

(2014) 09 CAL CK 0145

Calcutta High Court

Case No: C.P. No. 661 of 2013

Net 4 Communications India Ltd.

APPELLANT

Vs

Tata Capital Financial Services
Ltd.RESPONDENT

Date of Decision: Sept. 29, 2014**Acts Referred:**

- Companies Act, 1956 - Section 433, 434, 434(1)(a), 439(2)
- Stamp Act, 1899 - Section 35

Hon'ble Judges: N. Patherya, J**Bench:** Single Bench

Advocate: Tilok Bose, Ranjbati Sen, Saubhik Chowdhury, Paritosh Sinha and Debayan Ghosh, Advocate for the Appellant; Abharajit Mitra, Jishnu Chowdhury, Deepnath Roychowdhury and Aditya Garodia, Advocate for the Respondent

Judgement

Patherya, J.

In this winding up petition the petitioning creditor is claiming sums on account of rentals payable by the company to it. The case of the petitioning creditor is that the company entered into a Master Lease Agreement with Leasing IQ (I) Private Limited (Leasing IQ). Under the said agreement equipments were given on rent by Leasing IQ to the company. Payment was to be made as per rental schedule. Subsequently, the petitioning creditor purchased the receivables arising out of the rental equipment from Leasing IQ. By virtue of the said purchase the rental schedule became payable by the company to the petitioning creditor. Necessary documents thereafter were executed between the parties. One of the clause of the rental agreement was that in the event the company defaulted in making payment it will be liable to pay interest at the agreed rate. The company defaulted in making payment of the lease rentals and a notice was issued on 1st July, 2013 by the petitioning creditor calling upon the company to make payment. In its reply the company acknowledged its liability and requested for re-scheduling payment. As no

payment was forthcoming, termination notice was issued on 8th August, 2013 and a statutory notice under Sections 433 & 434 of the Companies Act on 13th August, 2013. In spite of receipt of the statutory notice no reply was given thereto and as no payment was made the instant application filed. By virtue of the notice of assignment, the master lease agreement so also the rental schedule and post dated cheques were assigned to the petitioning creditor by Leasing IQ. Notice of such assignment was given to the company. This, therefore, entitles the petitioning creditor to avail of all remedies available to the assignor Leasing IQ for breach of any of the terms of the agreement including the recovery of rentals.

2. By Clause 2.3 of the Receivable agreement the company assigned to the use of the financier all right, title, interest in the receivables with liberty to enforce payment. In case of default the petitioning creditor was entitled to exercise powers for recovery of receivables, and was also entitled to initiate proceedings for such recovery. By virtue of the notice of assignment, the petitioning creditor became entitled to exercise the same powers as Leasing IQ was entitled to exercise. An irrevocable power of attorney was also issued by Leasing IQ in favour of the petitioning creditor.

3. Reliance is placed on AIR (1937) Cal 765, 175 Company Cases 107, 177 Company Cases 15, [Haryana Telecom Ltd. Vs. Sterlite Industries \(India\) Ltd.](#), Section 439(2) has also been relied on.

4. In opposing the said application Counsel for the company submits that the claim is inflated and the winding up petition is not maintainable by the petitioning creditor as the assignment cannot be relied on by virtue of Section 35 of the Stamp Act. The statutory notice was issued on 13th August 2013. An irrevocable power of attorney was executed on 17th February, 2011 entitling the petitioning creditor to do all things necessary including recover and realise payment of receivables in the name of and on behalf of the assignor Leasing IQ. Therefore, independently no recovery can be made by the petitioning creditor. As arbitration proceedings have been initiated and till the arbitrator adjudicates, the amount remains unascertained. Failure to pay or secure u/s 434(1)(a) of the 1956 Act will not give rise to a debt. As no debt exists and disputes referred to arbitration, so also exercise of law of election, no order need passed on this application. The arbitration proceedings were filed in November 2013, i.e., after the filing of this application.

5. In view of the decisions reported in 107 Company Cases 288, 79 Company Cases 835 and 156 Company Cases 203 as arbitration proceedings have been initiated, therefore, the claim is not definite. Reliance is also placed on 175 Company Cases 71 for the proposition that if the securities are sufficient to meet the claim a creditor's petition need not be admitted. An SLP has been filed from 177 Company Cases 15 and in view of (2001) 1 SCC 278 the order of the Trial Court subsists. Suppression of material facts will also disentitle the petitioning creditor to any relief.

6. In reply Counsel for the petitioning creditor submits that 175 Company Cases 71 is bad law as held in 177 Company Cases 15. 107 Company Cases 288 is bad law in view of 175 Company cases 107 which was an order passed in appeal. 107 Company Cases 288, 79 Company Cases 835 and 156 Company Cases 203 are distinguishable on facts. 179 Company Cases 15 will not aid the company. The Deed of Assignment has been stamped and the plea of inadmissibility cannot be sustained.

7. Counsel for the company submits that in 177 Company Cases 15, the order of the Trial Court was set-aside. The said order of the Appeal Court has been stayed by the Apex Court, therefore, the order of the Trial Court revives. Reliance is placed on the Trial Court's decision not so much on the issue of arbitration but for the issue of security.

8. Having considered the submissions of the parties in view of [Haryana Telecom Ltd. Vs. Sterlite Industries \(India\) Ltd.,](#) there is no bar to filing of a winding-up petition even though disputes have been referred to arbitration. Admittedly a statutory notice was issued on 13th August, 2013 to which there is no reply although received by the company. This raises the presumption of inability of the company to pay its debt which even in the affidavit filed by the company it has not been able to rebut. The company has questioned the authority of the petitioning creditor to file the instant proceedings on the ground of Deed of Assignment not being stamped u/s 35 of the Stamp Act and the right of the petitioning creditor to make recoveries in its name rather than in the name of Leasing IQ.

9. The said plea of agreement not being stamped cannot be accepted in view of payment of stamp duty borne out from the agreement itself.

10. Clause 2.3 of the Sale Receivable agreement has bestowed the petitioning creditor with the right to enforce payment. Furthermore, Clause 5.3(a) of the agreement entitles the petitioning creditor to exercise the powers or remedies of Leasing IQ to recover the receivables. The said clause is set-out below:-

"Financier"s Remedies

Without prejudice to any other rights of the Financier, on the occurrence of a default or an event of default (howsoever described) under the Rental Agreement in respect of the Receivables which have been sold to the Financier, the Financier may in its absolute discretion:

(a) exercise any one or more of the Company"s powers or remedies by which the Company can recover the Receivables."

11. Clause 5.4 of the agreement permitted Leasing IQ to issue Termination Notice subject to written approval of the petitioning creditor.

12. In view of the aforesaid it cannot be said that the petitioning creditor was required to file proceedings in the name of Leasing IQ.

13. In a winding petition the only issue that needs to be examined is whether the company has been able to raise a bona fide dispute which on examination of facts the company has failed to do. By its letter dated 12th July, 2013 the company has sought for rescheduling of the lease rentals and the only reason given for non-payment is financial crunch faced.

14. Although the company seeks to take recourse to the decision reported in 175 Company Cases 71 for the proposition that in case securities are adequate to meet the claim the winding petition ought not to be admitted but the facts of the reported decision and the instant case are distinguishable. In the reported decision proceedings under the SARFESI Act, 2002 had been initiated, not so in the instant case.

15. 107 Company Cases 288 is not good law as held in 175 Company Cases 107 and in view of 177 Company Cases 15 is bad law.

16. 79 Company Cases 835 and 156 Company Cases 203 in view of [Haryana Telecom Ltd. Vs. Sterlite Industries \(India\) Ltd.](#), will not apply.

17. There is no dispute with the proposition laid down in 2001 (1) SCC 278.

18. Therefore, in the absence of bona fide dispute, the winding up petition is admitted for the sum of Rs. 1,10,75,565/- (56,61,933/- + 54,13,632/-) as on 1st July, 2013. The said sum will carry interest at 8% per annum on and from the date of issuance of statutory notice till payment on the reducing balance. An opportunity is given to the company to make payment of the said sum in 10 equal monthly instalments, the first of such instalment be paid by 10th October, 2014 and on the 10th day of each succeeding month.

19. In default of payment of any one instalment the petitioning creditor will be entitled to advertise once in Ei Samay and Times of India. Matter is made returnable 8 weeks hence.