

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.08.2016

DELIVERED ON: 04.10.2016

Coram

The Honourable **Mr. Justice RAJIV SHAKDHER**

C.P.No.125 of 2011

SBI Global Factors Limited,
(Formerly known as M/s.Global Trade
Finance Limited),
Metropolitan Building,
6th Floor, Bandra Kurla Complex,
Bandra (E), Mumbai-400 051. ... Petitioner

Vs.

M/s.RKR Gold Private Limited
No.10, Sreenivasa Raghavan Street,
R.S.Puram, Coimbatore - 641 002. ... Respondent

Petition filed under Sections 433(e) and 434(1)(a) read with Section 439(1)(b) of the Companies Act, 1956, praying (a) to wind up the respondent company, namely, M/s.R.K.R.Gold Private Limited, under the provisions of the Companies Act, 1956 ; (b) to appoint an Official Liquidator to take charge of the assets and liability of the respondent company M/s.R.K.R.Gold Private Limited ; and (c) to pay the cost of the winding up proceedings.

For Petitioner : Mr.V.Soundararajan

For Respondent : Mr.Vidhya Shankar
for M/s.Ramani and Shankar

O R D E R

1. This is a Company Petition preferred under Sections 433(e) and 434(1)(a) read with Section 439(1)(b) of the Companies Act, 1956 (hereafter referred to as "1956 Act").

PREFATORY FACTS:

2. It is averred that the petitioner is a subsidiary of the State Bank of India, which, to begin with was incorporated and registered under the 1956 Act, under the name and style: Global Trade Finance Limited.

2.2 It is averred that the petitioner, stood amalgamated with SBI Factors and Commercial Services Private Limited upon a Scheme being sanctioned by the Bombay High court on 15.1.2016.

2.1 It is further averred, upon change in name, from Global Trade Finance Limited to SBI Global Factors Limited, a fresh certificate of incorporation was issued by the Registrar of Companies (ROC), on 18.03.2010.

2.3. In view of the aforesaid averments, made in the

petition, I would have thought that the petitioner would have been described in the Company Petition, more appropriately, via its new name. This, evidently, has not been done. The petition has been filed, as it appears under its earlier name.

2.4. Notwithstanding the above, on merits, the case set up by the petitioner, is that, being in the business of International Factoring, it entered into Trade Finance Facility Agreement with the respondent on 23.09.2006, upon issuance of a sanction letter of even date, i.e., 23.09.2006.

2.5. Under this agreement, the petitioner sanctioned a funding limit upto a maximum of Rs.2,85,00,000/- (Rupees two crores and eighty five lakhs only) in favour of the respondent.

2.6. The said facility was secured by execution of the following documents :

- i. Letter of undertaking dated 11.11.2006
- ii. Letter of confirmation dated 11.11.2006, by which, the respondent confirmed that in the event, it avails of any pre-shipment finance in respect of any receivables

- assigned to the petitioner, it will advise the petitioner as to the details of such facility, and that, all payments made in respect of such receivables would be made directly to the pre-shipment account
- iii. Execution of a Global Accounts Receivables Management Agreement (in short "GARMA") dated 11.11.2006.
- iv. Letter of Guarantee, dated 11.11.2006, issued by Mr.S.V.Sreenivasen, who at the relevant time, was acting in his capacity as the Proprietor of the respondent
- v. Letter dated 11.11.2006, issued by Mr.S.V.Sreenivasen, whereby, he undertook, that the Proprietor's Capital Account would not be reduced below Rs.1,42,90,000/-; which incidentally at the relevant time was the balance then obtaining in the account.
- vi. Letter dated 11.11.2006, whereby, Mr.S.V.Sreenivasen undertook that none of the debtors mentioned in the sanction letter dated, 23.09.2006, were related to either the proprietor or, relatives of the proprietor. Pertinently, the only debtor, referred to in the sanction letter dated 23.09.2009, was B.C.P.M.S. (Europe) Limited (in short BCPMS)
- vii. Lastly, letter dated 11.11.2006, issued by Mr.S.V.Sreenivasen confirming, thereby, that the post-dated cheque issued in favour of the petitioner in the sum of Rs.2,85,00,000/- was valid and, had been issued with due authorisation.

3. Evidently, the respondent, in the first part of 2007, converted itself into a private limited company, the

name by which it is described in the cause title.

3.1. This information was communicated to the petitioner vide a letter dated 08.05.2007.

4. Concededly, prior to that, on 05.01.2007, the sanction letter dated 23.09.2006, was amended, whereby, the maximum trade finance limit was enhanced to Rs.58,72,500/-.

4.1. The important aspect of the amendment letter was that while all other terms and conditions remained the same, it made the respondent liable for the facility extended by including the following term in the amended sanction letter **"includes INR 58,72,500/- on (sic) with Recourse Basis"**.

4.2. The schedule attached to the letter dated 05.01.2007, would show that the Approved Debtor was an entity by the name, B.C.P.M.S. (Europe) Limited (in short 'BCPMS'), with Debtors Credit Limit of 3,75,000 GBP and the Debtors Credit Protected Limit, crystallized at 2,70,000 GBP.

4.3. Evidently, thereafter, a second amendment to the

sanction letter was carried out on 16.04.2007. This resulted in the trade facility limit being enhanced this time around to Rs.7,20,00,000/- (Rupees seven crores and twenty lakhs only). The Approved Debtor increased in number from one to two. Thus, apart from BCPMS, an entity by the name of Al-Riffa Jewellery LLC was included. The Debtors Credit Limit and the Debtors Credit Protected Limit was set forth as follows :

<i>Debtor Name</i>	<i>Debtor Limit Currency</i>	<i>Debtors Credit Limit</i>	<i>Debtors Credit Protected Limit</i>
BCPMS	USD	590,278	425,000
Al-Riffa Jewellery LLC	INR	64,705,882	44,000,000

4.4. Like in 2006, the relevant documents and undertakings were executed.

4.5. On 26.06.2007, the sanction letter of 16.04.2007 was amended. This was, in effect, the third amendment. However, Approved Debtors remained the same, i.e., BCPMS and Al-Riffa Jewellery LLC. Furthermore, the Debtors Credit Limit and Debtors Credit Protected Limit also remained unchanged.

4.6 Consequent thereto, a series of security documents and undertakings, including GARMA, were executed between the parties herein, all of which, were dated 16.07.2007.

4.7. The record shows that several realignments of the Trade Finance Facility took place between December, 2007 and October, 2008, with the execution of sanction letters dated: 12.12.2007; 01.01.2008; 18.01.2008; 16.06.2008; 19.09.2008; and 10.10.2008.

4.8. Admittedly, the relevant security documents and undertakings were executed between the parties herein every time, there was a realignment of the Trade Finance Facility. It appears that, sometime, in the early part of 2009, post the issuance of the sanction letter dated 10.10.2008, the respondent's account, become, "sticky", which resulted in the petitioner issuing a notice dated 20.02.2009.

4.9. By this notice, the petitioner called upon the respondent to pay a sum of USD 639,312.78 within ten (10) days of its receipt along with "discount" and other charges till the date of payment. The respondent was put to notice

that if, the demand was not satisfied, the petitioner will take recourse to appropriate legal remedies, albeit, at its cost and consequences.

4.10. Importantly, at the time, when, the sanction letter dated 10.10.2008 was issued, the only Approved Debtor was BCPMS.

5. Since, the respondent failed to satisfy the demand raised, the petitioner, vide notice dated 25.08.2009 called upon the respondent to pay a sum of Rs.32,318,801.57, which was, according to it, outstanding as on 31.07.2009.

5.1. A perusal of this letter would show that the trigger for issuance of this letter after a gap of six (6) months was the non-recognition of outstandings of the respondent by the Administrators of BCPMS and, therefore, the petitioner's anxiety to approach the respondent for payment, as its title to the receivables was not perfected.

5.2. In this behalf, the petitioner adverted to Clause Nos.7 and 9 of GARMA. It was, thus, the petitioner's stand that, since, credit protection would not be available in

terms of agreement obtaining between them, the liability had to be liquidated by the respondent.

5.3. The petitioner followed up the communication dated 25.08.2009 with an Advocate's notice dated 12.07.2010. This, in effect, was a statutory demand raised by the petitioner in terms of Section 434 of 1956 Act.

5.4. By this notice, the petitioner called upon the respondent to pay a sum of Rs.3,69,95,724.80 along with interest at the rate of 18% per annum.

6. The respondent replied to the Advocate's notice vide its reply dated 10.08.2010. In this behalf, the respondent also used the services of its Advocate. In its response, the respondent relied upon Clauses 2,3,5,6 and 9, as also, the relevant sub-clauses of GARMA to contend that, since, the Approved Debtor had become insolvent, the petitioner could not take recourse to it or, its Guarantor/Directors for recovery of the amounts referred to in its demand notice.

6.1. It was also averred that as the receivables

aggregated, to a sum of Rs.3,22,07,350/- (which was within the credit protection limit of Rs.5,00,00,000/-, available to the Approved Debtor, ie., BCPMS), the petitioner could have no recourse to the respondent or its Guarantors.

6.2. The thrust of the reply was that the factoring facility offered by the petitioner was different from the conventional Bill-discounting facility offered by the local commercial banks, in as much as, it came with an added feature, which was, that it could have no recourse to the respondent in case the Approved Debtor became insolvent.

6.3. The respondent's Advocate also adverted to the fact that the Guarantor Directors' had, as a matter of fact, instituted a Civil Suit, which was numbered as: O.S.No.126 of 2009, in the Court of Additional District Judge, Coimbatore, in respect of matters raised in the petitioner's legal notice. The fact that the Directors/Guarantors of the respondent had taken a stand that they were neither liable nor any amount was paid to them was disclosed in the reply, more particularly, by appending a copy of the plaint to the said reply.

7. The petitioner, in the interregnum, had presented the post-dated cheques, which were dated 10.09.2009, with its bankers. These cheques, however, bounced, whereupon, the petitioner filed two criminal complaints, being: C.C.No.234/SS/2010 and C.C.No.377/SS/2010, in the Court of 12th Metropolitan Magistrate, Mumbai, under Section 138 of the Negotiable Instruments Act, 1881.

8. The record shows that the complaint was dismissed by a speaking order dated 19.07.2011. The concerned Court held that the complainant, ie., the petitioner herein, had failed to prove that the respondent and its Directors/Guarantors, ie., Mr.S.V.Sreenivasan and, his wife, Smt.Surrega S.Vasan were guilty of the offence with which they were charged. Consequently, all accused, which included the respondent and its aforementioned Guarantors/Directors were acquitted.

9. Being aggrieved, the petitioner filed appeals against the order of the 12th Metropolitan Magistrate, Mumbai. These appeals were filed in the Bombay High Court and were numbered as : Appeal No.377 of 2013 and 378 of 2013. Appeal No.377 of 2013 was, evidently, admitted on

25.03.2013, whereas Appeal No.378 of 2013 was admitted on 05.07.2013.

10. In the meanwhile, the petitioner instituted the instant petition, on 30.11.2010. Upon notice being issued in the petition, counter affidavit was filed on behalf of the respondent, which was followed by a rejoinder.

CONTENTIONS:

11. Given the aforesaid background, submissions on behalf of the petitioner were advanced by Mr.V.Soundararajan, while on behalf of respondent, submissions were made by Mr.Vidhya Shankar.

12. Learned counsel for the petitioner submitted that the respondent was liable to pay the amount crystallized, both in the petitioner's demand notice and the Company Petition, as under the sanction letter issued in favour of the respondent, it was empowered to take "recourse" to the respondent in respect of moneys payable by the Approved debtor, i.e., BCPMS.

12.1. For this purpose, counsel for the petitioner, in

particular, relied upon the contents of the sanction letter dated 05.01.2007. Learned counsel emphasized the fact that, since, the respondent had failed to perfect its title to the receivables, the petitioner, was entitled to take recourse to the respondent for recovery of amounts paid to the respondent under the Trade Finance Facility Agreement.

13. On the other hand, learned counsel for the respondent contended that the petition under Section 433 of the 1956 Act was not maintainable, as this was not a case of an admitted liability, which, the respondent had failed to liquidate.

13.1. Mr. Vidhya Shankar, relied upon Clause 9.1 of GARMA to contend that in a situation, where the Approved Debtor became insolvent, the petitioner could not take recourse to the respondent qua the liability of BCPMS. Learned counsel further submitted that, since, the amount outstanding, vis-a-vis, the Approved Debtor, ie., BCPMS, was within the Debtors Protection Limit, the entire burden had to be borne by the petitioner.

13.2. Learned counsel, also, relied upon the counter

affidavit to draw my attention to the averments made therein which pointed in the direction that not only had the petitioner approached the Administrators of BCPMS, but had also, taken secured itself against risks, vis-a-vis, amounts paid under the Trade Finance Facility Agreement, by taking out an insurance with ICICI Lombard.

13.3. In sum, it was the contention of the learned counsel that the defence was bona fide and tenable and, therefore, a winding up petition would not lie against the respondent.

REASONS:

14. I have heard the learned counsel for the parties and perused the record, what emerges therefrom is as follows:

14.1. The petitioner, who is in the business of international factoring, appears to have purchased Bills Of Exchange drawn up by the foreign buyers, who had dealings with the respondent, under the Trade Finance Facility Agreement executed between them.

14.2. The first such trade facility was extended in favour of the respondent, with the issuance of sanction letter dated 23.09.2006. The term sheet appended to the sanction letter is indicative of the fact that the Approved Debtor was BCPMS, having a Debtors Credit Limit of GBP 7,50,000 and, a Debtors Credit Protected Limit equivalent to GBP 7,50,000. The maximum limit under this sanction letter was pegged at Rs.2,85,00,000/-

14.3. The sanction letter of 23.09.2006 was amended with the issuance of a fresh sanction letter dated 05.01.2007, as a result of which, the Trade Finance Facility Agreement had the following term incorporated in it : **"includes INR 58,72,500/- on (sic) with recourse basis"**. Resultantly, the maximum export factoring facility, which was pegged at INR 2,85,00,000 included Rs.58,72,500/- qua which recourse could be taken against the respondent. The Approved Debtor, though, remained the same, which is BCPMS. The Approved Debtors Credit Limit, however, was frozen at GBP 3,75,000, while this Debtors Credit Protected Limit was fixed at GBP 2,70,000.

14.4. Thereafter, there were series of realignments carried out to the Trade Finance Limit. These were carried out, via sanction letters dated: 16.04.2007; 12.12.2007; 01.01.2008; 18.01.2008; 16.06.2008; 19.09.2008 and finally 10.10.2008.

14.5. Since, the respondent's account had turned "sticky", the petitioner issued a notice dated 20.02.2009 to the respondent, which was followed, six (6) months later, by yet another notice dated 25.08.2009.

14.6. As the respondent failed to pay the amounts demanded, the petitioner served upon the respondent a statutory notice dated 12.07.2010, under Section 434 of the 1956 Act, via its Advocates. This notice was responded to by the respondent, via a reply dated 10.08.2010.

15. The aforesaid facts would show that the agreement between the parties herein was that the petitioner would purchase the bills, and hence, have the title to the documents transferred, based on which, exports were made by the respondent to the Approved Debtor, for a consideration. The receivables against the exports made by the respondent

would directly come to the fold of the petitioner. The only exception carved out to this arrangement was, the Approved Debtor's insolvency. Clause 9.1. of GARMA, quite clearly, exemplifies this position.

15.1. For the sake convenience, the said clause is extracted, herein below:

"9. RECOURSE AND CREDIT PROTECTION

9.1. GTF shall have Recourse in respect of :

9.1.1 each Receivable which the Debtor shall be, or shall claim to be, unable to pay by reason of legal constraints (**other than those created by the Debtor's insolvency**) or acts or orders of Government (unless otherwise specified in paragraph 9 of the Schedule);

9.1.2. each Receivable in respect of which the Debtor shall dispute liability for payment whether in whole or in part;

9.1.3 each Receivable in respect of which the Debtor shall assert any right of lien, retention, counterclaim or set-off or shall claim discount, commission or allowance not previously Notified in writing by the Client to GTF;

9.1.4 the non-payment of each [Approved] Receivable which has arisen as a consequence (whether direct or indirect) of the occurrence of any of the following events:

(i) a nuclear explosion or contamination (whatever its origin); or

(ii) a war (whether declared or not), between two or more of the following countries, namely France, the People's Republic of China, the Russian Federation, the United Kingdom and United States of America;

9.1.5 (except where the Credit Protection Facility is indicated as applicable in paragraph 9 of the Schedule, in which case clause 9.3 shall apply) each Approved Receivable (not being a Receivable included in clauses 9.1.1, 9.1.2, 9.1.3 or 9.1.4) which remains unpaid in whole or in part after it has become due for payment by the Debtor.

9.1.6 each Receivable in respect of which the Client is unable to perfect title; all of which shall forthwith and automatically be deemed Unapproved Receivables whereupon GTF shall be entitled to adjust the Supplier Account (and any other relevant account) to reflect the change.

9.2 GTF will credit the Client with sums subsequently received by GTF in respect of any Receivable in respect of which it has exercised its right of Recourse.

9.3 Where the Credit Protection Facility is indicated as applicable in paragraph 9 of the Schedule then GTF will accept the risk or risks therein specified (except in relation to taxes recoverable by the Client and the Client's Credit

Risk Element) that an Approved Receivable will remain unpaid in whole or in part after it has become due for payment in the amount and upon such further terms as may be specified in paragraph 9 of the Schedule. The provisions of this clause shall not prevent GTF having Recourse in respect of any taxes not recoverable by the Client, the Client's Credit Risk Element and any settlement, trade or retrospective discount taken or claimed in respect of any Approved Receivable which remains unpaid after expiry of the period referred to above nor in relation to any amount by which the unpaid element of such Receivable exceeds the relative Debtor's Credit Limit"

16. A perusal of Clause 9.1 along with Clause 9.1.1 would show that the petitioner would have recourse qua all receivables emanating from the Approved Debtor, except those which were created by Debtor's Insolvency. Admittedly, the Approved Debtor i.e., BCPMS had become insolvent and the knowledge with respect to the same was available with the petitioner. This fact is laid bare on perusal of letter dated 30.01.2009, issued by KPMG, the Administrators of BCPMS.

16.1. Furthermore, if there was any doubt with regard to aforesaid it is set to rest upon a perusal of the petitioner's own letter dated 25.08.2009, wherein, it makes a reference to the Administrators of BCPMS. The said letter is a clear pointer to the fact that the petitioner was in touch with the Administrators of BCPMS and, it had, dispatched the said communication, when, the Administrators informed the petitioner that no outstandings were owed by BCPMS to the petitioner.

16.2. It is, in this context, that the petitioner, by very same letter, indicated to the respondent that, since, it had not protected its title qua the receivables, it was seeking from the respondent the payment of the amounts involved. In support of its stand, the petitioner alluded to Clauses 7 and 9 of GARMA in the said communication.

16.3 Importantly to lend clarity to the submissions advanced before me, I had indicated to the counsel for the petitioner during the course of hearing to advert to the specific sub-clause (8) in Clauses 7 and 9, based on which, it was sought to be asserted that even in a situation where the Approved Debtor had turned insolvent, the petitioner

could take recourse to the respondent.

16.4. I must record that the counsel for the petitioner was not able to point to any provision, which would run counter to the provisions of Clause 9.1.1 of GARMA. As a matter of fact, as indicated in my narration, the 12th Metropolitan Magistrate, Mumbai, in coming to the conclusion that the respondent along with its Directors/guarantors was not guilty of the offence with which they were charged, had based his reasoning on Clause 9.1.1 of GARMA. My view, in the matter, is no different.

17. This apart, the issue raised, in defence, to the present Company Petition by the respondent is alive and pending adjudication in the suit filed by the Directors/Guarantors of the respondent. To my mind, the defence raised by the respondent is not only bona fide, but is also one of substance, and therefore, it would not be appropriate to allow the petitioner to press ahead, with the instant Company Petition. In this behalf, the argument advanced that the Suit is not filed by the respondent but by its Directors/Guarantor is without merit, as not only is the respondent party to the suit, albeit, as a pro-forma

defendant but its liability in law is coextensive with that of its Directors/Guarantors. The issue, if decided, one way, or other would attain finality as amongst the parties to the Suit.

18. Consequently, I find no merit in the petition. The Petition is, accordingly, dismissed, leaving the parties to bear their own costs.

Sd/.R.S.A.J

04.10.2016

//Certified to be a true copy//

Dated this the day of 2017

R.s/20.02.2017

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