IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.565 OF 2014

SVC Co-operative Bank Limited ….Petitioner
Vs.
M/s. Prahladrai Fabrics Limited ....Respondent

Dr. Birendra Saraf a/w. Mr. Nikhil Rajani i/b. V. Deshpande and Co. for petitioner.
Mr. Raj Patel i/b. J.R. Patel for respondent.
Mr. Mahendhar Aithe, Company Prosecutor for Official Liquidator present.

CORAM : K.R.SHRIRAM, J.
DATE : 27th NOVEMBER, 2017

P.C.:

1 Some time in August, 2009 respondent company had approached petitioner for cash credit facility which petitioner agreed to provide in the sum of Rs.10 lakhs. Respondent executed various documents and further facilities were provided. With a view to meet part of the working capital requirement and in addition to existing facilities granted and sanctioned to respondent by three other banks, viz., Bank of India, Allahabad Bank and Syndicate Bank, petitioner agreed to join in consortium to meet working capital requirement of respondent and granted a sum of Rs.38 Crores. Under this, the exposure of petitioner was Rs.10 Crores. At the time of admission of the petition, it was recorded that respondent do not deny the amount claimed.

2 Various defences as recorded in paragraph 5 of the order dated 30th November, 2015 were raised by respondent and all these defences

came to be rejected and petition was admitted. It will be useful and will save time to simply reproduce the order dated 30th November, 2015 which reads as under :

1. The respondent company is indebted to the petitioner in the sum of Rs.8,89,29,647.86/- as on 5th October, 2013 together with future interest. The petition is filed in view of the inability of the respondent company to pay its just and legitimate dues of the petitioner due and payable in its ordinary course of business. The petitioner is alleging that the respondent company is commercially insolvent.

2. Some time in August, 2009, the respondent company had approached the petitioner for cash credit facility which the petitioner agreed to provide in the sum of Rs.10 lakhs. In view of the said facility being granted, the respondent through its Directors, on 25th September, 2009, executed a demand promissory note,continuing security bond, agreement in respect of invoice cum trade bills, agreement for collection/discount of bills/hundis/ cheques, declaration by Directors and Power of Attorney. In addition to these documents, the Directors of the respondent company one Mr. Kamal Jajoo and Nita Jajoo had jointly and severally guaranteed the repayment by executing a letter of guarantee. The repayment was also secured by executing a Composite Hypothecation Agreement dated 25th September, 2009 of stocks, book debts, future stocks of raw material, goods in process and/or debts and assets. In addition thereto, the repayment of the facilities was also secured by collateral security of exclusive charge on the fixed deposit of Rs.250 lakhs which was pledged with the petitioner.

3. With a view to meet part of the working capital requirement and in addition to existing facilities granted and sanctioned to the respondent by three other banks, viz., Bank of India, Allahabad Bank and Syndicate Bank, the petitioner agreed to join in consortium to meet working capital requirement of respondent and granted a sum of Rs.38 crores. The Bank of India was acting as a lead banker to the said consortium. Under this, the exposure of the petitioner was Rs.10 crores. On 21st February, 2011, in consideration of this facility, the respondent executed working capital consortium agreement with all the four bankers and security for repayment to the consortium bankers executed by Joint Deed Hypothecation alongwith other bankers. The respondent also executed other documents and the petitioner also disbursed the amount to the respondent. The respondent also executed an acknowledgement of debts on 15th June, 2013 whereby the respondent acknowledged and confirmed that the balance outstanding in cash credit account was Rs.1005,28,213.86/-. The respondent also confirmed that they had executed the documents mentioned therein by way of security for the credit facilities sanctioned by the petitioner. As no amount was forthcoming, the petitioner called upon the respondent and the two Directors of the respondent to pay to the petitioner a sum of Rs.10,63,26,454,86/-. As no payments were forthcoming, the petitioner adjusted an amount of Rs.1,73,96,807/- from the fixed deposits in part *satisfaction of their claim. The petitioner has given due credit of the said amount. This left a balance of Rs.8,89,29,647.86/- as outstanding under the cash credit facility. The petitioner have also opted to enforce their rights to recover the total outstanding amount of Rs.8,89,29,647.86/- and have filed necessary proceedings in the Debts Recovery Tribunal on 15th October, 2013. On 28th October, 2013 the petitioner obtained an ad-interim relief from the Debts Recovery Tribunal restraining the respondent from creating any third party rights in respect of the mortgage premises.*

4. Thereafter the petitioner have issued their statutory notice on 6th December, 2013. The notice was returned unserved with the remark "not claimed".

5. The counsel appearing for the respondent stated that they are not denying the amount claimed but at the same time have filed an affidavit in reply. The following defences are taken in the affidavit in reply, viz., [a] that statutory notice sent under Section 434 (1) (a) of the Companies Act, 1956 was returned by the postal authority with the remark "not claimed" and therefore, the service was not good service and hence the petition is not maintainable, [b] that the petitioner having filed proceedings under the Recovery of Debts Due to Banks and Financial Institution Act, 1993 in the Debts Recovery Tribunal on the same cause of action in which the present petition is based, the petition is not maintainable and [c] the petitioner did not disclose in the petition that they had obtained an ex-parte order of injunction on 28th October, 2013.

6. As regards the first defence that the notice was not properly served, the same has to be rejected. The Apex Court has held that a notice which is returned as unclaimed but which was despatched in the manner prescribed with the correct address on it is deemed to have been served. It is not disputed anywhere that the address given in the notice was not registered address. I find support in the judgment of this court in the matter of Deepak Machineries Pvt. Ltd. vs. Ispat Industries Limited1, in which paragraphs 14,15 and 16 reads as under :-

"14. The Supreme Court thereafter went on to hold that a notice which is returned as unclaimed but which was despatched in the manner prescribed with the correct address on it is deemed to have been served.

15. The judgment would apply to a notice under Section 434 (a) (1) of the Companies Act with greater force. Section 138 of the Negotiable Instruments Act entails criminal consequences, whereas Section 434 (1) (a) involves only civil consequences. Moreover the requirements of a notice under Section 138 of the Negotiable Instruments Act are stricter and wider. Despite the same, the Supreme Court held that a person who properly addresses a notice and mails it would be deemed to have fulfilled his obligation of sending the notice even if the same is returned unclaimed. On a parity of reasoning, it must be held that a notice though returned unclaimed, if duly mailed by registered post addressed to the registered office of the company, must be deemed to have been "delivered" within the meaning of that expression in Section 434 (1) (a) of the Companies Act.

16. I would come to this conclusion even or principle. Any other view would permit a dishonest company to avoid service of a notice in a variety of ways by refusing to claim the same from the postal authorities despite intimation of the delivery thereof. Take a simple example. Companies are known to have their registered office in premises where they do not carry on any significant manufacturing, trading or administrative activities. The premises are used as a registered office only for the purpose of convenience and for complying with statutory provisions. In such a case, the company could well avoid service of notices and then refuse to claim the same despite notification from the postal authority to do so."

7. As regards the second defence that is once the claim is filed in DRT, this petition is not maintainable, the same has to be rejected. There is no provision in the RDB Act empowering the Tribunal to wind up a company which owes the debt to the applicant financial institution. The jurisdiction of the Tribunal under the RDB Act is only to adjudicate the liability of the respondent before it, ascertain the debt due to the bank/financial institution and issue a certificate for recovery thereof. The jurisdiction to wind up the company is wholly unavailable to the DRT. The Division Bench of this Court in the matter of Viral Filaments Limited vs. Indusind Bank Limited in paragraphs 4,6,17 and 18 observed as under :-

"4. Mr. Shah, learned Counsel appearing for the Appellant, strenuously contended that the judgment of the Supreme Court in Allahabad Bank v. Canara Bank and another, supports the proposition canvassed by him. He contends that this judgment of the Supreme Court holds that once a bank or financial institution, which is entitled to move the Tribunal constituted under the R.D.B. Act for recovery of debt, has moved the D.R.T., then a winding up petition is totally barred. We shall shortly examine whether this contention has merit.

…..............

6. The argument of Mr. Shah that what could be done by the Company Court can equally be done by the D.R.T. under the R.D.B. Act is erroneous. There is no provision in the R.D.B. Act empowering the Tribunal to wind up a Company which owes the debt to the applicant financial Institution. The jurisdiction of the Tribunal under the R.D.B. Act is only to adjudicate the liability of the Respondent before it, ascertain the "debt" due to the bank/financial Institution and issue a certificate for recovery thereof. Once such a certificate of recovery is issued to the Recovery Officer, the Recovery Officer is empowered to execute the same in the manner prescribed under the R.D.B. Act. We find that the jurisdiction to wind up the Company is wholly unavailable to the D.R.T.. Hence, what could be done by the Company Court under Section 433 (e) could obviously not be done by D.R.T.

…..................

17. Upon a careful consideration of the judgment in Allahabad Bank (supra), we are unable to agree with the learned Counsel for the Appellant that this judgment in any manner supports the contention that merely because the petitioning creditor before the Company Court is a bank/

financial institution or because an application has already been filed before the D.R.T. under the provisions of the R.D.B. Act, the petition for winding up would not be maintainable.

18. Mr. Shah raised a subsidiary contention that the role placed by the Company Court under Section 433 of the Companies Act and the D.R.T. under the R.D.B. Act is more or less equivalent since in the Company Petition also the Company Court has to adjudicate the amount due to the petitioning creditor before it can admit petition under Section 433 (e) of the Companies Act, 1956. In our view, this contention is misconceived. As we have already observed the admission of petition for winding up under Section 433 (e) need not be preceded by an adjudicated liability of the Company. It proceeds upon the Inability of the Company to pay its debts. Section 434 (1) (a) prescribes a statutory presumption of such inability on the part of the Company if the conditions prescribed therein are fulfilled. We recount the of quoted words of Lord Asquith in East End Dwelling Co. Ltd. v. Finsbury Borough Council.. "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs: it does not say that having done so, you must cause or permit you imagination to boggle when it conies to the inevitable corollaries of that state of affairs." (Followed by the Supreme Court with approval in State of Bombay v. Pandurang Vinayak and Others,; CIT, Delhi v. S. Teja Singh, and Chief Inspector of Mines v. Karam Chand Thapar,. Thus, if the statute says that the Company must be deemed to be unable to pay its debts, the logical result would be to admit the petition for winding up to investigate it. We find it difficult to accept the contention that the admission of the petition can only follow upon the adjudicated liability of the Company towards the petitioning creditor."

8. As regards the third defence that the petitioner did not disclose the fact that they had ad-interim order in their favour restraining the respondent from dealing with their assets, is only a red herring. It is a baseless submission in as much as DRT proceedings are disclosed in the petition. Even if the ad-interim order passed by DRT is not mentioned in the petition, no prejudice is caused to the respondent as admittedly, the petitioner owes a sum of Rs.8,89,29,647.86/- as on 5th October, 2013. The respondent do not deny that they have taken the facility and they have to pay back the money. The defences taken by the respondent are baseless. When the petitioner issued a notice under Section 434 even at that stage the respondent kept quite and never replied. The respondent is taking defences which are per-se far from being honest. The counsel for the respondent stated that the respondent do not dispute the amount claimed. Even in the affidavit in reply, there are not even denials that these amounts are payable.

9. In the circumstances, the following order is passed :

(a) The petition is admitted and made returnable on 25th January, 2016;

(b) Service of the petition under Rule 28 of the Companies (Court) Rules, 1959 is waived;

(c) The petition shall be advertised in two local newspapers viz., (i) Free Press Journal (in English) and (ii) Navshakti (in Marathi) as also in (iii) Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959;

(d) On or before 15th December, 2015, the petitioner shall deposit a sum of Rs.15,000/- towards publication charges with the Prothonotary and Senior Master, under intimation to the Company Registrar, failing which the petition shall stand dismissed for non-prosecution without further reference to the court. After the advertisements are issued, the balance, if any, shall be refunded to the petitioner.

10. Given the conduct of the respondent company of not replying to the statutory notice or earlier demand notices, in my view, this is a fit case for not only admission of the petition but also appointment of Provisional Liquidator. That would be in the interest of all the creditors of the company. For these reasons, the Official Liquidator is appointed as Provisional Liquidator of the company. He shall forthwith proceed to take charge of the Company's books of account, assets and properties, both movable and immovable. A compliance report shall be made to this court within a period of three weeks from today. The Official Liquidator is also directed to act on an authenticated copy of this order and not to await a final notification.

11. Till further orders of this court, the company, its Directors, Officers and agents are restrained from transferring, alienating, encumbering, parting with possession and/or creating any third party rights in respect of any of the assets or properties (both movable and immovable) of the company.

3 Respondent carried this order in appeal and Division Bench while dismissing the appeal, was pleased to observe that respondent's defences are not acceptable because having once admitted before the Single Judge that amounts are due and payable to petitioner, respondent cannot recile from that statement recorded by the Court. Respondent did not carry the matter further and therefore, the order dated 30th November, 2015 remained unaltered.

4 Respondent has filed a further affidavit in reply of one Kamal Jajoo affirmed on 23rd August, 2016. While reiterating the submissions already made earlier and rejected by this Court, respondent has raised three further defences, viz., (a) petitioner as secured creditor, must in the instance, relinquish its security, if it wants to be a part of the process of winding up of the company from whom a debt is due and payable and unless the security is relinquished in the first instance, the petition for winding up cannot be maintained; (b) all the consortium member banks unanimously agreed for proportionate release from the deposits (FDR) of Rs.8.22 Crores given by the company as collateral security in lieu of immovable properties at Indore (MP) valued at Rs.6.51 Crores offered by the company to the consortium as collateral and petitioner being part of the consortium, cannot arbitrarily refused to release the proportionate deposit in favour of petitioner; and (c) petitioner has filed recovery proceedings before the Debts Recovery Tribunal and respondent is contesting the amount claimed by petitioner.

5 Going in the reverse order, the Court asked Mr. Patel, counsel for respondent, as to whether the company admits that it owes money to petitioner. Mr. Patel was candid to state that the company owes money to petitioner but disputes the amount claimed by petitioner. The Court asked Mr. Patel whether the company would deposit the amount, which according

to them, is payable to petitioner. Mr. Patel, on instructions, stated that it was not possible but added that the company had given adequate security.

6 In my view, what petitioner is looking for is repayment of the money lent by petitioner to respondent and simply stating they have security is not enough. Respondent has to pay back the amount received from petitioner together with accumulated interest.

7 At this stage, it should be noted that Official Liquidator has placed on record minutes recorded at the time of making attempt to take possession of the registered office of respondent on 10th December, 2015. In page 2, 3 and 4 of the said report it is noted as under :

> *"Mr. Dinesh further stated that the Regd. Office of the company (In liqn.) alongwith the Regd. office of another two companies viz., (1) Jajoo Enterprises P. Ltd and (2) Guru Ashish Textiles P. Ltd. are functioning from the said premises and the movable assets and records of all the three companies are lying in this premises and also stated that the company (In liqn.) has stopped their business activities since 2013 when the petitioner has filed the proceeding before DRT – Mumbai against the company (In liqn.). The representatives of the OL has started to prepare the inventory of all the records/files of the company (In liqn.) lying at the Ground Floor and Mezzanine Floor and also the movable assets lying at the said floor. The list of the said inventory of the files/records and movable assets are enclosed herewith as Exhibit – 'B', 'C' & 'D', respectively.*
>
> *As regard the statutory records as per the list of the official liquidator, Mr. Dinesh Kushwah after having discussion with Mr. Kamal Jajoo (Ex-director of company in liquidation) telephonically has stated that as the company has closed its working business since year 2013 except books Debts, accounts, Income Tax and previous sales and purchase files no other statutory files are maintained and further stated that the ex-director will not allow Mr. Dinesh to handover possession of the premises to the official liquidator as the said premises is not belonged to company (In liquidation). However, the ex-director has informed him on telephone to allow the representatives of the official liquidator to take out all the records and movable assets of the company (In liqn.) to their office or give an undertaking on behalf of the ex-director of the company (In liqn.) on the non judicial stamp paper to safeguard the records/files and movable assets*

> *lying in the said premises at Ground Floor and Mezzanine Floor on "As is where is and whether there is basis" as per the inventory list prepared by the representatives of the official liquidator till its shifting to the office of the official liquidator."*

8 It is to be noted that Mr. Kamal Jajoo, who is referred to in this report, is the same person who has filed the further affidavit in reply, in which curiously in paragraph 11 it is stated that "In any event, I say that the Company is a running concern and is commercially solvent to meet its liabilities out of its existing assets." Therefore, it is quite clear that when Official Liquidator went to take possession on 10th December, 2015, the same Mr. Jajoo states that the company is not doing any business and whereas in the further affidavit in reply dated 23rd August, 2016 he has stated that the promoters and their family and friends have also made huge investment to the tune of Rs.35 Crores in the Company and the Company is a running concern and is commercially solvent. I am unable to accept the averments made in the further affidavit in reply, particularly in view of what is recorded by Official Liquidator in the minutes at the time of making attempt to take possession of the registered office of respondent. It has to be noted that what is stated in the minutes has not been contradicted and denied by the said Mr. Jajoo or anybody on behalf of the company.

9 So far as the second defence that the consortium bank has agreed to give up the FD receipts and take some immovable properties as collateral security and that there was adequate security in paragraph 6 of

the further affidavit in reply, the said Mr. Kamal Jajoo himself states that "Bank of India as the lead bank for itself and also on behalf of the petitioner and Allahabad Bank has already invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for recovery of their dues by enforcement of the security by issuing the Notice u/s. 13(2) of the SARFAESI Act and have also taken symbolic possession of the mortgaged property". It is also stated that "even the Chief Metropolitan Magistrate has passed an order under Section 14 of the SARFAESI Act on 30th November, 2015 to take physical possession of the mortgaged property".

Therefore, the defence raised that petitioner was taking arbitrary decisions contrary to what has been suggested by the consortium or there is adequate security is of no assistance to respondent.

10 So far as the first defence that petitioner being a secured creditor has to first relinquish its security if it has to maintain a winding up petition, a Single Judge of this Court (Dr. D.Y. Chandrachud, J.) in ***Canfin Homes Limited vs. Lloyds Steel Industries Limited***[1] has held that the stage for a secured creditor to relinquish his security for the benefit of the general body of the creditors would arise only when the secured creditor seeks to prove the whole of his debt in the course of winding up. The Court further held that it would be wholly inappropriate and

1. 2001 Company Cases Vol.106 page 52

inapposite to require the secured creditor at the stage when he files a company petition for winding up to exercise the option of relinquishing his security since that stage does not arise until the debt is to be proved. It will be useful to reproduce certain portions from the judgment which read as under :

> *"In setting out the defense of the company to the petition, the following submissions were urged on behalf of the respondent:*
> …..............
> *(iii) A secured creditor must, in the first instance, relinquish its security if it wants to be a part of the process of winding up of the company from whom a debt is due and payable. Unless the security is relinquished in the first instance, the petition for winding up cannot be maintained. In any event, the petition does not contain any disclosure of whether the security is or is not sufficient to meet the dues of the petitioner;*
> ….............…
> *The principal point on which the arguments were addressed to the Court was on the question as to whether the petitioner as a secured creditor is entitled to maintain the petition for winding up without relinquishing the security had by it as a secured creditor. The submission on the part of the respondent company, which has already been noted earlier, is that unless the petitioner were to relinquish the security prior to the institution of or in any event by an express statement in the petition for winding up, the petition itself would not be maintainable.*
> …...............…
> *The secured creditor who seeks to prove the whole of his debt in the course of the proceedings of winding up must before he can prove his debt relinquish his security for the benefit of the general body of the creditors. If he surrenders his security for the benefit of the general body of creditors, he may prove the whole of his debt. If the secured creditor has realized his security, he may prove for the balance due to him after deducting the net amount that has been realized. The stage for relinquishing security arises when a secured creditor seeks to prove the whole of his debt in the course of winding up. If, he elects to prove in the course for winding up the whole of the debt due and owing to him, he has to necessarily surrender his security for the benefit of the general body creditors. Therefore, in my view, it would be wholly inappropriate and inapposite to require the secured creditor at the stage when he files Company Petition for winding up to exercise the option of relinquishing his security since that stage does not arise until the debt is to be proved.*
> …......….......
>
> *A secured creditor who seeks to prove the whole of his deot in the course of the winding up proceedings is necessarily required to relinquish the security. That however, cannot be construed to mean that when he files a petition for*

> *winding up, a secured creditor must relinquish his security. In the present case, the petitioner has filed a suit in this Court and made it clear, therefore, that he seeks to enforce the security. When the stage for the proving its of debt does arise, the petitioner would necessarily have to prove for the balance of the debt which is due and owing to it after the security in respect of which the petitioner is a secured creditor is realized."*

Therefore, this defence also is not available to respondent.

11 Affidavit of one Mahesh Girkar affirmed on 22nd December, 2015 is on record proving advertisement of petition in Free Press Journal and Navshakti. The same Mahesh Girkar has also filed another affidavit dated 6th January, 2016 proving advertisement of petition in Maharashtra Government Gazette. While admitting the petition, respondent has also waived service under Rule 28 of the Companies (Court) Rules, 1959.

12 In the circumstances, I am satisfied that the company is unable to pay its debts, is commercial insolvent and deserved to be wound up. Therefore, company petition is allowed in terms of prayer clauses – (a) and (b) which read as under :

> (a) that the Respondent Company viz., M/s. Prahladrai Fabrics Ltd., be ordered to be wound up by and under the directions of this Hon'ble Court;
>
> (b) that the Official Liquidator attached to this Hon'ble Court be appointed as the Liquidator of the Respondent Company viz. M/s. Prahladrai Fabrics Ltd., with all powers under Section 457, 458 read with Sections 454, 455 and 456 of the Companies Act, 1956.

13 Official Liquidator shall forthwith act on the authenticated copy of this order without awaiting for any notification.

14 Petition accordingly stands disposed.

(K.R. SHRIRAM, J.)