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

COMPANY PETITION NO.633 OF 2014

SICOM Limited ….Petitioner

Vs.

The Freyssinet Prestressed Concrete Co. Ltd. ….Respondent

WITH

COMPANY PETITION NO.891 OF 2015

ATO (I) Limited ….Petitioner

Vs.

The Freyssinet Prestressed Concrete Co. Ltd. ….Respondent

WITH

COMPANY PETITION NO.1137 OF 2015

M/s. Calcutta Iron Udyog ….Petitioner

Vs.

The Freyssinet Prestressed Concrete Co. Ltd. ….Respondent

WITH

COMPANY PETITION NO.199 OF 2016

M/s. J.D. Steel Corporation ….Petitioner

Vs.

The Freyssinet Prestressed Concrete Co. Ltd. ….Respondent

WITH

COMPANY PETITION NO.500 OF 2016

Pidilite Industries Limited ….Petitioner

Vs.

The Freyssinet Prestressed Concrete Co. Ltd. ….Respondent**s**

Mr. Raj Patel i/b. Mr. Prakash Panjabi for petitioner in CP/633/2014.
Ms. H.D. Kapadia i/b. Ms. Kalyani G. Parmar for petitioner in CP/891/2015.
Mr. Bankim Gangar i/b. Gangar and Co. for petitioner in CP/1137/2015.
Ms. Garima Mehrotra i/b. Law Chamber of Siddharth Murarka for petitioner i n CP/199/2016.
Mr. Jas Sanghavi i/b. PDS Legal for petitioner in CP/500/2016.
Mr. Mohit Chabria i/b. Mr. Jitendra G. Shukla for respondent.
Mr. Mayur Bhojwani a/w. Ms. Prangana Barua i/b. Manilal Kher Ambalal

and Co. for L & T (Noticee).

CORAM : K.R.SHRIRAM, J.
DATE : 30th OCTOBER, 2017

P.C.:

COMPANY PETITION NO.633 OF 2014

1 Petitioner has filed this petition for winding up of respondent company on the ground that it is unable to pay its debts. The company petition is taken up for hearing and final disposal.

2 According to petitioner, respondent company is indebted to petitioner in the sum of Rs.9.59 Crores together with interest thereon at the rate of 16.75% p.a. from 4th March, 2014 till payment.

3 The brief facts giving rise to the present controversy are that vide a sanction letter dated 10th November, 2010 petitioner sanctioned a revolving short term loan of Rs.10 Crores to respondent company. Pursuant thereto, the parties entered into a Loan Agreement dated 29th November, 2010, a Deed of Hypothecation dated 29th November, 2010 as well as an ESCROW Agreement dated 6th December, 2010. This ESCROW Agreement was entered into between petitioner, respondent company and Punjab National Bank respectively. Pursuant to this agreement, an ESCROW account was opened in Pubjab National Bank to ensure that the retention money to be received by respondent company (retention money receivables) was to be deposited in the said account. This retention money receivables were hypothecated to petitioner.

4 Thereafter, on 17th January, 2013 this revolving short term loan was renewed and reduced to Rs.8.96 Crores. Since, respondent company was unable to service this loan, a notice dated 8th October, 2013 was served upon respondent company calling upon it to pay a sum of Rs.2.12 Crores on or before 23rd October, 2013 failing which petitioner would be left with no alternative but to recall the entire outstanding principal amount of the said loan together with interest thereon.

5 As there was no reply to the aforesaid notice and neither were the requisitions therein complied with, petitioner by its letter dated 2nd December, 2013 recalled the entire loan, which, as on 30th November 2013, was a sum of approximately Rs.9.10 Crores. As no payment was made pursuant to the said notice, petitioner thereafter issued a statutory notice under Section 434 of the Companies Act, 1956 calling upon respondent company to pay a sum of Rs.9.27 Crores. It is not in dispute before me that this statutory notice was served at the registered office of respondent company and has been duly received by it. Despite this, there was no reply to the statutory notice and hence the present petition has been filed on 4th March, 2014 seeking to wind up respondent company.

6 For the sake of completeness, it must be mentioned here that for recovery of its dues, petitioner has also approached the Debts Recovery Tribunal under the provisions of the Recovery of Debts Due to Banks and

Financial Institutions Act,1993 on 10th March, 2014 by filing an Original Application before the said Tribunal. The said Original Application is still pending.

7 In this factual background, Mr. Patel, counsel for petitioner submitted that there are huge amounts that are due and payable by respondent company to petitioner which have admittedly not been paid. Despite indulgence being shown by this Court in the past to respondent company, only an amount of approximately Rs.85 Lakhs has been recovered. In this regard, counsel brought to my attention the order dated 27th April, 2015 passed by this Court in which it is recorded that respondent company informed this Court that it had to receive an amount of Rs.5.36 Crores from its clients, a list whereof was tendered to this Court and marked “X” for identification. In view of this statement and considering this list tendered by respondent company, this Court directed the persons mentioned in the said list to deposit the amounts due and payable by them in the ESCROW account, being Current Account No.1274002100022537 with Punjab National Bank, Pedder Road branch, on or before 9th June, 2015. Mr. Patel submitted that admittedly only an amount of approximately Rs.85 Lakhs has been deposited in this Escrow account. In contrast, the dues of petitioner were over Rs.9 Crores. In this view of the matter, Mr. Patel submitted that this is a clear case where respondent company was

unable to pay its debts, is commercial insolvent and hence deserves to be wound up.

8 In the affidavit in reply, it is stated that because petitioner has also commenced proceedings in the Debt Recovery Tribunal under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, this petition is not maintainable. This submission has been negatived by the learned Single Judge while admitting the petition and the same has been dealt with as under :

> *"11. This only leaves me to deal with the argument of Mr. Shukla that since the Petitoner has already approached the DRT for recovery of its dues, the present Company Petition is not maintainable. This issue is no longer res-integra and is squarely covered by a decision of a Division Bench of this Court in the case of Viral Filaments Limited Vs. Indusind Bank Limited, reported in 2001 (3) ALL MR 737. This exact argument was canvassed before the Division Bench and the same was emphatically negated. Paragraphs 5 to 7 of this decision read thus:-*
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> *"5. Section 18 of the RDB Act provides that, on and from the appointed day, jurisdiction of Courts and other authorities in relation to matters specified in Section 17 is barred. Section 17 provides that on and from the appointed day, a Tribunal constituted under the RDB Act shall exercise the jurisdiction, powers and authority 'to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions'. Thus, it is obvious that the exclusion of the jurisdiction of all other Courts and authorities is only to the extent the jurisdiction is specifically vested in the DRT. That jurisdiction under Section 17 is only the jurisdiction to entertain and decide applications from banks and financial institutions for recovery of debts due to them. On first principles, we are unable to agree with the learned Counsel that a petition presented under Section 433(e) of the Companies Act, 1956 for winding up of a Company is or equivalent to an application seeking recovery of a debt due to the petitioning creditor. In the first place, Section 433 of the Companies Act, 1956 is not intended to supplant the jurisdiction of a Civil Court to adjudicate a money suit. Section 433(e) vests in the Company Court the jurisdiction to wind up a Company, inter alia, under Clause (e), if the Company is unable to pay its debts. Section 434 creates a statutory fiction that if the creditor has issued a prescribed notice to the Company to pay up the debt and the Company fails to do so or fails to secure the said debt within the*

prescribed time, the Company shall be deemed to be unable to pay its debt. Once such a contingency has arisen, and the statutory fiction has come into play, it is perfectly open to the Company Court to entertain the Petition under Section 433(e) of the Companies Act,1956.

6. The argument of Mr.Shah that what could be done by the Company Court can equally be done by the DRT under the RDB Act is erroneous. 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. 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 RDB Act. We find that the jurisdiction to wind up the Company is wholly unavailable to the DRT. Hence, what could be done by the Company Court under Section 433(e) could obviously not be done by DRT.

7. We are supported in our view by a judgment of the Supreme Court in Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., JT 1999 (4) SC 545. In that case, a winding up petition was filed by creditor before the High Court and the Company moved an application under Section 8 of the Arbitration and Conciliation Act, 1996, contending, inter alia, that the High Court should refer the matter to arbitration. This contention failed before the learned Single Judge of the High Court and before the Division Bench of the High Court. When the matter came up before the Supreme Court, the Supreme Court pointed out (vide paragraph 5), 'The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the Company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a Company is contained under the Companies Act and is conferred on the Court.' The Supreme Court held that the Arbitrator having no such power could not have entertained the petition and, therefore, the application made to the High Court for referring the matter to arbitration was misconceived. In our view, the principle laid down in this judgment applies to the situation before us. The DRT not having been invested with the power to wind up a Company, it would not be possible to urge before the Company Judge that the petition should not be heard."

(emphasis supplied)

9 Mr. Chabria, counsel for respondent states that settlement talks are going on between respondent and petitioner. Mr. Patel, counsel for petitioner denies that any settlement talks are going on. Mr. Patel states that even after the order dated 2nd April, 2016 was passed, respondent has

not paid a single farthing to petitioner and the interest component is mounting to the date.

10 After hearing petitioner and respondent, the order dated 2nd April, 2016 read with order dated 6th April, 2016 was passed. Mr. Bhojwani, counsel appearing for L and T (Noticee) states that whatever amount was payable by L and T to respondent has been deposited in ESCROW account. Mr. Bhojwani tenders a photocopy of letter dated 30th November, 2016 from respondent to one Mr. Kavlekar of Larsen and Toubro. Mr. Bhojwani states that an amount of Rs.14,69,095/- has been deposited by L and T in ESCROW account. The counsel for respondent does not dispute that. Therefore, notice issued to L and T is discharged.

11 Mr. Patel states that an affidavit of one Vishakha J. Tambe affirmed on 20th July, 2016 confirming advertising of notice in Free Press Journal and Navshakti has been filed. Mr. Patel states that another affidavit of same Vishakha J. Tambe affirmed on 6th December, 2016 confirming advertising of notice in Maharashtra Government Gazette on 1st December, 2016 is also on record.

12 I have considered both the affidavits. Notice under Rule 28 of the Companies (Court) Rules, 1959 has been waived by company. In view of the above and particularly in view of the fact that there are other petitions for winding up of respondent no.1 has also been filed and even

after the order dated 2nd April, 2016 was passed not a penny has been paid by respondent to petitioner shows that respondent company is unable to pay its debts, it is commercially insolvent and deserves to be wound up. The company petition is, therefore, allowed in terms of prayer clauses-(a) and (b), which are reproduced herein under :

> (a) that the Company viz. THE FREYSSINET PRESTRESSED CONCRETE CO. LIMITED be wound up by and under the order and directions of this Hon'ble Court under the provisions of the Companies Act, 1956;
>
> (b) that the Official Liquidator of this Hon'ble Court or some other fit and proper person be appointed Liquidator of the Company viz. THE FREYSSINET PRESTRESSED CONCRETE CO. LIMITED with all its assets, properties, funds, affairs, books of account, papers, vouchers and all other documents with all powers under the provisions of the Companies Act, 1956."

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

14 Petition accordingly stands disposed.

COMPANY PETITION NO.891 OF 2015
WITH
COMPANY PETITION NO.1137 OF 2015
WITH
COMPANY PETITION NO.199 OF 2016
WITH
COMPANY PETITION NO.500 OF 2016

1 In view of the order passed above in Company Petition No.633 of 2014, these petitions also stand disposed.

2 Petitioners are at liberty to take appropriate steps in accordance with rules including filing affidavit of claim with the Official Liquidator.

(K.R. SHRIRAM, J.)