Export-Import Bank of India *v* Surya Pharmaceutical (Singapore) Pte Ltd [2015] SGHC 258

Case Number : Companies Winding Up No 82 of 2014

Decision Date : 08 October 2015

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Oon Thian Seng (Oon & Bazul LLP) for the plaintiff; Darshan Singh Purain (Darshan & Teo LLP) for the defendant.

Parties : Export-Import Bank of India — Surya Pharmaceutical (Singapore) Pte Ltd

Companies – Winding up

8 October 2015

Choo Han Teck J:

1 The plaintiff applied for the defendant to be wound up on the ground that the defendant is insolvent and unable to pay its debts. It also sought an order for the provisional liquidators appointed by Woo Bih Lih J on 30 May 2014 to be appointed as liquidators.

2 The plaintiff is a bank that is incorporated in India. It was established under the Export-Import Bank of India Act (No 28 of 1981) to, *inter alia*, provide financial assistance to exporters and importers and to function as the principal financial institution for coordinating the working of institutions engaged in the financing of the export and import of goods and services to promote India's international trade.

3 The defendant is a company incorporated in Singapore. It is wholly-owned by Surya Pharmaceutical Limited ("SPL"), an Indian company. The defendant does not have trading activities in Singapore but is a holding company that wholly owns two companies in the United States of America, namely, Amershire Investment Corporation and Herkules Capital Management Ltd ("Herkules"). Herkules in turn owns another US company, Family First Pharmaceutical Inc. I will refer to these three companies as the "US Companies".

4 The plaintiff's application for a winding up order against the defendant was made pursuant to s 254(1)(*e*) read with s 254(2)(*a*) or s 254(*c*) of the Companies Act (Cap 50, 2006 Rev Ed), on the ground that the defendant is unable to pay its debts. 7 April 2014, the total amount due and payable by the defendant to the plaintiff amounted to the sum of US$9,544,441.89 and Rs199,714,270.96.

5 This debt can be traced back to a loan agreement, termed as the Dollar Loan Agreement, which the plaintiff and the defendant entered into on 2 November 2010. As part of its Overseas Investment Finance Programme, the plaintiff extended a sum of US$15m as a loan to the defendant. The defendant was then a newly incorporated overseas venture of SPL. It seems that the purpose of this loan and the defendant's incorporation was for SPL to receive funding through the Dollar Loan Agreement to acquire the US Companies. SPL acted as the defendant's corporate guarantor and Mr Rajiv Goyal and Ms Alka Goyal acted as its personal guarantors under this agreement. Mr Goyal is the managing director of the defendant and SPL, and Ms Goyal is a director of both companies.

6 After making a few repayments, the defendant defaulted on the loan. A sum that totalled about US$11m was outstanding. At the same time, the defendant's parent company, SPL, owed the plaintiff other debts. These debts, together with the outstanding sum of US$11m that SPL stood as corporate guarantor for under the Dollar Loan Agreement, were referred to a corporate debt restructuring scheme in India. In March 2013, SPL and other financial institutions, including the plaintiff, entered into a Master Restructuring Agreement ("MRA") in India. According to the defendant, the plaintiff only agreed to be part of the corporate restructuring scheme after the outstanding loan of US$11m under the Dollar Loan Agreement that SPL was liable for as the defendant's corporate guarantor was included in the restructuring process. The MRA was a mechanism through which SPL acknowledged the debts owed to its creditors and committed to the restructuring of the debts in exchange for certain waivers by the creditors. The MRA eventually failed because SPL did not comply with the pre-conditions to the MRA. On 29 July 2013, the corporate debt restructuring scheme was also declared to have failed.

7 After the corporate debt restructuring scheme failed, SPL registered itself under the Sick Industrial Companies (Special Provisions) Act 1985 ("SICA") in India on 5 August 2013. The SICA is an Act aimed at reviving and rehabilitating "sick" industries and companies. A "sick industrial company" is defined under the SICA as "an industrial company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its net worth". SPL is presently involved in proceedings before the Indian Board for Industrial & Financial Reconstruction ("BIFR"), which may lead to a rehabilitation scheme. The BIFR is an administrative board which exercises powers similar to a court in India and oversees the possible rehabilitation of debtors under the scheme. The SICA confers the BIFR wide powers and provides some degree of protection to the company whilst proceedings are ongoing. For example, it is stipulated under the SICA that without the BIFR's consent, no suit can be brought for the recovery of money or for the enforcement of any security against a company that has been registered under the SICA. The plaintiff has since assigned its rights against SPL to another company, Edelweiss Asset Reconstruction Company Ltd.

8 Whilst SPL was involved in the SICA proceedings in India, the plaintiff, as it is entitled to, separately sought the repayment of the loan from the defendant in Singapore. On 3 December 2013, the plaintiff's solicitors issued a letter of demand to the defendant and its corporate and personal guarantors for the sum of US$9,240,500.55 and Rs192,253,270.47. The defendant did not reply to the letter of demand. On 7 April 2014, the plaintiff issued a statutory demand for the sum of US$9,544,441.89 and Rs199,714,270.96. The sums were higher than what was demanded in the first letter because the interest and penal interest that were due had increased. The defendant continued to default on the repayments. Eventually on 8 May 2014, the plaintiff filed an application for the defendant to be wound up.

9 Mr Oon Thian Seng, counsel for the plaintiff, submitted that the statutory presumption in s 254(2)(*a*) of the Companies Act that the defendant was unable to pay its debt can be invoked since the defendant failed to pay its debt, which far exceeds $10,000, in the three weeks that had passed since the statutory demand was served. Mr Oon further argued that even putting aside the deeming provision under s 254(2)(*a*), it had been proved to the satisfaction of the court that the defendant was unable to pay its debts as they fell due and thus s 254(2)(*c*) of the Companies Act was met.

10 The defendant resisted the application for winding up on two grounds. Mr Darshan Singh Purain, counsel for the defendant, argued that India was the more appropriate forum for the application and thus the proceedings in Singapore should be stayed. Secondly, he submitted that the defendant was not insolvent and had sufficient assets to meet the debt owing to the plaintiff. Additionally, the defendant disputed the accuracy of the amounts stated in the statutory demand.

11 On the preliminary issue of whether Singapore is the appropriate forum to hear this application, I did not accept Mr Singh's submission that the application should not be heard in Singapore. Singapore is the proper jurisdiction for an application to wind up a company that is incorporated in Singapore. Perhaps what the counsel meant was that given the ongoing SICA proceedings and the history of dealings of SPL, the defendant, and the plaintiff, the plaintiff's claims against the defendant (for its primary liability under the loan) and SPL (who stood as guarantor) for the same debt should not be split and should be dealt with in the same jurisdiction. If that was the case, counsel for the defendant should have made it more explicit. For the same reasons, counsel's submission on *lis alibi pendens* also fails. In any event, there is no pending application, let alone any similar cause of action, in India that directly involves the defendant. Further, contrary to Mr Singh's submission, the Singapore court has no obligation under the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-border Insolvency or the Comprehensive Economic Cooperation Agreement ("CECA") to stay the winding up application. Singapore has not adopted the UNCITRAL Model Law on Cross-border Insolvency. Although Singapore has signed the CECA, the agreement imposes no such obligation on our courts.

12 Returning to the merits of the winding up application, I am satisfied that the defendant is unable to pay its debts and the presumption in s 254(2)(*a*) of the Companies Act was invoked. The plaintiff had served a demand on the defendant for a sum that far exceeded $10,000 and the defendant failed to repay this sum even after the statutory deadline of three weeks was up.

13 The defendant alleges that the arrangement under the Dollar Loan Agreement may be unlawful and that SPL's corporate guarantee as well as the defendant's debt under the agreement may thus be tainted with illegality (at paragraphs 24 and 25 of Mr Singh's submissions). A defendant company must show that there is a *prima facie* case that there is a *bona fide* dispute over the debt based on substantial grounds and cannot merely put forward a frivolous or unsubstantiated allegation. It is clear to me that the defendant disputed the debt as an afterthought. Prior to the submissions and in the period of more than two years that the debt was due, this was never raised as a reason for the defendant's refusal to repay the debt. The defendant has not provided any substantial grounds to support this assertion. Additionally, the defendant disputes the accuracy of the amounts claimed in the demand dated 7 April 2014. But this pertains only to the amount of interest that was payable and there was no dispute over the accuracy of the principal sum, which was far in excess of $10,000. I am therefore satisfied that s 254(2)(*a*) was met.

14 This presumption of insolvency was not rebutted by the defendant. In fact, an independent auditors' report by M/s Kreston David Yeung PAC contained statements that suggested otherwise. It was stated in the report that "[a]s at 31 December 2012, the [defendant] has [a] capital deficit of US$1,929,903 and its current liabilities exceeded its current assets by US$6,580,894". A 'Statement of Directors" enclosed in the same report stated that "[i]n the opinion of [the] directors … there are no reasonable grounds to believe that the company will be able to pay its debts as and when they fall due".

15 Mr Singh seeks to explain these statements but I am not persuaded by his explanations. He submitted that the plaintiff's interpretation of the defendant's audited accounts was incorrect because it did not take into account the fact that SPL had agreed to provide adequate financial support to the defendant when required. Mr Singh also pointed out that the defendant had assets in the form of the US Companies, which had a total value that exceeded its debt to the plaintiff. His submission was that the test of insolvency ought to be taken "on an international and group basis" and should take into account the intentions of the parties when SPL and the plaintiff entered into the corporate debt restructuring scheme and MRA and thereafter the SICA proceedings in India. But, as pointed out by Mr Oon, the defendant has not provided the court with any evidence that SPL will or,

more importantly, can provide any financial assistance to the defendant, especially when SPL is in financial difficulties. On the issue of the defendant's assets in the form of the US Companies, Mr Oon submitted that the report on the valuation of the US Companies that was prepared by M/s American Appraisal Singapore Pte Ltd was problematic and should be disregarded. Even if there was no problem with the valuation report, the defendant would still be insolvent as the shares in the US Companies that it asserted may allow it to discharge its liabilities in full cannot be immediately realised. The defendant failed to produce any evidence or take any steps to show that its shares in the US Companies could and would be used to repay the plaintiff for the debt, which had been due and owing to the plaintiff for more than two years.

16 For the same reasons, I am also satisfied that the plaintiff had proved to the satisfaction of the court that the defendant was unable to pay its debts and that s 254(2)(*c*) had been satisfied. The question now, is whether I should exercise my discretion to wind up the defendant pursuant to s 254(1)(*e*) of the Companies Act.

17 In the light of the ongoing SICA proceedings in India as well as the history of dealings between SPL, the defendant and the plaintiff, I am of the view that the defendant should not be wound up. I am aware that the defendant is not directly involved in the SICA proceedings. Neither am I persuaded that the corporate veil between the defendant and SPL should be pierced for the purposes of the present winding up application. SPL and the defendant are separate legal entities and should be treated as such. But, a close look at this case shows how intricately linked SPL, the plaintiff and the defendant are in all the related transactions. This ranges from the purpose the defendant was set up, to the way in which the Dollar Loan Agreement was structured, and to the conduct of the parties in negotiating the subsequent MRA under the corporate restructuring scheme. In these circumstances, it will not be prudent to wind up the defendant, and consequently, isolate its shares in the US Companies from the global state of affairs. This may also constrain the SICA proceedings in India and prejudice the other creditors that are involved in those proceedings.

18 I therefore dismissed the plaintiff's application to wind up the defendant. I ordered that the provisional liquidators were to remain for four weeks until 11 September 2015 or further order. On 10 September 2015, I discharged the provisional liquidators from their appointment. I ordered that costs were to follow the event and to be taxed if not agreed. Mr Singh submitted that there should be an inquiry into the damages suffered by the defendant as a result of the plaintiff's application. In light of the plaintiff's appeal against my order to dismiss the winding up application, I adjourned the defendant's application for an inquiry into damages to a date after the appeal has been decided.