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HIGH COURT OF CHHATTISGARH, BILASPUR

COMP No. 18 of 2015

1. U C O Bank , Through- Zonal Manager, U C O Bank, Telibandha, Raipur, P.S. Telibandha, Tah. & Dist.- Raipur, Chhattisgarh

2. U C O Bank, Through- Chief Manager, U C O Bank, Main Branch, Near Jaistambh Square, K.K.Road, Raipur, Tah. & Dist.- Raipur, Chhattisgarh ....(Creditors)

---- Petitioner

Versus

1. M/s Khushi Funfood And Apparels , India Pvt. Ltd., Regd. Office At 311 & 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh

2. Shri Ashish Kumar Jain S/o Late R.K.Jain, Director & Guarantor Of M/s Khushi Funfood And Apparels, India Pvt. Ltd., Regd. Office At 311 & 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh

3. Shri Vikas Kumar Jain S/o Late R.K.Jain, Director & Guarantor Of M/s Khushi Funfood And Apparels, India Pvt. Ltd., Regd. Office At 311 & 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh

4. Smt. Premlata Jain, W/o Late R.K.Jain, Director & Guarantor Of M/s Khushi Funfood And Apparels, India Pvt. Ltd., Regd. Office At 311 & 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh

5. Smt. Payal Jain, W/o Shri Ashish Kumar Jain, Director & Guarantor Of M/s Khushi Funfood And Apparels, India Pvt. Ltd., Regd. Office At 311 & 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh

6. Shri Paresh Kumar Maganlal Pomal, R/o House No.22, Prem Pushp, Jalvihar Colony, Telibandha, Raipur, Chhattisgarh

7. M/s R.K.Jain Construction India Pvt. Ltd. Registered Office At Shop No. 311 & 312, 3rd Floor, Lal Ganga Shoping Moll, G.E.Road, Raipur, Chhattisgarh ....(Borrowers)

---- Respondent

For Petitioners	Mr. H.V. Sharma, Advocate
For Respondent/UOI	Mr. N.K. Vyas, Assistant Solicitor General

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Hon'ble Shri Justice Prashant Kumar Mishra

Order On Board

16/3/2016

1. Heard.

2. This petition under Section 433 of the Companies Act, 1956 (in short "the Act, 1956") has been preferred by the petitioner – Bank for winding up of respondent No.1-Company. Notice of this company petition was issued to the respondents, however, notices were returned unserved with endorsement that the doors were found locked at the given addresses. On 12.02.2016, notice was directed to be served through publication in the Hindi Newspaper having wide circulation at Raipur, which is the place where the registered office of the Company is situated. However, no one appears for the Company despite service through publication.

3. Before proceeding to issue advertisement of this contempt petition as required under rule 96 and 99 of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules, 1959"), this Court required the petitioner to satisfy as to how this petition is maintainable when the loan obtained by respondent-Company is secured by mortgage, hypothetication of goods etc.

4. Mr. H.V. Sharma, learned counsel for the petitioner, would refer to the judgment reported in (2005) 128 Company Cases 1007 (Bom) [Global Trust Bank Ltd. Vs. Killick

Nixon Ltd.] and **1986 (60) Company Cases 169 [Sarabhai Machinery Vs. Haryana Detergents Ltd.]**, to argue that existence of alternative remedy is not a bar for maintaining a petition for winding up of the borrower company. He would submit that even when a suit or a recovery proceeding or an execution is pending before the Civil Court or before the DRT, filing of winding up petition is not barred, because, the respondent Company is unable to pay its debts, which is covered under Section 433(e) of the Act, 1956, as one of the circumstance, in which, a Company may be wound up.

5. Per contra, Mr. N.K. Vyas, learned Assistant Solicitor General, assisting the Court for and on behalf of the Registrar of Companies-cum-Official Liquidator, Chhattisgarh, would submit that when a debt is secured, there is no occasion to presume that the Company is unable to pay its debt, therefore, the company petition is not covered under Section 433(e) of the Act, 1956 and it deserves outright dismissal.

6. Necessary facts, which needs to be adverted to before deciding the core issue, are that the respondent Company obtained cash credit facility of Rs. 2 crores from the petitioner bank on 17.11.2011. Respondent No.2, Managing Director of respondent No.1 Company, executed a security document on 23.11.2011. Respondents 2 to 6 also issued a letter of guarantee on the same date. Respondent No.4 stood guarantee to the loan transaction by creating mortgage of immovable properties by

depositing the title deeds on 18.11.2011 concerning Shop No.3 area 1239 sq. ft. and shop No.8-A area 938 sq. ft. situated at the ground floor of R.K. Mall, Ward No.14, Ishwari Charan Shukla Ward, Mohaba Bazar, G.E. Road, Raipur. They also hypotheticated the stocks and goods in transit bill, outstanding bill and receivable claim at the end of each month and at the end of each financial year. Upon failure of the respondents to repay the dues with interest amounting to Rs.23095971.65 as on 23.11.2014, demand notices were served, however, the dues were not cleared, therefore, the petitioners preferred O.A. No.356 of 2014 before the Debts Recovery Tribunal, Jabalpur. The respondents were proceeded *ex parte* before the DRT and eventually, the recovery application was allowed on 27.03.2015 to issue Recovery Certificate against respondents 1 to 4 for Rs.2,38,96,731.30 together with *pendente lite* and further interest @ 11.50% per annum with monthly rest from the date of filing of the aforesaid O.A. i.e. 14.11.2014 till the full recovery is made from the defendants.

7. The averments made in the company petition fails to disclose as to whether the Recovery certificate was put to execution before the DRT.

8. Be that as it may, this company petition was preferred on 06.11.2005 for winding up of the respondent Company, as according to the petitioner, the Company is unable to pay its debts, therefore, the petitioner Bank is entitled to seek winding up under Section 433 (e) of the Act, 1956.

9. Under Section 433 (e) of the Act, 1956, a Company may be wound up by the Court when the Company is unable to pay its debts. Under Section 434 (1) (b), a Company is deemed to be unable to pay its debts 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.

10. A harmonious reading of Sections 433(e) and 434 (1) (b) compels this Court to take the view that when a decree or certificate of recovery has been issued against a Company, it can be presumed to be unable to pay its debts only when in execution or other process issued on such decree or order in favour of a creditor company is returned unsatisfied in whole or part. This deeming provision provides ample guidance to conclude that whenever a debt is secured by mortgage or hypothetication of goods, it cannot be presumed or deemed that the Company is unable to pay its debts.

11. In the case in hand, the Company has mortgaged two shops situated at R.K. Mall, Raipur, however, without putting the Recovery Certificate to execution, the petitioner company has straightway preferred this company petition. It is not known as to for what reason the Manager or responsible officer of the petitioner Bank had chosen not to execute the Recovery Certificate and indulge in other unwanted litigation by preferring this company petition. The Bank also did not proceed under the Securitisation and Reconstruction of Financial Assets and Enforcement of

Security Interest Act, 2002, which provides a more efficient recovery procedure including obtainment of physical possession of the mortgaged assets.

12. In taking the above view that when the debt is secured by mortgage of properties, the Company cannot be said to be unable to pay its debt, this Court is fortified with the observations made by the Gujarat High Court in the matter of UTI Bank Ltd. Vs. Shree Rama-Multitech Ltd., 2005 126 Company Cases 15. In the said case, the loan advanced by the Company was unsecured, therefore, while negativing the plea of the Company that winding up of the Company is not maintainable, it was observed that even though the Bank has filed Recovery Application before the DRT, the claim made in the present petition is not the secured one and that in absence of any security for the claim of the petitioner (therein), they were apprehending that even if ultimately, they succeed in the application, they would not be in a position to execute the Recovery Certificate against the assets of the Company.

13. In the cases relied by Mr. Sharma, the debts were unsecured and in that factual background, it has been held by the Supreme Court in the matters of Dolphin International Ltd. Vs. Gavs Laboratories (P) Ltd, JT 2002 (10) SC 142, M/s. Madhusudan Gordhandas & Co. Vs. Madhu Woollen Industries Pvt. Ltd. 1971 (3) SCC 632 and Pradeshiya Industrial & Investment Corporation of U.P . Vs. North India Petrochemicals Ltd. And another, 1994 (3) SCC 348, that the pendency

of a suit or any other proceeding before any of the Tribunal would not bar for filing a winding up petition.

14. For the foregoing, this Company Petition is not maintainable and therefore, it is dismissed.

Sd/-

Company Judge

(Prashant Kumar Mishra)

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