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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CO.A.(SB) 6/2007 & CO. APPL. 373/2007

M/S TYAGI PIPE CRAFT PVT. LTD. Appellant
Through Mr. Kaanan Kapur with
Mr. Y.K. Kapur, Advocates
versus

M/S ASSET CARE ENTERPRISES
LTD. & ANR. Respondents
Through Mr. Atul Sharma with
Mr. Abhishek Misra,
Advocates for R-1.
Dr. Ashwani Bhardwaj with
Mr. Varun Kumar, Advocate
for R-2.

% Reserved on: 17th November, 2011
Date of Decision: 30th November, 2011

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J :

1. Present appeal has been filed under Section 10F of the Companies Act, 1956 (for short 'the Act') challenging the order dated 7th March, 2007 passed by the Company Law Board (for short 'CLB') whereby Company Petition No. 461/141/06-CLB filed by

the respondent under Section 141 of the Act was allowed.

2. The relevant facts of the present case are that the appellant had offered its guarantee vide its letter dated 2nd March, 2005 for credit limits sanctioned to M/s. Naturex Oils (P) Ltd. by Union Bank of India and Indian Overseas Bank. The amount under the said guarantee was not to exceed ₹ 5,48,00,000/-. Clauses 1, 7, 8, 9 & 13 of the Letter of Guarantee dated 2nd March, 2005 executed by the appellant are reproduced hereinbelow:-

“1. The guarantee shall be continuing security binding me/us and my/our personal representative until the expiration of three calendar months from the receipt by the bank of a notice in writing to discontinue it and notwithstanding the discontinuance by or any release of granting of the time or indulgence to any one or more of us this Guarantee shall remain in continuing security as to the other and if discontinued by notice this guarantee shall nevertheless as to the party or parties giving such notice continue to be available (subject to the aforesaid limit of total amount) for and shall extend to all indebtedness and liabilities of the Principal to the Bank at the date of the receipt of such notice whether then certain or contingent and whether then payable forthwith or at some further time or times and also for and to all credits then established by the Bank for the Principal for and to all credit facilities granted and to cheques, drafts, bills, notes and negotiable instruments drawn by or for the account of the principal on the Bank and dated or purporting to be dated on or before such date although presented to or paid by the bank after such date and to all guarantees given by the Principal in favour of the

Bank and that in the event of my/or any of us dying or becoming under disability the liability of the executor, administrators or legal representatives of such person so doing and of his estate shall continue until the expiration of three calendar months from the receipt by the Bank of an written notice given by such executor, administrators, legal representative for the survivors or survivor of one us) to determine this clause at any time within the three calendar months to open a fresh account and/or to grant fresh facilities to the Principal and to appropriate thereto all payments subsequently made to you by the principal and not expressly appropriated to the old account without prejudice to my/our estates liability to the extent aforesaid.

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7. *Though as between the principal and me/ us I am /we are sureties only, I/We agree that as between the Bank and me/ us I am/ we are principal debtor(s) and I/We shall not be entitled to any of the right conferred on sureties by sections 133, 134, 135, 139, 141 and 145 of the Indian Contract Act, 1872.*

8. *I/We waive in the Bank's favour all or any of my/our rights against the bank or the Principal as far as maybe necessary to give effect to any of the provisions of this Guarantee.*

9. *I/We declare that I/We have not received any security from the Principal for the giving of this Guarantee and I/We agree that I/We will not so long as any money remain owing by the Principal to the Bank or any liability of the Principal to the Bank remain outstanding take any security in respect of my/our liability hereunder without first obtaining the bank's written consent and I/We agree that in the event of my/our taking any such security the amount for which*

I/We are to be liable under this Guarantee shall be increased by the amount of which the dividend payable by the Principal to the Bank on insolvency or winding is thereby diminished.

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13. In the event of this Guarantee being determined either by notice by me/us or by demand in writing by the Bank, it shall be lawful for the bank to continue the account of the Principal notwithstanding such determination and my/our liability of the moneys advanced or paid or agreed to be advanced or paid and liabilities incurred by the Bank at the date when the guarantee is so determined shall remain notwithstanding any subsequent payment or out of the cash credit by or on behalf of the Principal upto the limit aforesaid."

3. However, prior to registration of charge, appellant had withdrawn its guarantee vide its letter dated 13th November, 2005. The relevant portion of said letter withdrawing the guarantee is reproduced hereinbelow:-

"Please refer to the Guarantee Deed signed by the Company for securing credit facility in favour of M/s. Naturex Oil Pvt. Limited.

The borrowing company has not performed its' obligations towards the guarantors. Guarantors viz. Tyagi Pipes Craft Pvt. Ltd. have accordingly in its Board Meeting on 13th November, 2005 decided to withdraw the Bank Guarantee forthwith. It is requested that the Bank may take notice that the said Bank Guarantee stands withdrawn from the date and time the notice is delivered to the Bank."

4. Vide letter dated 17th November, 2005, Union Bank of India rejected appellant's unilateral revocation/withdrawal of guarantee/security as it was neither acceptable to the Bank nor in consonance with the agreement executed between the parties. As charge was not registered by the appellant, Union Bank of India in September, 2006 filed a petition under Section 141 of the Act before CLB praying for condonation of delay and registration of charge. The relevant paragraphs of the said petition are reproduced hereinbelow:-

“7. That the Company executed guarantee deed and created equitable mortgage on 2.03.2005. The copies of Guarantee deed and other documents are attached at Annexure A-3.

8. That in spite of various verbal requests, the Company did not file particulars of charge under Section 125 till now and also failed to comply with provisions of Section 130 of the Companies Act.

9. That the petitioner has communicated to the Company along with Form 8 to be filed with Registrar of Companies vide letter dated 31.07.2006, which was sent to the Company through speed post with a request to sign the form 8 so that form can be filed under the provisions of Section 125 of the Companies Act, 1956. The copy of the letter along with proof of dispatch is enclosed hereto at Annexure A-4.

10. That the applicant did not receive any response

from the company till the filing of this petition. The company did not reply or sent signed form No.8 for filing with Registrar of Companies.

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12. That the petitioner could not file the form-8 for the above charge now as in re-filing, system does not accept the form without the signature of company.”

5. CLB by way of the impugned order condoned the delay and directed the Registrar of Companies to register the charge sought to be created by the Union Bank of India.

6. During pendency of the present appeal, Union Bank of India assigned its debt to M/s. Asset Care Enterprises Ltd. Accordingly, M/s. Asset Care Enterprises Ltd. was substituted in place of respondent-Union Bank of India as respondent no. 1.

7. Mr. Kaanan Kapur, learned counsel for the appellant submitted that the impugned order had been passed in a cursory manner inasmuch as the appellant's request for interrogatories had been rejected on respondent's mere statement before the CLB that it was not a consortium.

8. Mr. Kapur further submitted that the issue of consortium was fundamental to the present proceedings as the United Bank of India had no right to institute a petition under Section 141 of the Act. According to him, when two banks enter into a consortium to lend money, it results in an unregistered partnership and consequently, a company petition under Section 141 of the Act is not maintainable in view of Section 69 of the Indian Partnership Act, 1932. In this connection, Mr. Kapur relied upon the reply of the respondent wherein it had admitted that loan had been advanced to M/s. Naurex Oils Private Limited by a consortium comprising Indian Overseas Bank and Union Bank of India.

9. Mr. Kapur also submitted that respondent had not given any reason as to how the condition precedent under Section 141 of the Act had been satisfied for condonation of delay. He also pointed out that prior to filing of the petition under Section 141 of the Act, appellant had vide its letter dated 13th November, 2005 addressed to the two banks revoked its Letter of Guarantee.

10. Mr. Kapur further submitted that the appellant's rights under Section 134(2) of the Indian Contract Act, 1872 could not be wished

away as had been done by the CLB.

11. Mr. Kapur also relied upon judgments in *Mangalore Chemicals and Fertilizers Ltd. Vs. Company Law Board, (2005) 126 C.C. 261 (Kar.)* and *In Re : Reshma Estate Private Ltd. and Advance Commercial Co. Ltd., (1977) 47 C.C. 447 (Bom.)*

12. On the other hand, Mr. Atul Sharma, learned counsel for the respondent referred to the petition filed by the respondent to show that the condition precedent under Section 141 of the Act was satisfied inasmuch as the delay in filing Form 8 for the above charge was due to default and negligence on the part of the appellant.

13. Mr. Sharma after referring to the terms of the Guarantee submitted that the appellant could not have unilaterally withdrawn the guarantee after the loan had been advanced by the respondent in terms of the agreement and the Letter of Guarantee. According to him, even if the same had been withdrawn by the appellant, the amount would still be due and payable by the appellant as a guarantor and the respondent-bank herein would be entitled to get the charge registered.

14. Having heard the parties at length this Court is of the view that the factum that loan had been advanced by the respondent to the borrower on the strength of a Letter of Guarantee executed by the respondent are admitted facts. A perusal of the Letter of Guarantee executed by the appellant, in particular, the Clauses referred to hereinabove, reveals that the appellant was legally bound to register the charge in favour of the respondent.

15. Further, on a perusal of the petition filed by the respondent under Section 141 of the Act, this Court is of the opinion that the condition precedent of the aforesaid Section had been satisfied inasmuch as sufficient cause for condonation of delay had been disclosed by the respondent to the CLB in its petition.

16. Moreover, the underlying reason for filing an application for interrogatories, namely, violation of Section 69 of the Indian Partnership Act, 1932 is misconceived on facts and untenable in law inasmuch as when two banks form a consortium to give a loan to a borrower on the strength of a guarantee document, it can never be said that the two banks have entered into a partnership as

contemplated under the Indian Partnership Act, 1932.

17. In fact, the interrogatories sought for by the appellant in its application before the CLB are as under :-

“A) In what share both the banks i.e. United Bank of India and Indian Overseas Bank had advanced the loan to M/s. Naturex Oil (P) Ltd.

B) How and in what proportion the interest accruing on the said advance was to be apportioned between both the banks.

C) Whether or not any meeting were held between the banks before agreeing to jointly undertake advancing a loan to M/s. Naturex Oil (P) Ltd.

D) Whether or not correspondence was exchanged between the banks before agreeing to jointly undertake advancing of loan to m/s. Naturex Oil Pvt. Ltd.”

18. Upon a perusal of the aforesaid interrogatories, this Court has no doubt that same were totally irrelevant to the controversy at hand and same had been filed only to protract the proceedings.

19. This Court is also of the opinion that in view of the Clause 7 of the Letter of Guarantee, appellant cannot rely upon Section 134(2) of the Indian Contract Act, 1872.

20. The judgment of *Mangalore Chemicals and Fertilizers Ltd.* (supra) does not help the respondent inasmuch as the Karnataka High Court in that case held that in an application seeking condonation of delay in filing a charge, the question of merits or validity of a charge cannot be gone into. It was further held that CLB has only to consider whether the cause shown in the application for condonation of delay and extension of time for filing the intimation was sufficient or not.

21. As far as judgment in *In Re : Reshma Estate Private Ltd.* (supra) is concerned, the Bombay High Court only laid down the broad principle as to how a petition under Section 141 of the Act should be dealt with by the CLB. In the said case, the Court held that the appellant on his own showing was unable to say as to what prevented him from filing proceedings between June, 1972 to August, 1974 and therefore, could not seek the aid of Section 141 of the Act.

22. However, in the present case, this Court is of the opinion that there is sufficient explanation for the delay. Consequently, this

Court is of the view that the impugned order passed by the CLB requires no interference.

23. Accordingly, present appeal and pending application are dismissed, but with no order as to costs. Interim orders granted earlier stand vacated.

MANMOHAN,J

NOVEMBER 30, 2011
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