

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

**COMPANY PETITION NO.277 OF 2011
WITH
COMPANY PETITION NO.128 OF 2011**

The State Trading Corporation of India Ltd.Petitioner

Vs.

M/s. Masumi Overseas Private LimitedRespondent

Mr. Darshit Jain a/w. Ms. S.I. Shah I/b. M/s. S.I. Shah and Co. for petitioner in both petitions.

Mr. Sameer Jain a/w. Ms. Jayashree Parihar I/b. Probus Legal for respondent in both petitions.

CORAM : K.R.SHRIRAM, J.

DATE : 10th SEPTEMBER 2018

P.C.:

COMPANY PETITION NO.277 OF 2011

1 This petition is for winding up of respondent company - M/s. Masumi Overseas Private Limited (the company) under the provisions of the Companies Act, 1956 on the ground that the company is unable to discharge its debts and is commercially insolvent.

2 On 6th June 2017 a very detailed order of admission was passed. The same reads as under :

. By these two petitions filed under Sections 433 and 434 of the Companies Act, 1956, the petitioner seeks winding up of the respondent company on the ground that the respondent is unable to pay its debts.

2. By consent of the parties, both the petitions were heard together for the purpose of deciding whether these petitions shall be admitted or not and are being considered by a common order.

Some of the relevant facts in Company Petition No.277 of 2011 are as under :-

3. The petitioner is one of the agencies nominated by the Government of India for import and export of gold and other precious metals under the Foreign Trade Policy. The respondent expressed its desire to associate

with the petitioner for selling or exporting gold and diamonds to the prospective overseas buyers. The petitioner agreed to provide its co-operation to the respondent in order to promote the export of gold jewellery. The parties accordingly entered into an agreement dated 15th December 2006 for export of gold jewellery by the respondent through the petitioner to certain prospective foreign buyers as identified by the respondent on the terms and conditions recorded in the said agreement. Clause 10 (b)(v) of the said agreement provided that in the event of non-payment of export bills by the foreign buyers, the petitioner will have full recourse of the post shipment credit with interest etc. from the respondent. The respondent-company shall immediately refund the amount of post shipment credit with interest as and when asked for by the petitioner. Clause 16(a)(c) of the said agreement provided that the respondent shall indemnify and keep indemnify the exporter against all such claims, actions, proceedings, losses, costs, taxes, levels, duties, expenses arising out of the said agreement. It was further agreed that in the event of the buyers failing to honour their contractual obligations, the respondent alone shall bear all the risks and costs.

4. It is the case of the petitioner that the respondent obtained various export orders from various foreign buyers. The respondent accordingly exported the gold jewellery to those foreign buyers through the petitioner. The bills/invoices for the sale of gold jewellery were raised on the foreign buyers by the petitioner from time to time during the period 2008-09 and the said bills/invoices were discounted by the bankers of the petitioner i.e. Standard Chartered Banks while giving post shipment finance facility which was extended through the petitioner to the respondent in the year 2008-09. It is the case of the petitioner that the petitioner during the said period 2008-09 exported the gold jewellery aggregating to US \$7759680 was sold to the foreign buyers.

5. The respondent had availed of post shipment finance facility from time to time from the bankers of the petitioner i.e. Standard Chartered Bank during the said period. It is the case of the petitioner that none of the bills/invoices raised on the foreign buyers for export of gold jewellery were, however, honoured by the foreign buyers on due date. The respondent had issued a corporate guarantee dated 17th June 2008 upto maximum of sum of Rs.1 crore in favour of petitioner in order to ensure due payment from the foreign buyers of the price of gold jewellery sold to them by the petitioner. Under clauses 3 and 4 of the said corporate guarantee, the respondent also guaranteed the due payment of the purchase price, in the event of failure of the foreign buyers not paying to the petitioner the purchase price payable by it for the purchases of gold jewellery.

6. It was agreed that any demand made on the guarantor by the beneficiary shall be final, binding and conclusive evidence and that the respondent would be liable under the said guarantee as if it were the sole principal debtor and not merely a security. The managing director and one of the directors of the respondent had also submitted their personal guarantees dated 7th January 2010 in favour of the petitioner making themselves personally liable to pay the purchase price of the exported

gold jewellery in the event of failure on the part of the respondent to pay the said amount to the petitioner. It is the case of the petitioner that the petitioner from time to time reminded the respondent to pay to the petitioner various amounts payable under the said post shipment finance facility availed of by the respondent but the respondent did not pay any amount.

7. The petitioner vide its letters dated 7th May 2010 and 18th May 2010 called upon the respondent to pay US\$ 7759680 which was equivalent to Indian Rs.41,22,10,222/- as on the date of said notice. On 20th May 2010, the petitioners invoked the corporate guarantee and called upon the respondent to pay an amount of US\$ 7559680 equivalent to Indian Rs.36,27,65,040/- as on 20th May 2010 along with interest of Rs.1,99,56,606.79. By a letter dated 28th May 2010, the petitioner also called upon the respondent to pay the said outstanding liabilities of the respondent in view of personal guarantee dated 7th January 2010 submitted by the respondent. The respondent, however, did not make any payment to the petitioner. It is the case of the petitioner that the respondent vide its advocate's reply dated 30th May 2010 took a frivolous stand for referring the subject matter to arbitration and raised an alleged claim of Rs.110 crores against petitioner.

8. It is the case of the petitioner that the respondent company thereafter had held various meetings with the officers of the petitioner and had vide letter dated 14th June 2010 admitted the liability of the said payment and had requested the petitioner for further post shipment finance assistance with a view to resume normal business enabling the said foreign buyers to remit their dues.

9. The respondent vide its letters dated 25th August 2010 and 4th September 2010 requested the petitioner for providing fresh additional financial facility in the form of preshipment and post shipment additional finance assistance. The petitioner through its advocate's letter dated 30th November 2010 issued a statutory notice upon the respondent calling upon the respondent to pay to the petitioner sum of Rs.41,22,10,222/- inclusive of accrued interest on the outstanding liability of the payment of export bills of the said foreign buyers. The said notice was replied by the respondent vide its advocate's common reply dated 20th December 2010 and denied its liability to pay the said debts of the petitioner.

10. On 14th December 2010, the petitioner filed a summary suit (1885 of 2011) against the respondent in this Court for recovery of Rs.38,27,21,646.79 in respect of 9 invoices on the basis of dishonoured post dated cheques, corporate guarantees and personal guarantees given by the respondent in this Court. On 18th December 2010, the respondent filed an arbitration application (212 of 2011) under section 11 of the Arbitration and Conciliation Act, 1996 in this Court. The respondent filed notice of motion in the said summary suit under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the parties to the Arbitration . Some time in the year 2011, the petitioner filed this winding up petition against the respondent.

11. By an order dated 13th January 2014, this Court dismissed the said notice of motion filed by the respondent under section 8 of the Arbitration and Conciliation Act, 1996 in said summary suit filed by the respondent. By an order dated 7th October 2015, the division bench of this Court dismissed the Appeal (L) No.52 of 2014 filed by the respondent against the said order dated 13th January 2014 as not maintainable. By an order dated 12th July 2016, the Supreme Court has dismissed the special leave petition filed by the respondent against the said order 7th October 2015 passed by the division bench of the this Court.

12. On 24th June 2011, the arbitration application filed by the respondent came to be rejected by this Court by observing that such an application will have to be made with the Indian Council of Arbitration. On 6th July 2011, the respondent filed an arbitration application (1797 of 2011) with the Indian Council of Arbitration along with statement of claim. On 2nd August 2011, the petitioner nominated Shri Justice D.P.Wadhwa, a former Judge of the Supreme Court as their nominee arbitrator. The respondent nominated of Shri Justice R.C. Lahoti, former Chief Justice of India as their nominee arbitrator. The learned arbitrators have appointed a Presiding Arbitrator.

Some of the relevant facts in Company Petition No.128 of 2011 are as under :-

13. It is the case of the petitioner that under Agreement dated 15th December 2006 for export of gold jewellery by the respondent through the petitioner, the respondent had committed default in making payment to the petitioner. The foreign buyers also failed to make payment to the petitioner. It is the case of the petitioner that the respondent vide its letter dated 30th June 2009 submitted the Diamond Export Document worth US \$ 15281061 to the petitioner for onwards submission to Exim Bank and requested for adjusting the old overdues of Gold Jewellery Account. The respondent also sought permission for export of cut and polished diamonds to roll over the old overdues instead of gold jewellery at the earliest. The petitioner accordingly forwarded those documents to Exim Bank for adjustment of the account of outstanding dues of the respondent of gold jewellery.

14. It is the case of the petitioner that the Exim Bank adjusted those export documents for cut and polished diamonds with outstanding dues of 20 invoices of gold jewellery and created a new debt account based on invoices of those cut and polished diamonds. The respondent vide its letter dated 29th December 2009 to the petitioner, as regards the remittance of an outstanding export proceeds for the bills with Standard Chartered Bank is concerned, requested the petitioner to accede an extension as sought by the petitioner from the foreign buyers to work out the situation in a very amicable way. It was further stated that the foreign buyers had made assurances that they would clear all the outstanding dues and therefore sought an extension of time and in turn on the basis of their assurances, the respondent requested for extension of time.

15. It is stated that the market condition in Dubai had worsened more. The foreign buyers thus needed extension of time for at least six months. It was mentioned in the said letter that to clear all the outstanding dues and settle the matter for which the foreign buyers were equally concerned and keen, they had given an understanding to the respondent that before July 2010, they would clear all the overdues and therefore had sought an extension of time period. The respondent accordingly requested the petitioner to grant an extension of time period of six months. The respondent requested the petitioner to send the required letter to the Exim Bank to enable them to issue "NO ADJUSTMENT FROM THE EXPORT PROCEED" letter which would help the respondent to further pursue remittance of old outstanding export proceeds from the foreign buyers since the respondent had to continue the business with the various buyers for keeping the business terms running for the sake of best business relationship.

16. The respondent vide its letter dated 29th January 2010 to the petitioner alleged that the respondent was unable to receive the requisite letter from the petitioner as well as from the Exim Bank whereas the respondent had been consistently pursuing with the buyers to make the payments against the export bills. The respondent made a suggestion to the petitioner to permit the respondent to allow the buyers to make the payment against the export bills directly to the account of the respondent and suggested that in turn, the respondent shall be submitting to the petitioner the requisite Foreign Inward Remittance Certificate (FIRC) in order to get the GR cleared. The respondent requested the petitioner to give their consent against those 20 bills mentioned therein.

17. On 17th February 2010, the respondent addressed a letter to the petitioner alleging that they had discussed the arrangement with the Axis Bank and had requested for 'No objection Certificate' from the petitioner and the Exim Bank as well as for release of the FIRC to the respondent for receipt of the payment in their account. The petitioner addressed a letter on 19th February 2010 to the Exim Bank giving its no objection to the proposal made by the respondent with reference to those 20 bills. In the said letter, it was mentioned that the petitioner would also request the Exim Bank to give their approval and issue NOC, if possible, so that the export proceeds can be realised from Monday and the petitioner was in a position to clear the pending GR's corresponding to those 20 bills within third week of March 2010.

18. The petitioner addressed a letter dated 14th November 2002 to the Exim Bank enclosing various documents and requested to forward those various documents. The respondent vide its letter dated 23rd February 2010 informed the petitioner that they were pursuing with the buyers to make payment against those mentioned export bills directly to their Axis Bank Account. It is the case of the petitioner that 100% value of the export proceeds in respect of those 20 bills in respect of gold jewellery were received by the respondent in its Axis Bank Account. The petitioner had annexed 20 inward remittance in respect of the said 20 invoices.

19. It is the case of the petitioner that the respondent-company has

already availed of 83.5 % value of export proceeds in respect of 20 invoices of gold jewellery from the petitioner as post shipment finance availed from the Exim Bank through the petitioner and simultaneously had fraudulently received double payment in respect of those 20 invoices of gold jewellery from the Exim Bank. The respondent is thus liable to pay to the petitioner 100% remittances received from the foreign buyers for settlement of the Exim bank debts which is still outstanding.

20. It is the case of the petitioner that since the Exim bank has already adjusted the said 20 invoices of gold jewellery for which the respondent had received 83.5% as post shipment finance against the said adjusted 8 invoices of cut and polished diamonds, the total outstanding of the Exim Bank pertains to 8 invoices to cut and polished diamonds and 5 invoices of gold jewellery which are other than the said 20 invoices of gold jewellery. It is the case of the petitioner that despite receiving remittances from the foreign buyers in their account in the Axis Bank, the respondent fraudulently did not remit the said remittances to the Exim Bank. Since the export proceeds had not been remitted to the petitioner, the entire outstanding amount of the said 8 invoices of diamond document and other 5 gold jewellery invoices is recoverable from the respondent by the petitioner. It is the case of the petitioner that this company petition is filed by the petitioner against the respondent in respect of the said 8 invoices of diamond document and other invoices referred to at page 106 of the petition which were adjusted against the gold jewellery but sale proceeds was not received from the foreign buyers and 5 gold jewellery documents which were other than gold jewellery documents.

21. The Managing Director and other Directors of the respondent submitted their personal guarantees dated 7th January 2010 in favour of the petitioner.

22. The petitioner vide its letters dated 7th May 2010 and 18th May 2010 called upon the respondent to pay US\$ 18966601 equivalent to Indian Rs.87,24,63,640/- as the amount due from the foreign buyers as on the date of the said notice. The respondent responded to the said demand notice dated 18th May 2010 and referred the subject matter to the arbitration. By a letter dated 30th May 2010 sent by the respondent through its advocate, the respondent raised a claim of Rs.110 crores against the petitioner. The respondent thereafter vide its letters dated 25th August 2010 and 4th September 2010 requested the petitioner for providing fresh additional financial facilities in the form of preshipment and post shipment additional finances.

23. On 30th November 2010, the petitioner issued a statutory notice calling upon the respondent to pay a sum of Rs.92,94,24,151/-. The respondent replied to the said statutory notice vide its advocate's reply dated 20th December 2010 and denied the claim of the petitioner. The respondent had also issued a post dated cheque for the 83.5% disbursed amount to the petitioner. The petitioner forwarded a joint 'Application for RTGS transaction' dated 13th February 2008 in respect of 4 invoices to the State Bank of India with instructions to remit an amount of Rs.9,59,19,279/- to the respondent. The said amount was debited from

the State Bank of India account of the petitioner and correspondingly credited in the bank account of the respondent. The respondent issued a post dated cheque of Rs.2,66,66,712/- in favour of the petitioner in respect of Invoice No.STC/GOLD/MASUMI/0045/07-08. The said cheque was dishonoured with remark "stop payment." The respondent issued a post dated cheque of Rs.2,77,57,125/- dated 1st December 2009, cheque of Rs.3,07,14,807/- dated 1st December 2009, cheque of Rs.2,23,40,321/- dated 1st December 2009 and cheque of Rs.3,71,34,252/- dated 1st December 2009 which were dishonoured with the remark "stop payment."

24. Several other cheques were issued by the respondent in favour of the petitioner in lieu of the amount having credited in the account of the respondent and debited in the account of the respondent but all the cheques were dishonoured with remark "stop payment." Sometime in the year 2011, the petitioner filed a summary suit on the basis of the dishonoured cheques, corporate guarantees and personal guarantees. Notice of Motion No.1697 of 2012 filed by the respondent in the said summary suit under Section 8 of the Arbitration and Conciliation Act, 1996 came to be dismissed. Appeal against the said order dated 13th January 2014 is also dismissed by the Appeal Court as not maintainable. Special Leave Petition filed by the respondent is also dismissed.

Submissions of both the parties in Company Petition Nos.277 of 2011 and 128 of 2011 :-

25. Mr.Sancheti, learned senior counsel appearing for the petitioner invited my attention to the agreement dated 15th December 2006 and also to other documents executed by and between the parties and the correspondence forming part of the record. He submits that under the said agreement dated 15th December 2006, the realization of export proceeds from the foreign buyers was the responsibilities of the respondent besides the successful execution of the export order. The said contract provided for 'Mode/Terms of Payment'. The petitioner was to retain 1.5% on C.I.F. value of the export as Trading Margin plus 5% towards interest and bank charges etc. and was to pay the balance amount to the respondent against the post dated cheques of equivalent amount. The said cheques were to be retained by the petitioner till realization of the export proceeds from the foreign buyers and final settlement of the account.

26. It is submitted that on receipt of the payment of the export bills from the foreign buyers after making final adjustment of its Trading Margin, bank charges, interest and any other dues and funds released to the respondent on discounting, net available export proceeds would be released to the respondent. He submits that accordingly, the petitioner had discounted those bills. The foreign buyers, however, did not release any amount to the petitioner in respect of the said gold jewellery items exported by the petitioner. He submits that though the petitioner invoked the corporate guarantees and personal guarantees given by the respondent, the respondent did not pay any amount to the petitioner.

27. It is submitted by the learned senior counsel that as per the terms of

the said agreement, the petitioner had released 83.5% out of the finance received from the Standard Chartered Bank/Exim Bank of the petitioner after making certain deductions permissible under the said contract. He submits that the application filed under Section 8 of the Arbitration and Conciliation Act, 1996 by the respondent in the summary suit filed by the petitioner is dismissed by this Court. The appeal as well as the Special Leave Petition filed by the respondent are also dismissed. He submits that all post dated cheques issued by the respondent in favour of the petitioner towards payment of the said 83.5% made by the petitioner to the respondent were also dishonoured with remark "stop payment." It is submitted that the petitioner had released payment through its bankers to the respondent in the sum of Rs.366.54 crore and final payment of Rs.71,46,05,222/- to the respondent till September 2008. The respondent never raised any objection on the said transaction taken place after September 2008. He submits that the total outstanding amount recoverable from the said foreign buyers against each and every invoices is US \$ 11381500 equivalent to Indian Rs.82,96,73,548/-.

28. Learned senior counsel invited my attention to statement no.1 at page 167 i.e. part of the affidavit-in-reply and submits that there is no dispute between the parties in respect of the said statement no.1 since the payment of the said transaction had been realized from the foreign buyers and the balance of the said post shipment finance was made by the petitioner to the respondent as per the agreement dated 15th December 2006. He submits that as regards the statement no.2 at page no.168 of the company petition mentioned in the affidavit-in-reply, a sum of Rs.52,79,77,683/- has been remitted by the petitioner to the respondent as post shipment finance being 83.5% through its bankers and had raised separate invoices to the foreign buyers towards those transactions. The petitioner had not received any final remittance from the foreign buyers except serial no.10, 11 and 12 of the said statement.

29. It is submitted that since the respondent has received post shipment finance as against the serial nos.1 to 9, 13 to 18 upto 83.5% through the bankers of the petitioner, the respondent has reimbursed the amount of the said post shipment finance by issuing post dated cheques for the value of invoice value. The petitioner has accordingly utilized the payment of the said post dated cheques towards corresponding invoices issued by the petitioner to the said foreign buyers at serial nos.1 to 9 and 13 to 18 of the statement no.2. The said post dated cheques are dishonoured and the petitioner has filed separate proceedings against the respondent on the said dishonoured cheques. It is submitted by the learned senior counsel that the respondent had requested the petitioner to adjust overdue payment of the Exim bank against the export document of cut and polished diamond. The petitioner had accordingly adjusted the said export documents against the outstanding of export gold jewellery. The petitioner did not receive any payment from the foreign buyers towards the said export cut and polished diamonds as against the corresponding invoices issued by the petitioner against the said foreign buyers. The total amount of the said various corresponding invoices comes to Rs.73,30,31,836/-.

30. The petitioner has given credit of Rs.65,32,65,360/- to the respondent being 90% of the value of the said invoices of export of cut and polished diamonds. He submits that the total outstanding amount due and payable by the respondent in respect of the invoices of the export of cut and polished diamonds is in the sum of Rs.73,30,31,836/-.

31. In the Company Petition No.128 of 2011, learned senior counsel invited my attention to the documents annexed to the petition and also to various affidavits. It is submitted that pursuant to the request made by the respondent for adjusting the outstanding invoices of the gold jewellery towards invoices of cut and polished diamonds and requesting the petitioner and the Exim bank to give NOC allowing the respondent to receive the export/sale proceeds from the foreign buyers directly into the Axis bank account of the respondent, the petitioner and the Exim Bank gave their NOC on the assurance that the export/sale proceeds would be paid to them within a period of 1 month.

32. It is submitted that though the respondent received payment from the foreign buyers towards various invoices directly in its Axis Bank account, the respondent did not pay the outstanding dues of the petitioner despite there being no dispute in respect of the said invoices. He submits that the Axis Bank had already issued a 'Certificate of Foreign Inward Remittance' in respect of the Invoice No.STC/GOLD/MASUMI/0001/09-10 evidencing a payment of US \$ 713615. Similar certificates were issued by the Axis Bank in respect of various other invoices. It is submitted by the learned senior counsel that the respondent has thus received double payment and has dishonestly refused to pay the dues of the petitioner. Those banks through whom the bills were discounted have raised a claim against the petitioner before Debts Recovery Tribunal.

33. It is submitted by the learned senior counsel that the respondent is heavily indebted and has taken an undue advantage of the petitioner accepting the request of the respondent for adjustment of the payment. He submits that the respondent being unable to pay its debts, these two company petitions filed by the petitioner deserve to be admitted and the official liquidator be appointed as a provisional liquidator of the respondent-company with all powers under the provisions of the Companies Act, 1956.

34. It is submitted by the learned senior counsel that the petitioner did not make any claim in respect of 8 invoices in these company petitions. The petitioner has been paying the dues of the banks though the amounts were not released by the respondent. He submits that transactions between the parties are not in dispute. The invoices are also not in dispute.

35. Learned senior counsel invited my attention to various allegations made in the affidavits filed in the aforesaid two petitions and submits that the respondent has raised various false and dishonest defences which are ex facie moonshine and cannot be accepted by this Court. He submits that Company Petition No.128 of 2011 relates to the discounting of the bills through the Exim bank whereas the Company Petition No.277 of 2011 relates to the bills discounting by the petitioner through the

Standard Chartered Bank. Statement of Outstanding Export Bills finance by the Exim Bank of gold jewellery is relating to 5 invoices whereas 8 invoices are relating to cut and polished diamonds which were replaced with 20 gold invoices. He submits that the respondent has raised a false plea raising a claim of Rs.11,74,04,418/- against the petitioner instead of paying the legitimate dues of the petitioner. He submits that no counter claim has been made by the respondent against the dues of the petitioner till date. He submits that the liability of the Exim Bank is admitted by the respondent. My attention is invited to the letter of the Exim bank to the petitioner.

36. Learned counsel appearing for the respondent, on the other hand, submits that the arbitral tribunal for adjudication of the dispute between parties has been already constituted. The arbitral tribunal has already issued a direction to the parties to file pleadings. The respondent has already filed statement of claim along with documents before the arbitral tribunal. The respondent has also deposited the fees of the arbitral tribunal including the contribution of the fees of the petitioner. No counter claim has been filed by the petitioner before the arbitral tribunal. He submits that the summary suit filed by the petitioner is still pending. The respondent has already filed the affidavit-in-reply in the summons for judgment. The said summons for judgment is still pending. It is submitted by the learned counsel that insurance claim is not properly pursued by the petitioner. The petitioner has filed complaints against some of its officers.

37. It is submitted that the respondent has raised substantial defence not only in the affidavit-in-reply but also in the correspondence. He submits that the disputed question of facts cannot be adjudicated upon in the company petition. It is submitted that the cut and polished diamond documents were without recourse and thus the petitioner could not have raised any claim against the respondent even if the foreign buyers had not released the payment to the petitioner or even if the respondent had not released any payment to the petitioner. He submits that tripartite agreement had been entered into between the foreign buyers, the petitioner and the respondent. It is submitted that the petitioner has received about Rs.151 crores by discounting some of the bills and did not release any payment to the respondent. He submits that no claim is made by the petitioner against the respondent in respect of cut and polished diamond transaction. He submits that in view of tripartite agreement in respect of the said transaction, there is no obligation of the respondent to make any payment to the petitioner. He invited my attention to the said alleged tripartite agreement dated 16th June 2009.

38. In so far as the dispute arising out of the cut and polished diamond transactions is concerned, the learned counsel for the respondent submits that the petitioner did not invoke arbitration agreement against the foreign buyers. He submits that no amount is received by the respondent from the foreign buyers in respect of the cut and polished diamond transaction. He submits that the respondent is not aware whether the petitioner has received any amount from the Exim Bank or not. Learned counsel for the respondent placed reliance on the judgment of the Delhi

High Court in the case of German Homoeopathic Distributors Pvt. Ltd. Vs. Deutsche Homeopathic-Union Dhu-Arzneimittel Gmbh & Co., reported in (2009) 150 Comp Cas 887 (Delhi) and submits that since the respondent has to recover substantial amount from the petitioner, this company petition cannot be entertained by this Court.

39. Learned counsel for the respondent also placed reliance on the judgment of the Supreme Court in the case of Pradeshiya Industrial & Investment Corporation of U.P. Vs. North India Petrochemicals Ltd. and Anr., reported in (1994) 3 SCC 348 and in particular paragraphs 26 to 30 in support of the submission that the machinery for winding up cannot be allowed to be utilized merely as a means for realising its debts due from a company. Reliance is placed on the said judgment in support of the plea that since the subject matter of this company petition is pending adjudication before the arbitral tribunal, this company petition cannot be entertained by this Court.

40. Learned counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of Everest Holding Limited Vs. Shyam Kumar Shrivastava & Ors., reported in (2008) 16 SCC 774 and in particular paragraph 27 in support of the submission that though the arbitral tribunal would have no power to order for winding up of the company, the arbitral tribunal can find out and adjudicate as to whether or not a company is functional and if it was found not functional, the arbitral tribunal can always find out the nature and status of its assets and can also issue direction and pass orders regarding dues and liabilities and also for taking recourse to appropriate remedy.

41. Mr. Sancheti, learned senior counsel for the petitioner in rejoinder submits that on 20th July 2009, the said so called tripartite agreement is already cancelled. He submits that cancellation of the said tripartite agreement is not challenged by the respondent. The officers of the petitioner who had alleged to have signed the said tripartite agreement had no authority to execute such agreement. He submits that those bills were not discounted by the petitioner at all. It is submitted that if according to the respondent, in view of the tripartite agreement or in view of the said bills, cut and polished diamond documents were submitted without recourse and no amount could be claimed from the respondent by the petitioner, the respondent would not have requested the petitioner to grant extension to the foreign buyers to release the payment. He submits that this defence of the respondent is thoroughly dishonest and is contrary to the documents on record. It is submitted that it is the case of the petitioner that the petitioner did not receive any payments from the foreign buyers and thus under the agreement entered into between the parties, it was the responsibility of the respondent to pay to the petitioner in respect of such dues not paid by the foreign buyers. He submits that foreign customers of the respondent could have informed the respondent about the payment, if any, alleged to have been made to the petitioner.

42. Mr. Sancheti, learned senior counsel for the petitioner in both the aforesaid petitions invited my attention to the order and judgment dated

5th September 2014 delivered by the Division Bench of this Court in the case of State Trading Corporation of India Ltd. Vs. M/s. Ushma Jewellery & Packing Exports Pvt. Ltd. in Appeal (L) No.191 of 2014 in Company Petition No.311 of 2011 and would submit that in the similar facts considered by the Division Bench of this Court, this Court has held that there was no bonafide defence of the company and has admitted the company petition.

43. Division Bench of this Court in the judgment delivered in case of State Trading Corporation of India Ltd. Vs. M/s. Ushma Jewellery & Packing Exports Pvt. Ltd. (supra) has considered the identical facts and has held that the respondent in that matter was responsible if the foreign buyers did not release the payment of export bills. It is held by the Division Bench that the company petition was not filed on the basis of the agreement entered into between the parties only but also on the basis of the corporate guarantee and other documents. In that matter also, the respondent had received payment directly from the foreign customers and did not release any amount to the appellant i.e. State Trading Corporation of India Ltd. This Court has held that the defence raised by the respondent therein was not bonafide and has set aside the impugned judgment and order dismissing the company petition and has admitted the said company petition filed by the State Trading Corporation of India Ltd. In my view, the facts before the Division Bench of this Court and the facts in this case are identical. The principles laid down by the Division Bench in the said Appeal (L) No.191 of 2014 would apply to the facts of this case. I am respectfully bound by the said judgment.

44. Learned counsel for the respondent placed reliance on the order dated 7th/8th March 2016 passed by the Additional Directorate General of Foreign Trade in the appeal filed by the respondent herein imputing the act of the authority placing the name of the petitioner in the Denied Entity list on 25th November 2011. By the said order, the said appellate authority has ordered withdrawal of show cause notice and addendum issued by the authority and also ordered to remove the name of the petitioner from Denied Entity list.

45. Mr.Sancheti, learned senior counsel submits that the said order dated 7th/8th March 2016 passed by the Additional Directorate General of Foreign Trade is not relevant for the purpose of deciding these matters and in any event would not be binding on this Court. He submits that the said order was passed by the appellate authority without hearing the petitioner.

REASONS AND CONCLUSIONS :-

46. With the assistance of the learned senior counsel for the petitioner and learned counsel for the respondent, I have perused the pleadings of the parties, documents annexed to both the petitions and the affidavits. There is no dispute that the parties had executed an agreement on 15th December 2006. Under the said agreement, the respondent had undertaken to obtain export orders from the prospective foreign buyers in the name of the exporter. The terms of payment of the export orders was DA 90-120 days Usance from the date of BL/AWB. The realization of the

export proceeds from the foreign buyers was the responsibility of the respondent besides successful execution of the export orders. The shipping documents were to be prepared and signed by the respondent and were to be submitted to the petitioner who was required to present such documents for negotiations with their bank.

47. The petitioner was required to release the said amount after deducting certain charges from the said amount to the respondent. It is not in dispute that the petitioner had released 83.5% of the bills discounted by the petitioner to the respondent. The respondent had also issued 7 post dated cheques to the petitioner to the tune of 83.5% of the amount. Admittedly, the said cheques upon deposit were dishonoured with remark "stop payment." The corporate guarantees and personal guarantees executed by the respondent were not honoured when invoked by the petitioner.

48. A perusal of the correspondence exchanged between the parties clearly indicates that the foreign buyers did not release the payment to the petitioner on due date or otherwise in respect of some of the invoices. The correspondence further indicates that the respondent had made a request to the petitioner from time to time to permit the respondent to make adjustment of the bills in respect of the cut and polished diamond documents as against the outstanding bills of gold export transaction. Similar request was made by the respondent also to the Exim Bank. The petitioner accepted the said request of the respondent and gave its NOC to make the payment directly by the foreign buyers through the banks in the account of the respondent. It is not in dispute that the respondent has received payment in respect of several such transactions from the foreign buyers through the bankers directly in the account of the respondent. The petitioner did not receive any further amount from the foreign buyers and at the same time also from the respondent.

49. A perusal of the record also indicates that the respondent has received 83.5% of the amount received by the petitioner upon discounting the gold export documents and at the same time received 100% from the foreign buyers in respect of the cut and polished diamond documents. The respondent, however, refused to make any payment to the petitioner or to the bankers of the petitioner with whom the petitioner had discounted those bills. As a result of this non-payment, though the respondent was under an obligation to make payment to the petitioner or to the bankers of the petitioner, the respondent has raised a dispute and has filed recovery proceedings. The petitioner has been making payment to those bankers though the said liability was to be discharged by the respondent. If the respondent would have released the payment to the petitioner, the respondent would have discharged the liability of its bankers.

50. In so far as the submission of the learned counsel for the respondent that the petitioner has filed a summary suit and summons for judgment is pending is concerned, in my view, even if the petitioner has filed a summary suit against the respondent, there is no bar in prosecuting the winding up proceedings against the same party. The company petition is

not for recovery of money claim but is for winding up.

51. I am not inclined to accept the submission of the learned counsel for the respondent that since the arbitration proceeding filed by the respondent is pending before the arbitral tribunal, this Court cannot pass any order in these winding up proceedings filed by the petitioner on the ground that the respondent is unable to pay its debts. It is the case of the petitioner that the liability of the petitioner is an admitted liability. The respondent is however has dishonestly refused to pay the legitimate dues of the petitioner. The respondent is heavily indebted to the petitioner as well as several other creditors.

52. A perusal of the record indicates that the respondent has admitted the fact that the foreign buyers with whom the gold export transaction had taken place did not pay any amount in respect of some of the bills to the petitioner. The respondent was fully aware of non-payment of such amount by those foreign buyers and has expressed difficulty by those foreign buyers to make payment. The respondent had repeatedly requested the petitioner to grant extension of time to the foreign buyers to make payment. At the same time, the respondent also requested the petitioner to allow adjustment of the outstanding dues in respect of the gold export transaction against the said cut and polished diamond transaction. The respondent also agreed to release the payment to the petitioner if the payments were directly made by those foreign buyers by the petitioner in respect of various dues of the petitioner. The respondent wanted to have further transaction with those foreign buyers through the petitioner with a view to continue the business relations.

53. A perusal of the record clearly indicates that after receiving the amount directly from the foreign buyers through the bankers, the respondent has taken a dishonest stand and has raised a frivolous claim against the petitioner instead of releasing its dues. No counter claim is filed by the respondent in the suit filed against the petitioner.

54. In so far as the submission of the learned counsel for the respondent that there was a tripartite agreement and thus no amount is due and payable by the respondent to the petitioner is concerned, Mr. Sancheti, learned senior counsel for the petitioner invited my attention to a document thereby cancelling the said tripartite agreement. It is an admitted position that the respondent did not challenge the said cancellation of tripartite agreement till date. The application filed under Section 8 of the Arbitration and Conciliation Act, 1996, by the respondent in the said summary suit is dismissed. The appeal as well as the Special Leave Petition filed by the respondent arising out the said order are also dismissed. The said suit is still pending.

55. In so far as the submission of the learned counsel for the respondent that cut and polished diamond documents were without recourse and thus no amount could be recovered from the respondent is concerned, the respondent could not produce any document in support of this frivolous plea. If according to the respondent, the said diamond documents were without recourse, the respondent would not have asked the petitioner to grant extension of time to the foreign buyers to make payment by

expressing their difficulty and would not have applied for adjustment of the liability. In my view, this defence raised by the respondent is also thoroughly dishonest and moonshine. In my view, the respondent has deliberately not paid the legitimate dues of the petitioner and is unable to pay its debts. In view of the fact that the liability of the respondent against the petitioner is substantial and since the respondent is unable to pay its debts, it would be in the interest of justice, the official liquidator shall be appointed as a provisional liquidator as prayed by the petitioner during the pendency of the petition.

56. In so far as the judgment of the Delhi High Court in the case of German Homeopathic Distributors Pvt. Ltd. Vs. Deutsche Homeopathic-Union Dhu-Arzneimittel Gmbh & Co. (supra) relied upon by the learned counsel for the respondent is concerned, it is not in dispute that the application under Section 8 of the Arbitration and Conciliation Act, 1996 filed by the respondent in the summary suit filed by the petitioner is rejected by this Court. The appeal as well as the Special Leave Petition filed by the respondent are also dismissed. The respondent did not file any counter claim in the said summary suit filed by the petitioner. This proceeding is not for recovery of money which money claim is the subject matter of the said summary suit filed by the petitioner.

57. The Civil Court cannot pass any order for winding up of the respondent on the ground that the respondent is unable to pay its debts or on any other grounds. The Delhi High Court in the said judgment in the case of German Homeopathic Distributors Pvt. Ltd. Vs. Deutsche Homeopathic-Union Dhu- Arzneimittel Gmbh & Co. (supra) has held that as regards the prima facie proof of a bona fide character of a counterclaim, the burden lies on the party who sets-up the counterclaim, which burden can be discharged by producing sufficient material in support. The adequacy of the material cannot be objectively defined but it should convince the learned Company Judge that the counterclaim requires to be adjudicated in detail by a Civil Court. In my view, merely because the summary suit filed by the petitioner for recovery of the money and the claim filed by the respondent before the arbitral tribunal against the petitioner is concerned, that cannot be a ground for not entertaining the company petition which is for winding up of the respondent and not for recovery of the money. Judgment of the Delhi High Court in the case of German Homeopathic Distributors Pvt.Ltd.Vs. Deutsche Homeopathic-Union Dhu- Arzneimittel Gmbh & Co. (supra) thus would not assist the case of the respondent.

58. In so far as the judgment of the Supreme Court in the case of Pradeshiya Industrial & Investment Corporation of U.P. Vs. North India Petrochemicals Ltd. and Anr. (supra) relied upon by the learned counsel for the respondent is concerned, it is held by the Supreme Court that a debt under Section 433 of the Companies Act, 1956 must be a determined or a definite sum of money payable immediately or at a future date. The Supreme Court has adverted to the earlier judgment of the Supreme Court in the case of Madhusudan Gordhandas v. Madhu Woollen Industries Pvt. Ltd., reported in (1972) 42 Comp Cas 125 in which it has been held by the Supreme Court that where there is no

doubt that the company owes the creditor a debt entitling him to a winding-up order but the exact amount of the debt is disputed, the court will make a winding-up order without requiring the creditor to quantify the debt precisely. It is held that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company.

59. In the matter before the Supreme Court, the appellant was not a debtor because it was a financial institution for an amount which was agreed to be subscribed. Neither the learned Single Judge nor the Division Bench had decided this important question whether there was a debt and the company had either neglected or was unable to pay. However, in the facts of this case, the agreement entered into between the parties including the corporate guarantees submitted by the respondent clearly indicates that in the event of foreign customers of the respondent would have refused to make payment to the petitioner, the respondent was liable to pay to the petitioner for such transaction. The respondent had agreed to pay to the petitioner upon those foreign parties paying directly to the respondent subsequently and has also issued cheques which were dishonoured with remark "stop payment." In my view, there was a clear debt which was agreed to be paid by the respondent to the petitioner which the respondent failed and neglected to pay and was unable to pay to the petitioner. There is no dispute about the principles laid down by the Supreme Court in the said judgment. The said judgment, however, is clearly distinguishable in the facts of this case on the ground that defence in this case raised by the respondent is not substantial but is moonshine and is not bonafide.

60. In so far as the judgment of the Supreme Court in the case of Everest Holding Limited Vs. Shyam Kumar Shrivastava & Ors. (supra) relied upon by the respondent is concerned, Supreme Court has held that though the arbitrator would have no power to order for winding up of the company, as such power conferred or vested in the Court as envisaged under the Companies Act, 1956, however, in terms of the arbitration agreement, the arbitrator can always find out and adjudicate as to whether or not a company is functional and if it was found not functional, the arbitral tribunal can always find out the nature and status of its assets and can also issue direction and pass orders regarding dues and liabilities and also for taking recourse to appropriate remedy. The parties agreed before the Supreme Court in that case to refer the dispute to the arbitration. The matter was accordingly referred to a retired Judge of the supreme Court. Supreme Court accordingly appointed the learned arbitrator and disposed of the said appeal. The decision was rendered by the Supreme Court not arising out of the provisions of the Companies Act, 1956 but was rendered in an arbitration petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996. The said decision of the learned designated Judge of the Supreme Court who decided the said application under Section 11(6) of the Arbitration and Conciliation Act, 1996 in the year 2008 otherwise also cannot be considered as a binding precedent. The said decision of the learned designated Judge of the Supreme Court thus would not assist the case of the respondent.

61. I therefore pass the following order :-

a) Company Petition Nos.277 of 2011 and 128 of 2011 are admitted and shall be made returnable on 21st August 2017.

b) The petitioner shall advertise the Company Petition No.277 of 2011 in two local newspapers, viz. "Free Press Journal" (in English) and "Navshakti" (in Marathi) and also in Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette and any resultant inadequacy of the notice shall not invalidate such advertisement and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959.

(c) The learned counsel appearing for the respondent-company waives service of the company petition under Rule 28 of the Companies (Court) Rules, 1959.

(d) The petitioner shall also deposit an amount of Rs.10,000/- in the Company Petition No.277 of 2011 with the Prothonotary and Senior Master of this Court towards the publication charges, with intimation to the Company Registrar within three weeks from the date of admission of the petitions failing which, both the petitions to stand dismissed for non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be returned to the petitioner.

(e) The petitioner is not required to advertise the Company Petition No.128 of 2011 in view of the order for advertisement in Company Petition No.277 of 2011.

(f) There shall be interim relief in terms of prayer clause (c). Till the official liquidator takes possession in terms of prayer clause (c), there shall be interim relief in terms of prayer clause (d).

(g) The official liquidator to act on the authenticated copy of this order.

. At this stage, learned counsel appearing for the respondent seeks stay of advertisement of the Company Petition No.277 of 2011 as well as for appointment of Official Liquidator and other interim reliefs granted by this Court. Order of advertisement and appointment of liquidator is stayed for a period of four weeks from today.

3 The company filed an appeal (lodging) no.249 of 2017 against this order of admission which was withdrawn as recorded in the order dated 11th July 2017. Subsequently, the company filed a review petition no.6 of 2017 against the order of admission which came to be dismissed by an order dated 2nd July 2018. Against this order, the company preferred a special

leave petition which also came to an end and the company was given opportunity to file Letter Patents Appeal (LPA) against the order of admission. The company preferred an appeal and the counsel for respondent company states that the appeal also has been dismissed. There is no stay against this winding up petition being taken up for hearing. After the petition was admitted and the detailed admission order was passed, no fresh affidavit has been filed by the company to explain why the situation that prevailed when the admission order was passed does not prevailed now. At the time of admission, the company had also filed affidavits in reply opposing the petition and those affidavits in reply have been considered and the detailed admission order has been passed. Therefore, I see no reason why I should reopen all those arguments which have been already considered by this Court and rejected by the Appeal Court. No new case is made out or submissions made. Even today nothing is coming forth from the company as to when they would pay the debt to petitioner.

4 Mr. Jain, counsel for petitioner tenders an affidavit of one Vishwanath V. Mandavkar affirmed on 6th August 2018 confirming advertising the petition in Free Press Journal and Navshakti on 19th July 2018 and in the Maharashtra Government Gazette for the period 26th July - 1st August 2018 at Serial No.M-18124. Notice under Rule 28 of the Companies (Court) Rules 1959 had been waived as recorded in paragraph 61(c) of the admission order.

5 In the circumstances, having considered the order of admission, even I am satisfied that the company requires to be wound up because the company is unable to discharge its debts and is commercially insolvent.

6 The company petition is allowed in terms of prayer clauses – (a) and (b) which read as under :

(a) that the Respondent Company, i.e., M/s. Masumi Overseas Pvt. Ltd., be ordered to be wound up by an order of this Hon'ble Court;

(b) that the Official Liquidator, High Court, Bombay be appointed as Liquidator of the Respondent Company with all powers under the Companies Act, 1956 including the power to take possession of all the assets, books of accounts, stock in trade, cash on hand, moveable properties including future and fixtures as well as all immoveable properties.

7 Official Liquidator, within two weeks, to take steps upon receiving an authenticated copy of this order from the advocate for petitioner without waiting for any notification. The counsel for petitioner is also directed to forward a copy of this order to National Company Law Tribunal for information.

8 Upon receipt of the authenticated copy from petitioner's advocate, Official Liquidator shall forthwith cause notice to all concerned Directors calling upon them to file their respective statement of affairs strictly in consonance with the provision of law. All Directors of respondent company, now in liquidation, are hereby directed to file their respective statement of affairs as required under Section 454 of the Companies Act

1956, failing which Official Liquidator shall proceed further and lodge criminal complaint against the erring Directors, without seeking prior sanction of this Court for initiation of criminal prosecution.

9 Company petition accordingly stands disposed.

COMPANY PETITION NO.128 OF 2011

1 In view of the above order passed in company petition no.277 of 2011, this petition also stands disposed with liberty to petitioner to lodge their proof of debt with Official Liquidator, who shall consider the same in accordance with law.

2 If the order dated 10th September 2018 in company petition no.277 of 2011 winding up respondent company – M/s. Masumi Overseas Private Limited is recalled or set aside in appeal, liberty is given to petitioner to revive this petition and move once again for necessary orders including winding up of respondent company.

(K.R. SHRIRAM, J.)

Gauri
Amit
Gaekwad

Digitally signed
by Gauri Amit
Gaekwad
Date:
2018.09.11
19:31:57 +0530