Mr. Banerjee, in view of the said findings of the Supreme Court in the said case of reported in Allahabad Bank v. Canara Bank

(supra) the RDB Act, 1993 overrides the provision of Sections 433, 434 and 439 of the Companies Act and no bank or financial institution can

file any winding up against its borrower.

9. Mrs. Meena Venugopal, learned advocate representing the respondent/company, however, submitted that there is no merit in the said second

contention of Mr. Banerjee. According to Mrs. Venugopal, it is true that the respondent bank has approached the appropriate Tribunal for

realization of its dues from the appellant company but winding up petition filed against the company is for a different purpose, it is not a proceeding

for realization of the outstanding dues from the company.

10. Mrs. Venugopal, produced before the Court the balance sheet and the profit and loss account and other documents of the appellant/company

for the financial year ended March 31, 2013 showing substantial loss and the appellant company is selling its immovable properties. Thus,

according to Mrs. Venugopal, the appellant company is about to become commercially insolvent. Copies of the said documents were also made

over to the appellants. Mr. Banerjee, in his usual fairness, did not dispute the said documents. In support of her contention, Mrs. Venugopal relied

on a decision of the Division Bench of Punjab and Haryana High Court in the case of Aar Kay Concast Ltd. Vs. Reliance Capital Limited, , where

it was held that there is no bar of the proceeding for winding up being initiated, merely on account of pendency of proceeding against the company

before Debts Recovery Tribunal.

11. In order to appreciate the second contention of the appellant company, about lack of jurisdiction of the company court to entertain any winding

up application by a bank or non banking financial corporation against a debtor company due to enactment of the RDB Act, we first consider the

object of the said RDB Act which is as follows:

An Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and

for matters connected therewith or incidental thereto.

12. From the above object it is ex-facie evident that the RDB Act was enacted to establish the Tribunals for expeditious adjudication and recovery

of debts due to banks and financial institutions.

13. Now, ""debt"" under the said RDB Act has also been defined in Section 2(g), to include both secured and unsecured debt of the bank or the

financial institution from any person. The Debt Recovery Tribunals are established under Section 3 of the said Act. The jurisdiction, of the Debts

Recovery Tribunals is conferred under Section 13 of the RDB Act as follows:

17. Jurisdiction, powers and authority of Tribunals:-(1) A Tribunal shall exercise, on and from the appointed day, jurisdiction, powers and

authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial

institutions.

14. From a fair reading of the aforesaid Object of the Act and the provisions contained in Section 17 of the RDB Act, 1993 it is evident that the

jurisdiction and powers are vest with the Debts Recovery Tribunals to issue order and/or certificate for recovery of debts of the banks and

financial institutions from their borrowers.

15. From the provisions contained in Section 19 of the RDB Act, 1993 and various sub-paragraphs thereunder, it is further evident, the Debts

Recovery Tribunal an exercising jurisdiction and powers under the said Act to pass final order and certificate, specifying the amount found due to

the bank/financial institute on account of principal amount and interest till the date of the certificate and interest upto the date of realization or actual

payment. By way of amendment of the Act, a Tribunal has also been conferred with the jurisdiction to adjudicate even a counter-claim of the

constituent of the bank, if filed.

16. From the object of the RDB Act as also from the provision contained in Sections 17 and 19 of the RDB Act, 1993 it is evident that the said

Act was enacted for establishment of Tribunals for expeditious adjudication and recovery of debts due to bank and financial institutions and the

Tribunals exercise jurisdiction to decide the applications for recovery of debts due to such banks and financial institutions upto the stage or

execution of the certificate issued under Section 19(22) of the said Act. It is in this context, Section 18 of the RDB Act 1993 bars the jurisdiction

of all courts and authorities to exercise jurisdiction for recovery of debts of the banks and financial institutions.

17. It is the well settled principle of law that proceedings for winding up under Sections 433 and 434 of the Companies Act, 1956 is not a

proceeding for recovery of debts of the creditors or the Company sought to be wound up. It is a proceeding to wind up a company which has lost

its commercial solvency or substratum.

18. A decision of a Court is an authority for what it decides and not that everything said therein constitutes a precedent. The Courts are obliged to

employ an intelligent technique in the use of precedents bearing in mind that a decision of the Court takes it colour from the questions involved in

the case in which it was rendered. In this regard we are fortified by the decisions of the Supreme Court in the case Commissioner of Income Tax

Vs. M/s. Sun Engineering Works (P.) Ltd., and State of Punjab v. Baddev Sing reported in (1999) 6 SCC 172 (para 43)

19. In the said decision of Allahabad Bank v. Canara Bank, the Supreme Court was dealing with a case where the company court, before which

an winding up application was pending stayed the recovery proceeding pending before the Recovery Officer of the Debts Recovery Tribunal. In

those facts, the question arose before the Supreme Court, as to whether the RDB Act, 1993 would override Sections 442, 537 and 446 of the

Companies Act, 1956. In other words, in that case, the question arose as to whether the Tribunal could entertain proceedings for recovery,

execution proceedings and also for distribution of monies realized by sales of properties of a company against which winding-up proceedings are

pending, whether leave is necessary and as to which court is to distribute the sale proceeds and according to what priorities among various

creditors. (para 9 of the decision)

20. In the aforesaid backdrop, the Supreme Court, after considering the provisions contained in Sections 17, 18 and 34 of the RDB Act, 1993,

held that prescription of an exclusive Tribunal, both for adjudication and execution, is a procedure clearly inconsistent with realization of the debts

in any other manner and as such Sections 442, 446 and 537 of the Companies Act, 1956 cannot be applied against a Tribunal exercising powers

under RDB Act, 1993.

21. From the provisions contained in the RDB Act, 1993 it is evident that a Debts Recovery Tribunal does not have any jurisdiction to wind up a

debtor company. The power of the company court to wind up a company, under the Companies Act, 1956 is in conflict with any provision of the

RDB Act, 1993 and the provisions of Section 34 of the RDB Act, 1993 has any application in case of winding up application by a bank or

financial institution. Thus, the ratio of the decision of the Supreme Court in the case of Allahabad Bank v. Canara Bank (Supra), laying down that

in case of a conflict between the Companies Act, 1956 and the RDB Act, 1993 the provisions of the latter special Act shall override the previous

general Act, has no manner of application in this case.

22. We are also supported in our view by a judgment of the Supreme Court in the case of Haryana Telecom Ltd. Vs. Sterlite Industries (India)

Ltd., . In that case, a winding up petition was filed by a creditor before the High Court and the company filed an application under Section 8 of the

Arbitration and Conciliation Act, 1996, contending, inter alia, that the High Court should refer the matter to arbitration. The learned Single Judge of

the High Court rejected the said contention of the company; so did the Division Bench of the High Court. When the matter went before the

Supreme Court, in paragraph 5 of the said decision, the Supreme Court pointed out:

The claim in a petition filed under for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter

like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company

is contained under the Companies Act and is conferred on the court.

23. The Supreme Court held that arbitrator having no such power could not have entertained the petition and, therefore, the application made to

the High Court for referring the matter to arbitration was misconceived. In our considered view, the principle laid down in the said judgment of the

Supreme Court with regard to the exclusive power of company court to wind up a company squarely applies to the instant case before us. The

Debt Recovery Tribunal not having been invested with the power to wind up a company, it would not be possible to urge before the company

court that the petition should not be heard.

24. For deciding the second contention raised by Mr. Banerjee on behalf of the appellant, we may also look to the decision of the Supreme Court

in the case of Sri Vedagiri Lakshmi Narasimha Swami Temple Vs. Induru Pattabhirami Reddy, where it was held that in every situation where the

legislature has excluded jurisdiction of the Civil Court, the exclusion has to be applied only to the extent the legislature intends and not a bit beyond

it. In paragraph 13 of the said decision, the Supreme Court observed:

Any other construction would lead to an incongruity, namely, there will be a vacuum in many areas not covered by the Act and the general

remedies would be displaced without replacing them by new remedies.

25. For all the aforesaid reasons, we agree with the order made by the learned Single Judge admitting the petition for winding up. The appeal is

dismissed as without substance. However, there will be no order as to costs.

Ashim Kumar Banerjee, J.

I agree.