Small Industries Development Bank of India Vs. Nirmaan Bharati Samajik and Arthik Vikas Sangathan

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Court : Delhi

Decided On : Aug-25-2014

Judge : Vibhu Bakhru

Appellant : Small Industries Development Bank of India

Respondent : Nirmaan Bharati Samajik and Arthik Vikas Sangathan

Judgement :

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

25. 08.2014 CO. PET. 107/2011& CA3632011 SMALL INDUSTRIES DEVELOPMENT BANK OF INDIA versus NIRMAAN BHARATI SAMAJIK AND ARTHIK VIKAS SANGATHAN ..... Petitioner ..... Respondent Advocates who appeared in this case: For the Petitioner : Mr Dinesh Agnani, Sr. Advocate with Ms Leena Tuteja and Ms Dolly Sharma. For the Respondents : Mr Aakarsh Kamra. CORAM:HONBLE MR JUSTICE VIBHU BAKHRU

JUDGMENT
VIBHU BAKHRU, J1 The present petition has been filed by the petitioner bank under Sections 433(e) and 434 of the Companies Act, 1956 (hereinafter referred to as the Act) inter alia praying for winding up of the respondent company on the ground that the respondent company had failed and neglected to pay a sum of

`6,28,31,972/- alongwith interest, which was claimed as due and payable by the respondent company on account of the loan agreements dated 06.03.2007 and 20.02.2008 for `50 lacs and `600 lacs respectively.

2. Briefly stated, the relevant facts are that the respondent company applied to the petitioner bank for financial assistance in form of a term loan of `50 lacs and capacity building grant of `17 lacs (hereinafter referred to as Loan I) under Micro Credit Scheme of the petitioner bank. The said application was considered by the petitioner bank and by a letter of intent dated 02.03.2007, it granted the same to the respondent company. Thereafter on 06.03.2007, a loan agreement was executed for the same. The respondent company again applied to the petitioner bank for financial assistance in form of a term loan of `600 lacs and capacity building grant of `15.75 lacs (hereinafter referred to as Loan II) under Micro Credit Scheme of the petitioner bank. The said application was considered by the petitioner bank and by a letter of intent dated 13.02.2008, it granted the same to the respondent company. Thereafter on 20.02.2008, a loan agreement was executed for the same. Loan II was secured by an exclusive charge by way of hypothecation of book debts and underlying assets.

3. The interest with respect to Loan I was due 01.04.2007 and the first installment for the same was due on 01.12.2007. The interest with respect to Loan II was due 01.03.2008 and the first installment for the same was due on 01.09.2008.

4. The petitioner bank claims that the respondent company made regular payments of interest due on both the loans up to 10.08.2009 and defaulted in payment of installments with respect to both the loans from 10.03.2009 onwards and interest with respect to both the loans from 10.09.2009 onwards.

5. The petitioner bank states that in order to enable the respondent company to repay the loans, the petitioner bank restructured the account of the respondent company by way of re-schedulement of repayment and communicated the revised payment schedule to the respondent company by letters dated 26.02.2009 and 07.12.2009, however, the respondent company did not accept the same as the pacakage was conditional on infusion of additional funds by the promoters for proposed loans, furnishing personal guarantee by the promoters and submission

of post dated cheques etc.

6. The petitioner bank, by legal notice dated 18.5.2010 sent at respondent companys Lucknow address, recalled the entire principal amount of the two loans along with interest, liquidated damages and other charges, amounting to `5,97,95,040/-. The petitioner bank contends that the respondent company by its reply dated 07.06.2010 and additional response dated 24.06.2010, admitted that the respondent company was not in a position to pay the loans taken from the petitioner bank and requested for rephasing of the loans, comprehensive rehabilitation and sanction of further funds for making the respondent company successful and viable.

7. On 19.10.2010, the petitioner bank sent another legal notice at the registered office of the respondent company, being the statutory notice under the Act, calling upon the respondent company to pay `6,28,31,972/- with interest at the rate of 10.5% per annum on loan I and at the rate of 11.75% per annum on loan II, within three weeks.

8. The petitioner bank states that despite the aforementioned recall notices, the respondent company failed to repay the outstanding loan amounts and the petitioner bank, having no other alternative, filed the present Petition.

9. The respondent company claims that it had been regularly repaying the loans according to the agreed schedule and paid a sum of `2,06,50,052/towards principal and interest. It is contended that the amount of `6,28,31,972/- with interest, claimed as due and payable by the petitioner bank is substantially higher than the amount due and payable to the petitioner bank.

10. The respondent company submits that by an email dated 24.11.2009, it had informed the petitioner bank that it had less than sixty days (60 days) of cash for carrying on future operations, and the petitioner bank was prewarned of the resource crunch faced by the respondent company. The respondent company states that it had on various occasions called upon the petitioner bank to work out proper fund infusion programmes to revitalize the respondent company but the petitioner bank instead issued a demand advice dated 21.04.2010. It is further

contended that in a meeting between all the lenders of the respondent company, held on 13.05.2010, it was decided that an unconditional consent letter will be provided by the MD of the respondent company for the purpose of identifying and thereafter negotiating a sale of the respondent companys portfolio to the suitable buyer MFI. However, the petitioner bank without waiting for the consent letter issued a recall notice dated 18.05.2010.

11. The respondent company submits that, by a letter dated 23.09.2010, it proposed two compromise offers for a final settlement of its dues; One being, repayment of the amount due and payable in three installments over a period of twenty five months and the second being, full and final settlement of all dues owed to lenders/banks in four installments over a period of thirty seven months. It is stated that the petitioner bank rejected both the offers and issued another recall notice dated 19.10.2010. Thereafter, the respondent company, by its letter dated 20.10.2010, proposed yet another offer to pay total payout amount in yearly installments over a period of 10 years. This too was not acceptable to the petitioner bank. It is submitted that given the financial condition of the respondent company, the petitioner bank has acted in the most unreasonable manner.

12. The respondent company states that it has also filed a Writ Petition being W.P.(M/S) No.5176/2013 before the High Court of Allahabad, Lucknow bench, for providing a rehabilitation package in accordance with RBI guidelines and directives and for staying the proceedings initiated by the petitioner bank and other lenders in Debt Recovery Tribunal, Lucknow and Debt Recovery Tribunal, Delhi. The learned counsel for the respondent company relied upon the decision of the Supreme Court in the case of IBA Health (India) Pvt. Ltd. v. Info Drive Systems SDN. BHD: (2010)10 SCC553in support of its contention that a winding up petition would not lie in cases whether there were substantial disputes between the parties.

13. It is contended by the learned counsel for the respondent company that it is evident from the reply of the petitioner bank to the RTI application that the petitioner bank has singled out the respondent company for a hostile treatment, as 10 MFI accounts of the petitioner bank had become Non Performing Assets (NPA)

but a winding up petition was filed only against the respondent company.

14. The respondent company claims that in accordance with the RBI guidelines, the respondent company is entitled for grant of a rehabilitation package from the petitioner bank. It is stated that special audit teams of the petitioner bank and other lenders, as well as, an independent expert in the field of micro finance had carried out an in-depth viability study to establish the viability of the respondent company and verify the integrity of its management/promoters. It is contended that even though the said expert and other teams had recommended that financial, technical and operational support be provided to the respondent company, the petitioner bank had failed to do so.

15. It is further contended on behalf of the respondent company, that it is a settled proposition that mere inability to pay debts is not a ground for winding up and the Micro finance expert report and special audit report establishes that respondent company can be revitalised and rehabilitated. It is also contended that the present petition needs to be dismissed as, not only the petitioner bank is a secured creditor holding security in the form of hypothecated book debts and underlying assets, but it also has the option to recover the debt as per the provisions of Section 38 of the Small Industries Development Bank of India Act, 1989.

16. Considering the facts and the contentions urged, it is apparent that there is no dispute that the respondent company owes substantial debt to the petitioner bank and has been unable to pay the same. The respondent company has also not contested its current inability to repay the debt. Essentially, the defence raised by the respondent company is that the petitioner bank is liable to support the respondent company in its rehabilitation by providing further assistance, both in terms of providing additional funds and restructuring of the existing debt. Although, it contended on behalf of the respondent company that it is entitled to such financial assistance in terms of the RBI guidelines, the petitioner bank has disputed that it is obliged to grant any further assistance to the respondent company.

17. The only controversy that is required to be addressed is, whether the petitioner bank is precluded from recovering its debt due from the respondent company

and/or maintaining the present petition on account of the dispute raised in the present petition.

18. In the present case, it is an admitted position that the respondent company owes substantial amounts to the petitioner bank, which the respondent company has been unable to pay on account of its financial position. The claim of the respondent company, that it is entitled to be rehabilitated is an entirely separate controversy and is based on the substratal premise that the respondent company is unable to meet its current liabilities but has the potential to revive. It is implicit in this contention that the respondent company is unable to meet its liabilities and as such a substantial dispute with regard to the respondent companys liability towards the petitioner bank cannot be inferred.

19. The petitioner bank has alleged that although the petitioner bank was agreeable for restructuring the accounts and re-schedulement of repayment along with lenders, the respondent company did not accept the same as the reschedulement proposal included infusion of additional funds by promoters, personal guarantees of promoters and submission of post-dated cheques. It was further alleged by the petitioner bank that the respondent company had transferred its portfolio to another company, promoted by its promoters, without the prior consent of the petitioner bank. Although, these contentions are disputed by the respondent company, it is apparent that the petitioner bank is not agreeable to lend further assistance to the respondent company or defer the recovery of the amount due to it. And, in absence of such assistance the respondent company is not viable and cannot survive.

20. The respondent company has contended that the petitioner bank had satisfied itself of the bona fides of the management of the respondent company and the expert appointed had also given a report that the respondent company ought to be rehabilitated. The respondent company has further explained that its financial position had deteriorated as its borrowers, who were workers from the marginal section of the society, had themselves suffered on account of unprecedented floods and lack of demand for Ari- zardosi work. Further, a loan waiver scheme announced by the Chief Minister of Uttar Pradesh in 2008 and a rumor that the MD

of the respondent company had expired, also adversely impacted the recoveries by the respondent company from is borrowers. The respondent company has also alleged that the petitioner bank has singled the respondent company for not extending a rehabilitation package.

21. The reasons for the financial condition of the respondent company are not material at the present stage. Whether the financial condition of the company had deteriorated for reasons beyond the control of the respondent company is also not germane to the question whether the respondent company is unable to pay its debts. The question whether, the petitoner bank has acted arbitrarily or has adopted a policy of pick and choose is also not a controversy which can be considered in the present case. The respondent company had approached the Allahabad High Court, by way of a writ petition, and had inter alia also sought interim orders restraining the petitioner bank from initiating or continuing with any proceedings for recovery of the dues owed by the respondent company to the petitioner bank. However, the respondent company has not prevailed in securing any orders in its favour.

22. In the given circumstances, where the respondent company has neither disputed, the debt owed to the petitioner bank nor the fact that it has been unable to discharge its debt, the present petition is liable to be admitted. The contention that the petitioner bank is liable to extend a rehabilitation package to the respondent company in terms of the RBI guidelines is disputed. I am also unable to readily accept that the petitioner bank can be compelled to provide further assistance contrary to its commercial wisdom.The question whether the respondent company ought to be finally would up would be considered at a subsequent stage. In the meanwhile, it is open for the respondent company to persuade its creditors to support a rehabilitation scheme or otherwise present a concrete plan for repayment of its debts.

23. The contention that the present petition ought to be dismissed as the petitioner bank has recourse to Section 38 of the Small Industries Development Bank of India Act, 1989 to recover its dues, also cannot be accepted as a tenable defence to the present petition. It is well settled that proceedings under Section 433(e) of

the Act are not recovery proceedings and as such existence of a remedy to recover the dues does not preclude a creditor from maintaining proceedings for winding up of the debtor company.

24. In my view, the disputes raised by the respondent company cannot be considered as a defence to proceedings under Section 433(e) of the Act. Undisputedly, the respondent company has been unable to meet its liabilities towards the petitioner bank. In this view, the petitioner bank is entitled to maintain the present petition. The reliance placed by respondents to the decision of the Supreme Court in IBA Health (India) Pvt. Ltd.(supra) is also mis-placed. In that case, the Supreme Court had explained that in a case where there is a bona fide dispute as to the liability, the creditor could not prefer a petition for winding up of the company. The Court further held that it is not the duty of the Company Court to hold a full trial in cases where there is a substantial dispute as to the liability owed by the company. The relevant extract from the said decision is quoted below:

it is settled law that if the creditors debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is a danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt.

25. Accordingly, the petition is admitted and the petitioner bank is directed to advertise the petition in Statesman (English) and Jansatta (Hindi). The petition be also advertised in Amar Ujala having circulation in Uttar Pradesh. In addition, the petition shall also be advertised in the official gazette for a hearing to be held on 14.11.2014 CM3632011 26. In the given circumstances, where the respondent company is stated to be making efforts for its revival, I am not inclined to appoint a provisional liquidator, as that may impede the respondent company in its efforts. However, the respondent company shall submit a weekly statement of receipts and expenditure to the Official Liquidaor. Further, the promoters/ directors would not draw any remuneration or incur any liability without the express consent of the petitioner bank.

27. The application is disposed of with the aforesaid directions. VIBHU BAKHRU, J AUGUST25 2014 RK