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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CO. APP. 84/2013

Reserved on : 13th November, 2017
Date of decision : 8th January, 2018

M/S. HDFC BANK LTD. ..... Appellant
Through: Mr. Kunal Tandon, Advocate with Mr. Anirudh Bhargava, Manager, HDFC Bank.

versus

M/S PREM POWER CONSTRUCTION PVT. LTD. & ANR. ..... Respondents
Through: Mr. A.P. Singh & Mr. Aman Agarwal, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh J.,

The short question that arises in this case is as to whether the notice of winding up under Sections 433/434 of Companies Act, 1956 (for short 'the Act') was duly served upon the Respondent or not.

2. The present appeal arises out of the judgement of the learned Single Judge dated 6th December, 2013 by which the company petition filed by the appellant/HDFC bank (*'appellant', for short)* was dismissed on the ground that the winding up notice was not properly served on the Respondent.

Brief Background

3. It is the case of the appellant that on 25th October, 2007 the respondent Company was sanctioned fund based credit facility to the extent

of Rs.150 lakhs and non-fund based credit facilities to the extent of Rs.950 lakhs and foreign exchange (*'FOREX', for short*) cover limit of Rs.95 lakhs, with an aggregate limit of Rs.1100 lakhs. In order to avail these facilities, the respondent executed security documents, including a master credit facility agreement dated 30th October 2007, demand promissory notes for the sum of Rs.4 crores, Rs.9.5 crores, Rs.1.5 crores, Rs.1.10 crores and Rs.95 lakhs, letter giving a lien on fixed deposit receipts (*'FDRs', for short*) of Rs.60 lakhs and Rs.95 lakhs and the hypothecation agreement of goods, vehicle, plant and machinery and book debts for Rs.1100 lakhs. The directors of the respondent Company also executed a deed of guarantee and another deed of corporate guarantee was executed by M/s Prem Softech Pvt. Ltd. Various properties belonging to the company M/s Prem Softech Pvt. Ltd., which is a group company of the respondent, were also mortgaged. From time to time various other securities including reiteration of creation of mortgage, assignments of lease, rentals etc. were executed.

4. The respondent defaulted in its repayments to the appellant and according to the appellant it was unable to pay its debts. The account of the respondent was declared as a Non Performing Asset ('NPA') by the appellant. On 15th September 2010, the Appellant issued a recall notice calling upon the respondent to pay a sum of Rs. 6,01,35,890.68 together with future interest and costs and further sum of Rs.19,17,841 and Euros 2,65,427.30. All these amounts were due and payable according to the appellant. Since the payments were not forthcoming, the appellant approached the Debt Recovery Tribunal ('DRT'), which case is pending adjudication. It is the case of the appellant that on 3rd May, 2010 the

respondent admitted its liability in a proposed onetime settlement letter. The settlement proposal was, however, rejected by the appellant. The appellant treated this onetime settlement offer as an admission of liability by the respondent. It issued a winding up notice dated 1st October, 2012 which was followed up with another winding up notice dated 11th December, 2012. Having elicited no response to the said notices, the appellant filed the winding up petition before this Court registered as Company Petition No. 63 of 2013 on 28th January, 2013. An interim order was passed in the Company Petition No. 63 of 2013 on 15th February, 2013, restraining the respondent from creating any charge, alienating, transferring, parting of possession of any of the immovable assets and certain other directions were also passed directing the filing of affidavit by the Managing Director of the respondent. On 1st May 2013, despite the respondent being served, since there was no appearance, the Company Court proceeded further and appointed Provisional Liquidator. This order was challenged in appeal by the Respondent and the matter was remanded to the Company Judge by the Division Bench on 11th September, 2013.

5. An application being Co. Appl. 2126/2013, seeking vacation of the orders dated 15th February, 2013 and 1st May, 2013, was filed before the learned Company Judge. On hearing this application, the learned Single Judge passed the impugned order dismissing the company petition, on the ground of failure and non-service of the winding up notice.

6. In the present appeal, orders have been passed from time to time. Initially, a restraint order to secure the assets of the company was passed and the Official Liquidator (*'OL', for short*) was also directed to maintain status

quo on 20th December, 2013. Thereafter, the Division Bench had directed the parties to explore mediation, which failed. The OL had prepared a full inventory of the assets of the company and the OL was directed to hand over the physical possession of the factory premises to the Managing Director of the respondent. Further, maintenance of status quo of title and possession of the properties of the company was also directed. On 17th February 2016, the OL and Registrar of Companies were also directed to rectify the status on the website and delete the reference that the company was facing liquidation.

7. Arguments have been heard in the matter. During the course of arguments some proposals were also exchanged between the parties for exploring settlement, however, the same have not fructified. Thus, the matter has been decided on merits.

Appellant's submissions

8. The stand of Mr. Kunal Tandon, Advocate for the Appellant is that the impugned order wrongly records that service of the winding up notice was not properly effected on the Respondent. In support of his submission, he relies upon the winding up notice dated 1st October 2012, courier receipts, speed post receipts, tracking reports, and the original envelopes for the same. The original envelopes were also produced in the Court at the time of the hearing.

9. Learned Counsel for the Appellant also relies on the notice dated 11th December, 2012 along with its supporting documents. The submission of the learned counsel is that the record demonstrates that there was proper service and that a pedantic approach by the Court was not warranted. It was further

submitted that the Court ought to bear in mind the realities as it was perfectly certain that the respondent was avoiding service of the notice, despite all the efforts and attempts. He relies on the provisions of the Act to submit that whenever notices are sent by registered post they are deemed to be served. He specially relies upon the following cases:

- ***Kotak Mahindra Bank Ltd. v. Hermonite Associates Ltd. 2011 (161) CompCas 214*** *(hereinafter 'Kotak Mahindra Bank')*
- ***Global Infosystem Ltd. v. Lunar Finance Ltd. 2012 (130) DRJ 307*** *(hereinafter 'Global Infosystem')*
- ***State of M.P. v Hiralal & Ors. (1996) 7 SCC 523*** *(hereinafter 'Hiralal')*
- ***N. Parameswaran Unni v. G. Kannan & Anr. (2017) 5 SCC 737*** *(hereinafter 'Parameswaran Unni')*

Submissions of the Respondent

10. The respondent submits that it is a financially sound company with a turnover of about Rs. 40-50 crores. As per section 434 of the Act, the notice of winding up ought to be delivered at the registered office and reliance on Section 51 of the Act, by the appellant, is misplaced. According to the respondent, since the provision has very serious consequences, the deeming fiction as contained in Section 27 of the General Clauses Act, 1897 ought not to be made applicable. According to the respondent, because of the unreasonable conduct of the bank for recalling the loan facility, it has suffered huge losses. The respondent employs more than 500 persons in its business in the field of power transmission and construction of distribution

systems. It has successfully settled with other banks such as ICICI bank, Yes bank and ABN Amro bank. Thus, it is only HDFC bank i.e. the appellant, which is refusing to agree to any reasonable terms as per the respondent.

11. Respondent further submits that the winding up notice was never served upon it as per the provisions of the Act and hence the petition itself was not maintainable. In fact, it has suffered immensely because of the steps taken by the bank.

Analysis and Findings

12. The facts that emerge from the record, at this stage, are that the appellant has extended various credit facilities to the respondent, which have been availed of by the respondent. It is the position of the appellant that there were several outstanding dues to be paid by the respondent to the appellant. Despite long drawn proceedings, the appellant had been unable to recover its dues from the respondent. Under such circumstances, the appellant had issued the winding up notice dated 1st October, 2012. This notice was addressed by the Solicitors of the appellant to the registered office of the respondent being Khasra No.261/1, Village Ghitorni, New Delhi-110030 *(hereinafter `Ghitorni address')* as also at the alternate addresses of the respondent at Udhyog Vihar, Gurgaon, MIDC Bhandara, Nagpur, Maharashtra and to four directors of the respondent and one to the guarantee company M/s. Prem Softech Pvt. Ltd. There is no dispute that the Ghitorni address was the registered office of the respondent. The documents which have been placed on record include copies of 8 courier receipts, 8 speed post receipts, which clearly show that the notices have been dispatched to the said addresses. The tracking reports have been placed on

record in respect of some of the notices. The original envelope addressed to the registered office, was returned unserved by courier, and has also been placed on record. The notice sent by speed post, however, was not returned to the Solicitors.

13. The second notice dated 11th December, 2012 was sent to the Respondent at the new registered office at B-1/2065, Vasant Kunj, which address was obtained from the Ministry of Corporate Affairs (MCA) website. This notice was sent by speed post and by courier for which receipts have been placed on record. The original envelope sent by speed post had been received back by the Appellant with the noting "बी-1 में यह नंबर नहीं है" *("B-1 mein ye number nahi hai".)*

14. The winding up petition came to be filed on 28th January, 2013. Thus, there is merit in the contention of the appellant that prior to the said filing, two notices dated 1st October, 2012 and 11th December, 2012 were sent to the respondent through all possible modes i.e. by courier and speed post registered A.D. The question is as to whether this satisfies the requirement under law that the notices were delivered.

15. Section 433 (e) and 434 of the Act reads as under:

> *"433. Circumstances in which company may be wound up by Tribunal.—A company may be wound up by the Tribunal,—*
>
> *XXXXXXXXX*
>
> *(e) if the company is unable to pay its debts*;
>
> *XXXXXXXXX*

434. Company when deemed unable to pay its debts
(1) A company shall be deemed to be unable to pay its debts –

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding [one lakh] rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order of any Court [or Tribunal] in favour of a creditor of the company is returned unsatisfied in whole or in part ; or

(c) if it is proved to the satisfaction of the [Tribunal] that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the [Tribunal] shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm."

16. As per clause (e) to Section 433, a company can be wound up if it is unable to pay its debt. Sub-section (1) to Section 433 refers to three different clauses, when a company is deemed to be unable to pay its debt. As per clause (a), a company is deemed to be unable to pay its debt if it neglects to pay the sum exceeding Rs.1 lac or to secure or compound it to the satisfaction of the creditor, after it is served with a notice demanding the

said payment by causing the said notice to be delivered at the registered office by registered post or otherwise. The object behind the provision is that the company, which is a limited liability and a juristic person, must pay its creditors or secure them to their satisfaction. Refusal and failure to pay, in spite of demand, vide notice, results in deemed inability to pay debt. Thus, the contention that the petitioner company had paid dues to other creditors and continues to be in operation and employs 500 employees, etc., are all aspects, which will be taken into consideration by the Company Court while passing orders on the winding up petition, albeit will not be a ground to reject the petition at the threshold as not maintainable and bad in law. The deeming fiction under Section 434(1)(a) is not exhaustive of the power of the Company Court.

17. In case the contention of the respondent has to be accepted, then a company may refuse to accept notice on one pretext or the other and ensure that the notice sought to be served is returned. It is, in this context that the Bombay High Court in ***Cavendish Shipping Limited versus Poaris Marine Management Private Limited and Others***, ***[2010] 156 Company Cases 108 (Bom.)*** had referred to an earlier decision of the Delhi High Court in ***Hotline Teletubes and Components Limited versus A.S. Impex Limited***, ***[2004] 119 Company Cases 98*** to observe and hold as under:-

> ***33.*** *Before concluding, it would be necessary to advert to the submission that service of the statutory notice was not effected at the Registered Office of the Company. The requirement of serving a statutory notice under Section 434(1)(a) arises when the deeming fiction that is created by the provision is sought to be pressed in aid. The deeming fiction under Section 434(1)(a) is, however, not exhaustive of the*

power of the Company Court if a Company is unable to pay its debts within the meaning of clause (e) of Section 433. The effect of Section 434(1)(a) is to create a deeming fiction that the Company is unable to pay its debts if a creditor has served upon the Company by registered post or otherwise a demand under his hand requiring the Company to pay the sum due and the Company has neglected to pay the sum or to secure or to compound it for a period of three weeks. In Tailors Industrial Flooring Ltd. v. M&H Plant Hire (Manchester) Ltd. the Court of Appeal in the U.K held:

> *"There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who seek to petition for the winding up of companies do not serve statutory demands. The practical reason for that is that if a statutory demand is served, three weeks have to pass until a winding up petition can be presented. If, after the petition has been presented, a winding up order is made, the winding up is only treated as commencing at the date of the presentation of the petition; thus, if the creditor takes the course of serving a statutory demand, it would be giving the company an extra three weeks' grace in which such assets as the company may have may be dissipated in attempting to keep an insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So there are practical reasons for not allowing extra time, particularly where commercial conditions and competition require promptness in the payment of companies' debts so that the creditor companies can manage their own cash flow and keep their own costs down. …*

The first limb is that if a debt is due and an invoice sent and the debt is not disputed, then the failure of the debtor company to pay the debt is itself evidence of inability to pay."

34. *That apart, in the present case, it has been averred in the Company Petition that the statutory notice was addressed to the Registered Office of the Company as stated in the records of the Registrar of Companies, Maharashtra (ROC). The Petitioner obtained a certified copy from the record of the ROC with regard to the registered office address of the Company. However, the notices having been remitted on the address of the Registered Office as shown in the record of the ROC, all notices came back with the remark "not known". The affidavit in reply does not proceed on the basis that the address mentioned in the statutory notice is not the Registered Office of the Company. In a judgment of the Delhi High Court in Hotline Teletubes & Components Ltd. v. A.S Impex Ltd., Dr. Justice Mukundakam Sharma (as he then was) dealt with a case where a statutory notice addressed to the Registered Office of the Company was returned with the remark that the addressee had left the premises. The Delhi High Court held that the documents which were placed on the record indicated that the Petitioner had sent the statutory notices to the Company at the address at which the Registered Office was located. In the meantime, the Company changed the address of its Registered Office as a result of which the statutory notices were not served. The Court held that sending of the notices by the Petitioner at the Registered Office of the Company in terms of the official records had to be regarded as legal and valid and the proceedings could not be held to be not maintainable because the Company had, in the meantime, changed its office. There is, therefore, no merit in the submission in*

regard to the maintainability of the Petition for want of a statutory notice under Section 434(1)(a).

18. The Supreme Court in ***Parameswaran Unni (supra)*** referring to Section 27 of the General Clauses Act and Section 114 of the Evidence Act observed that once notice is sent by registered post by correctly addressing it to the drawer, the service of notice should be deemed to be affected. In the said case, this it was observed that the attempt would satisfy the requirements of proviso (b) to Section 138 of the Negotiable Instruments Act, 1881. The Supreme Court elucidated that notice sent by registered post returned with postal endorsement 'refusal, not available, house locked or addressee not in station' would be sufficient for the Court to presume due service. The Supreme Court held as under:-

> *"13. It is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Evidence Act, 1872, that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. Then requirements under proviso (b) of Section 138 stand complied, if notice is sent in the prescribed manner. However, the drawer is at liberty to rebut this presumption.*
>
> *14. It is well settled that interpretation of a statue should be based on the object which the intended legislation sought to achieve."*

In this judgment, reference was also made to ***Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647*** and ***V. Raja Kumari v. P. Subbarama Naidu***, ***(2004) 8 SCC 774***.

19. Thus, the notice under Section 434 has to be served on the company *"by causing it to be delivered at its registered office by registered post or otherwise"*. The term "causing it to be delivered" has been interpreted in several judgements. In ***Kotak Mahindra Bank (supra)***, this Court had the occasion to deal with a case where the registered office of the company was lying closed as the operation of the company was shut down on account of severe losses. After discussing the entire case law, this Court held that the sending of the notice at the registered office of the respondent ought to be held as legal and valid "delivery". The words "causing to be delivered" are significant and important, in the context of a company, a juristic person. The sending of the notice at the registered office, as per the official records, was held to be duly delivered and served even though the registered office was lying closed. A similar view has been taken in ***Global Infosystem (supra)***.

20. In the present case, apart from the fact that the notice was sent by the appellant at several addresses of the respondent, an effort was also made to send the said notice even at the new registered office address. Thus, it is obvious that the appellant left no stone unturned in sending the notices by various modes to the registered office of the respondent. Moreover, under Section 51 of the Act a document could be served on a company by sending it to the company at the registered office. Section 51 of the Act reads as under:

> *"51. Service of documents on company*
> *A document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by post under a certificate of posting or by registered post, or by leaving it at its registered office.*

> *Provided that where the securities are held in a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic mode or by delivery of floppies or discs."*

21. A conjoint reading of Section 434 and Section 51 of the Act leaves no doubt that the appellant had made repeated efforts to serve the winding up notices to the respondent. There are certain other facts which go to show that the respondent may, in fact, have been avoiding service in this case. Such other facts are as follows:

a. Service of the notice dated 1st October, 2012 at various offices of the company and also the directors of the respondent. The notice sent by speed post to the respondent Company was not returned undelivered dated 11th December, 2012.
b. Service of the second winding up notice at the new registered office as available on the MCA website by courier and speed post. Notice sent by courier was not received back, whereas notice sent by speed post was received back with the report "addressee left without address". Thus, the notice was tendered and served.
c. The service of the recall letter dated 15th September, 2010 which is admitted, after which a one-time settlement was proposed by the respondent.

22. The observations of the Supreme Court in ***Parameswaran Unni (supra)*** are apt in the present case. Several attempts were made by the appellant to serve the winding up notices on the respondent and the mere fact that it was not specifically mentioned in the company petition that the

winding up notice sent by speed post was not returned unserved, would not be a ground to dismiss the company petition.

23. In view of the above discussion, the winding up notice dated 1st October, 2012 and 11th December, 2012 are held to be in compliance with the requirement under Section 434 read with Section 51 of the Act as also under Section 27 of the General Clauses Act, 1897. The company petition is restored to its original position. The petition shall be listed before the Company Judge for further proceedings. The respondent shall maintain status quo of all its assets and properties, subject to further orders that may be passed in the company petition.

24. This Court has not gone into the merits or examined the issue of "winding up". These aspects and issues would be examined by the Single Judge.

25. The appeal is allowed with costs of Rs.25,000/-.

PRATHIBA M. SINGH, J

SANJIV KHANNA, J

JANUARY 8, 2017/*dk*