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

COMPANY PETITION NO.756 OF 2014

Export Import Bank of India ….Petitioner

Vs.

Gol Offshore Limited ....Respondent

WITH
COMPANY PETITION NO.119 OF 2015

Punjab National Bank (International) Ltd. ….Petitioner

Vs.

Gol Offshore Limited ....Respondent

Mr. Charles J. Desouza a/w. Ms. Aneesa Cheema i/b. Verus for petitioner in CP/756/2014.
Mr. Kunal Chedda i/b. M.V. Kini and Co. for petitioner in CP/119/2015.
None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 4th DECEMBER, 2017

P.C.:

COMPANY PETITION NO.756 OF 2014

1 This petition alongwith another petition no.119 of 2015 was called for admission before this Court on 5th May, 2017. In both the petitions, petitioners were seeking winding up of respondent company on the ground that respondent is unable to pay its debts and commercially insolvent. Both these petitions were heard together and common order of admission was passed. The facts in company petition no.756 of 2014 as noted in the order dated 5th May, 2017 are as under :

> *2. On or about December, 2009, the petitioner sanctioned a term loan of Rs.75.00 crores towards part financing amongst others to the respondent. The parties accordingly executed Dual Currency Loan Agreement on 12th January, 2010 on the terms and conditions set out therein. Great Offshore (International) Limited, Cayman Islands, wholly*

owned subsidiary of the GOL Offshire Limited sought sanctioned of a foreign currency term loan of US $ 46.40 million. The petitioner sanctioned the said loan. On 24th September, 2010, the petitioner and the said Great Offshore (International) Limited entered into a Facility Agreement whereby the petitioner agreed to lend and advance the said loan on the terms and conditions set out therein.

3. On 24th September, 2010, the said loan granted by the petitioner to the Great Offshore (International) Limited was guaranteed by Great Offshore Limited vide Deed of Guarantee dated 24th September, 2010 on various terms and conditions mentioned therein.

4. GOL Offshore Limited requested the petitioner for a Foreign Currency Term Loan / Standby Letter of Credit of US $ 24.00 million. The petitioner sanctioned the said loan. On 26th July, 2011, the petitioner and the respondent herein executed a Dollar Loan Agreement whereby the petitioner agreed to lend and advance the said second GOL loan to the respondent on the terms and conditions set out therein. On 3rd June, 2011, the petitioner sanctioned another loan to the Great Offshore (International) Limited upto the amount of US $ 46.40 million (second GOIL loan). The petitioner and the said Great Offshore (International) Limited executed a Facility Agreement (second Facility Agreement). The said second Facility Agreement was guaranteed by the respondent herein vide a Deed of Guarantee dated 7th September, 2011. On 31st March, 2014, the respondent and the said Great Offshore (International) Limited signed balance confirmation statement and acknowledged and admitted their respective liabilities towards the petitioner.

5. It is the case of the petitioner that in view of the respondent herein failed and neglected to repay the loan under the Dollar Loan Agreement, the first GOL loan and second GOL loan were classified as non-performing assets in the books of the petitioner. By a letter dated 13th May, 2014, the petitioner recalled the first GOL loan and second GOL loan and called upon the respondent to pay US $ 34,852,084.96 which was outstanding as on 6th May, 2014 within a period of seven days from the date of the said letter.

6. It is the case of the petitioner that since the said Great Offshore (International) Limited committed default in adhering to the repayment conditions set forth in the first Facility Agreement and the second Facility Agreement, the petitioner by a letter dated 29th May, 2014 recalled the said loans and called upon the said Great Offshore (International) Limited to pay an amount of US $ 44,572,935.60 which was outstanding as on 31st December, 2014 within a period of seven days from the date of the said letter. It is the case of the petitioner that since the Great Offshore (International) Limited failed to comply with the demand made by the petitioner in the letter dated 29th May, 2014, the petitioner invoked the first Deed of Guarantee and second Deed of Guarantee issued by the respondent herein and by a letter dated 10th June, 2014 called upon the respondent to pay an amount of US $ 44,572,935.60 outstanding as on 31st March, 2014 within seven days from the date of the said letter. The respondent however, failed and

> *neglected to comply with the said demand made vide letter dated 10th June, 2014.*
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> *7. The petitioner accordingly issued a statutory notice upon the respondent at its registered office address on 11th June, 2014 and called upon to pay an amount of US $ 79,903,524.81 within twenty days from the date of the said notice.*
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> *8. The respondent vide their letter dated 5th August, 2014, responded to the said statutory notice admitted that according to the respondent total outstanding amount was approximately US $ 80.00 million, including interest as on July, 2014 against a total debt sanctioned of US $ 131.80 million. It was alleged that the respondent had been discussing with the bank at various times about position of the respondent and the fact that the respondent was facing up temporary liquidated mismatch. The respondent recorded various reasons in the said letter, which according to the respondent created liquidated mismatch of the respondent temporarily. The respondent made various proposals to the petitioner. It was mentioned that some of the properties of the respondent could not be sold due to various reasons and that the respondent was taking all requisite steps to solve those critical outstanding issues in best possible manner.*
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> *9. Some time in the year August, 2014, the petitioner filed this petition inter-alia praying for winding up of the respondent.*

2 Various points were raised by respondent but the main argument of respondent was that meetings of Joint Lender's Forum had taken place in which there were many lenders who were not in favour of winding up, whereas there were many other lenders who were in favour of winding up. In paragraphs 37 and 38 the Court has noted respondent's submissions. To that petitioner's response was recorded in paragraph 45. The reasons and conclusions for passing the order of admission could be found in paragraphs 46 to 56 of the order admitting the petition and the same read as under :

> *37. Mr.Doctor, learned counsel for the respondent on the other hand submits that the petitioners in both the company petitions are secured creditors. No application for enhancement of the security is made by any*

of the petitioners. The respondent has already made payment of about Rs.6.5 million towards the principal amount to the petitioner in both the matters. He submits that the assets of the respondent company are more than Rs.3,000/- crores. There are 83,000 shareholders and 1,300 employees of the respondent. 67% of the revenue generated by the respondent is from the Government project. The respondent earns 70% of the income from the charter hire from the ONGC. He submits that if the company petitions are admitted by this Court, the ONGC may terminate the contract. It is submitted that insofar as the Company Petition No.510 of 2013 is concerned, the respondent has already cleared all the liabilities of the petitioner in that matter. He submits that the company proceeding is not a recovery proceeding.

38. Learned counsel for the respondent invited my attention to the various allegations made in the affidavit in reply. He submits that all the JLF meetings were regularly attended by the petitioner and in view of the fact that the time for taking appropriate decisions by the JLF has not expired, no order can be passed by this Court in these company petitions at this stage. Learned counsel for the respondent placed reliance on the judgment of the Madras High Court in case of Karnatak Vegetable Oils & Refineries Ltd. vs. Madras Industrial Investment Corporation Limited, XXIV Company Cases 249 (Madras) and on the relevant paragraphs on pages 251 to 253 and would submit that the petitioner being secured creditor, cannot be granted prayer for winding up. He submits that large number of other lenders have opposed these winding up petitions and thus this Court has to take into consideration the wishes of the majority of the creditors.

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46. A perusal of the record, including the minutes of various meetings of the JLF clearly indicates that the respondent has admitted the liability of the petitioner from time to time. The respondent is heavily indebted not only to the petitioner in the aforesaid two petitions but large number of other creditors. The liabilities of the respondent are much more than the assets. A perusal of the minutes of the meeting of the JLF clearly indicates that the liabilities of the respondent, including the statutory liabilities and towards the arrears of wage is also substantial in addition to the liabilities of the other secured and unsecured creditors. The promoters of the respondent have admitted before this Court that the shareholding of the promoters is now reduced to 2%. Upon raising a query by this Court to the learned counsel for the respondent whether the respondent would be in a position to infuse any funds to revive the company, learned counsel for the respondent, on instructions, states that in view of the fact that the shareholding of the promoters is now reduced to 2%, there is no possibility of the promoters infusing any further funds.

47. This Court thereafter raised a query upon the learned counsel for the intervenors, who are the members of the JLF whether any further funds would be infused by the intervenors, Mr.Dubash, learned counsel for the intervenors, on instructions, states that it would not be possible for the intervenors to infuse any further funds. Their debts are already converted *into equity share capital.*

48. A perusal of the minutes of meeting of the JLF clearly indicates that the promoters were as well as the intervenors have refused to infuse any funds in the respondent and were totally dependent upon the infusion of funds, if any, by the investors. Asmara Resources Private Limited had submitted Non-Banking Expression of Interest vide letter dated 25th January, 2017 and had agreed to infuse about Rs.600.00 crores on various terms and conditions. The JLF members did not accept various conditions imposed by the said investors. Be that as it may, it is now an admitted position that the said investors also vide its letter dated 7th March, 2017 has withdrawn the said Non-Banking Expression of Interest dated 25th January, 2017 on the ground that the ONGC Limited had not granted any extension of delivery date for Rig Badrinath, which was one of the key condition in the offer made by the said investor.

49. Neither the respondent nor the intervenors could produce before this Court any other such proposal, if any, made by any of the investors. The submission made by the learned counsel for the respondent as well as the investors is that 180 days period available with the JLF had not expired and would expire only on 27th July, 2017. A perusal of the record clearly indicates that neither the promoters nor the investors are now agreeable to infuse any funds in the respondent for its revival. None of these parties have made any offer before this Court also though repeatedly asked to infuse any funds even at this stage. The ONGC Limited has already terminated the major contract awarded to the respondent. In these circumstances, I do not find any scope of any revival of the respondent company in the facts and circumstances of this case highlighted aforesaid.

50. The judgment of this court in case of IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited (supra) heavily relied upon by the learned counsel for the respondent as well as by the intervenors would not assist their case in any manner whatsoever. The petitioner before this Court in the said company petition was having about 2% of debts of total debts of other lenders and large number of debts of the total creditors. In this case, the debt of the petitioner in the aforesaid two petitions is about 40% of the total debts. In that matter, the petitioner had participated in the JLF meetings, whereas in this case the petitioner has been objecting to the said JLF proposals on the ground that the respondent was declared as NPA even before the date of circular issued by the Reserve Bank of India. This Court in the said judgment also has not considered the effect of section 6 of the Banking Regulation Act. The lenders, who were the members of the JLF were 98% of the creditors in value of the total debts of the respondent and were opposing the petition for winding up. The JLF before this Court in the said matter had agreed to take steps to revive the respondent company therein by taking corrective action plan. In this case, the intervenors have refused to infuse any amount to the respondent. The investor has withdrawn its proposal for infusing Rs.600.00 crores. The judgment of this Court in case of IDFC Bank Limited vs. M/s. Ruchi Soya Industries Limited (supra) thus would *not assist the case of the respondent or the intervenors.*

51. Insofar as various judgments relied upon by Mr.Doctor, learned counsel for the respondent in support of the submission that the Court has to take into consideration the wishes of the creditors and the shareholders before even passing any order of admission of the company petitions are concerned, there is no dispute about the proposition of law laid down by various Courts in the said judgment. The respondent in this case has not only admitted the liability of the petitioner but of large number of other creditors. Though there was an attempt made by the intervenors by holding large number of meetings from time to time during the period between 18th April, 2014 and February, 2017, the members of the JLF could not revive the respondent. These two petitions are pending in this Court since 2014. The respondent however, could not make any other proposal also for clearing the dues of these petitioners. In the facts and circumstances of this case and more particularly when there are no chances of revival of the respondent even remotely, in my view, the judgments relied upon by the respondent and the intervenors would not assist their case. Before the assets of the respondent are frittered away, the same are required to be protected by this Court in the interest of all the creditors, including the petitioners by passing appropriate orders including by appointing the Official Liquidator as a Provisional Liquidator.

52. Various judgment relied upon by Mr.Setalvad, learned senior counsel for the petitioner referred to aforesaid would clearly assist the case of the petitioner. In these circumstances, this Court cannot exercise any discretion in favour of the respondent or the intervenors and against the petitioner. Though both the petitioners are secured creditors, a perusal of the record indicates that the securities granted in favour of the petitioners by the respondent are jeopardized. The petitioners have repeatedly called upon the respondent to enhance the security furnished to the petitioners but was of no avail.

53. A perusal of the record further indicates that though the JLF gave various opportunities to the respondent to infuse the additional funds, the promoters of the respondent have refused to infuse any funds. The liabilities of the respondent are mounting. In these circumstances, the lenders who are the members of the JLF also refused to infuse any funds. In my view, the respondent as well as the intervenors have not complied with the conditions of various circulars relied upon by the Reserve Bank of India and thus cannot avail any benefits / protection under those circulars. Though this Court called upon the respondent as well as the intervenors to infuse further funds if they propose to do so as to revive the respondent even at this stage, neither the respondent nor the intervenors agree to infuse any further funds. In my view, the petitioners have thus made out a case not only for admission of the petitions, but also for appointment of the Official Liquidator as pressed by the learned counsel for the petitioners.

54. This Court in the matter of Advent Corporation Private Limited (supra) has held that if a company petition for winding up is filed with a

> *view to enforce the payment of the disputed debt, it would amount to abuse of process of Court and should be dismissed, unless it is shown that the alleged dispute is not a bonafide one. The Supreme Court in case of IBA Health (I) Private Limited (supra) has held that if there is no dispute as to the company's liabilities, the insolvency of the company might not constitute a stand alone for setting aside a notice under section 434(1)(a), meaning thereby, if a debt is undisputedly owing then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under section 439 in reliance of the presumption under section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.*
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> *55. It is held that if there no dispute as to the company's liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent.*
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> *56. In the facts of this case, it is clearly beyond reasonable doubt that the respondent has not only admitted the liabilities of the petitioner, but is heavily indebted to large number of creditors. Inspite of several opportunities the respondent had for its revival, the respondent is not in a position to revive. In this situation, I am not inclined to accept the submission of the learned counsel for the respondent and the intervenors that these petitions are filed with a view to pressurize the respondent company and are not bonafide. In my view, the principles of law laid down by this Court and the Supreme Court in the above referred judgments squarely apply to the facts of this case. I am respectfully bound by the said judgments.*

3 After the petition was admitted, no new affidavit of reply has been filed opposing the winding up of the company. Today also there is nobody present for respondent company. Petitioner has also filed an affidavit of one Digambar Khadye affirmed on 2nd August, 2017 to which are annexed copies of newspaper cuttings advertising admission of petition and also a copy of the gazette notification advertising admission of petition. At the time of admission, service of petition under Rule 28 of the

Companies (Court) Rules, 1959 has been waived.

4 In the circumstances and particularly, in view of the conclusions while admitting the petition in paragraph 56, it is quite obvious that the company is unable to pay its debts, is commercially insolvent and deserves to be wound up. Therefore, the petition is allowed in terms of prayer clauses – (a) and (b) which read as under :

> (a) Hold that the Respondent is liable to be wound up and under the supervision, direction and orders of this Hon'ble Court in accordance with the provisions of the Act;
>
> (b) Appoint an Official Liquidator of the Respondent, with all powers under the provisions of the Act, to take charge of the affairs, assets and business of the Respondent and/or to conduct its affairs in the course of winding up.

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

6 Petition accordingly stands disposed.

COMPANY PETITION NO.119 OF 2015

1 In view of the winding up order passed above in company petition no.756 of 2014, no separate winding up order is required to be passed in this petition. Petitioner may lodge its claim with the Official Liquidator, who shall consider the same on merits.

2 This petition also accordingly stands disposed.

(K.R. SHRIRAM, J.)