IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.787 OF 2015

Barclays Bank PLC)....Petitioner

Versus

M/s.Precision Cars India Pvt. Ltd.)....Respondent

Mr. Chetan Kapadia a/w Mr.Abhishek Bhadang and Mr.Parikshit Desai i/by Hiren Mehta for petitioner.

Mr. Rishabh Shah i/by Raval Shah for respondent.

CORAM : K.R.SHRIRAM,J
DATE : 7.6.2018.

PC

1 By the present petition, petitioner is seeking winding up of the company Precision Cars India Pvt. Ltd. (the said company) on the ground that the company is unable to discharge its debts.

2 Petitioner is a banking company and the claim of the petitioner is based on the default in respect of various financial facilities that were provided to the company. The record indicates that petitioner has advanced these facilities to the company under different heads in excess of Rs.50 crores. The company had also executed a demand promissory note dated 12.6.2012 to that effect.

The agreement between the parties provided for maintaining a running account by petitioner and entitlement of the petitioner to interest for the late payment. It is the case of petitioner that the company failed to pay the amount due and payable and there is a liability of Rs.61,08,23,141.04/- which includes interest calculated upto 31.10.2013. As the company failed and neglected to pay this amount, despite admission of liability and repeated assurances of settling the dues of petitioner, petitioner caused a notice dated 31.12.2014 issued through its advocate. Respondent replied to the statutory notice vide its letter dated 28.1.2015 not disputing the liability but taking a stand that it has huge amounts of receivable from its sub-dealers who are not making payments for various reasons.

3 The petition came to be admitted by an order dated 12.7.2017. Paragraph nos.1 to 5 of the order of admission is reproduced for ease of reference as under :-

> *"1. By the present petition under Section 433(e) and 434 of the Companies Act, 1956 the petitioner has prayed for winding up of the respondent company namely M/s. Precision Cars India Pvt. Ltd.*
>
> *2. The petitioner is a banking company and the claim of the petitioner is based on the default in respect of various financial facilities provided to the respondent company. The record indicates that the petitioner had advanced financial facilities to the respondent under different heads*

to the tune of Rs.50.00 Crores (Fifty Crores). The respondent has executed a demand promissory note dated 12.6.2012 to that effect. The contract between the parties provide for maintaining a running account by the petitioner and entitlement of the petitioner to levy interest on delayed payment. It is the case of the petitioner that the respondent failed to pay the amount due and payable by the respondent and thus, liable to pay an amount of Rs.61,08,23,141.04ps. Which includes interest upto 31.10.2014. As the respondent failed to pay the said amount to the petitioner, the petitioner issued a statutory notice dated 31.12.2014. The respondent by its reply dated 28.1.2015 did not seriously dispute about its liability and inter alia has stated that the receivables i.e. amount due from their sub dealers are already over due and their suppliers are not able to make the payment for various reasons.

3. As the respondent failed and neglected to pay the amount to the petitioner, the petitioner filed the present petition for winding up of the respondent company on 12.6.2017. The petition is accepted on 22.7.2015 and in pursuance of the directions issued by the Company Registrar, the petitioner has served the respondent. After receipt of the notice the respondent had caused its appearance and also filed an affidavit in reply dated 22.3.2017.

4. Heard the learned counsel for the respective parties and perused the record.

5. The record indicates that by letters dated 30.7.2012 and 21.1.2013 the respondent while accepting its liability has in fact assured the petitioner that even though there is a delay the respondent will pay all its dues. Thus, the respondent has admitted its financial liability by the sai`d letters and had sought time from the petitioner to repay the same. In the reply, the respondent has taken a categorical stand that in the sanctioned letter of loan facilities the petitioner except taking an unconditional irrevocable Stand By Letter Of Credit (SBLC) of 105% of credit facilities sanctioned to the borrower the petitioner did not take any other security from the respondent. It is *the contention of the respondent that unconditional irrecoverable SBLCs executed by the sub dealers in favour of the respondent were not invoked by the petitioner within the stipulated period after the alleged default and the petitioner now cannot blame the respondent for the loss caused to the petitioner and the petitioner cannot claim the said loss from it for the own fault of the petitioner. It is the further contention of the respondent that it is for the default of the petitioner, it could not recover the amount within stipulated period and no blame can be put on the respondent for the loss caused to the petitioner. A mere perusal of the record would indicate that while availing the various financial facilities from the petitioner, apart from executing SBLC's the respondent has also executed a demand promissory note and has further admitted its liability by its letters dated 13.7.2012 and 21.1.2013. It prima facie appears to me that the defence as raised by the respondent is not bonafide and is spurious, illusory and misconceived and has been adopted only with a view to defeat the bonafide claim of the petitioner. In view thereof, it prima facie appears that the respondent is unable to pay the debt of the petitioner and is commercially insolvent".*

4 Against this order, the company preferred an appeal being Appeal (L) NO.311 of 2017 which came to be dismissed by an order dated 30.10.2017. It will be useful to reproduce paragraph nos.3 & 7 of the said order because the defence of the company today is the same that it took at the time of admission and in the appeal. Paragraph nos.3 & 7 read as under :-

"3. The Appellant herein after receipt of the notice in the above Company Petition has filed its affidavit-in-reply dated 22/03/2017. The learned Single Judge has considered the material on record which included the

letters dated 30/07/2012 and 21/01/2013 by which letters, the Appellant has in fact assured the Respondent i.e., the original petitioner that even though there is a delay, the Appellant would clear its dues. The learned Single Judge on the said basis has recorded that the Appellant has admitted its financial liability by the said letters and has sought time from the Petitioner to repay the same. The learned Judge has also found the defence taken by the Appellant that the Respondent could have invoked the Stand By Letters of Credit (SBLCs), which were to the extent 105% of the credit facilities within the stipulated period lacking in bonafides and spurious. The learned Single Judge resultantly has admitted the Company Petition and has issued the directions, which have been adverted in the earlier part of this order.

4.......

5.......

6.......

7. We have considered the rival contentions. As indicated above, the foundation of the case of the Appellant as urged by the learned counsel was based on the SBLCs, which were executed in favour of the Respondent Bank by the sub-dealers of the Appellant. In our view, the correspondence which ensued between the parties, disproves the case of the Appellant that having not invoked the SBLCs, the Respondent Bank could not have filed the above Company Petition for winding up of the Appellant. In our view, merely because the SBLCs were executed in favour of the Respondent bank, by the sub-dealers of the Appellant, the same would not absolve the Appellant of its liabilities, which in fact it has accepted. In our view, the learned Single Judge was justified in recording the finding that the defence taken by the Appellant was not bonafide and spurious. It is well settled that if the defence taken by the Respondent to a Company Petition is found to be frivolous and moonshine, apart from lacking bonafides and spurious, then appropriate orders are required to be passed in the Company Petition including the directions of the kind which are issued by the impugned order. In our view, therefore the impugned order passed by the learned Single Judge, does not merit any interference in the

Appellate jurisdiction. The Appeal is accordingly dismissed."

5 On 11.1.2018 when this petition was taken up for hearing, Shri Arif Bookwala, senior advocate appeared for the company. His submissions were in effect that the dealers of the company had executed stand by letters of credit in favour of petitioner which petitioner could have invoked in view of the default made by the company. Shri Bookwala had submitted that since the petitioner had failed to invoke those letters of credit, that would in effect absolve the company of its liability to petitioner. As the matter was inconclusive, it was stood over to 1.2.2018 and then to 8.2.2018, 22.2.2018, 26.2.2018, 28.2.2018 and then 6.3.2018. On 6.3.2018 Deputy Official Liquidator who was present in court informed the court that name of the company Precision Cars India Pvt. Ltd. has been struck off from the register of companies by the Registrar of Companies. At that stage, Shri Bookwala was in confusion whether he would continue to represent the company which has been struck off and requested the matter be stood over to 15.3.2018 so that he can consider the issue and seek instructions. Matter was thereafter taken on 22.3.2018 and the court was informed by the advocate on record that the Company Secretary of the company was present in

court and that he has filed an application before the NCLT, Mumbai for setting aside the order of striking off the name of the company from the register of companies. Thereafter the matter was listed on 13.4.2018 and stood over to 26.4.2018 and on 26.4.2018 it was stood over to 7.6.2018. Even today the status of the company is “struck off”.

6 Shri Kapadia submitted that even if the name of the company is struck off, relying on the judgment in ***Real Time Interactive Media Pvt. Ltd. Vs. Metro Mumbai Infradeveloper Pvt. Ltd.***[1] the company can be straightway wound up.

7 I have perused the petition, the affidavit in reply, rejoinder, further affidavits and also considered the submissions made. Admittedly, petitioner had extended various facilities to the company. Admittedly, amounts were payable by the company to petitioner. So far as the stand of the company that petitioner could have invoked the SBLC and failure to invoke SBLC absolve the company of its liability to petitioner, in my view also is not bonafide, bogus and dishonest. The last of the SBLCs, copy whereof is at Exh.A10 expired on 16.4.2012. There are atleast 8 communications

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after that date. At Exh.B to the petition is an email from Ashish Chordia addressed to petitioner in which it is stated "we have not been able to keep the payment deadlines due to various reasons". At Exh.B2 to the petition is a letter dated 30.7.2012 from the company to petitioner in which it is stated as under :-

> *"I write in reference to the limits sanctioned to us in Precision Cars India Private Limited.*
> *As apprised to Geoff and you in our last meeting we have some legal disputes with our supplier due to which our business is affected temporarily. However, we are fully committed to making good our commitments to Barclays Bank Plc and we will be able to do so in the manner below :*
> *. Making the account regularized by 15th August 2012*
> *. Making the account fully paid by 10th September 2012*
> *We have initiated actions to bring in capital by liquidation of some investments, which had hoped would be done last week but it will now take place on 13th August 2012 hence the delay in our commitments.*
> *Please be rest assured, even though delayed slightly we will pay all our dues and keep our commitments as listed above."*

8 At Exh.B3 to the petition is a letter dated 13.8.2012 from the company to petitioner which reads as under :-

> *"I write in reference to the limits sanctioned to us in Precision Cars India Private Limited and our previous communication dated 30th July 2012.*
> *The capital which was anticipated from the liquidation of our investments is taking slightly longer and will be received by the end of the week.*
> *In any case, we stay firm on our commitment for injecting the funds by 10th September, 2012.*

> *Please be rest assured, even though delayed slightly we will pay all our dues and keep our commitments as listed above."*

9 At Exh.B5 is an email dated 29.11.2012 in which it is stated as under :-

> *"We remain confident that all regularisation and clearance of dues thereafter will happen shortly".*

10 This was in response to the email dated 29.11.2012 from petitioner to company which also is reproduced hereunder :-

> *"Dear Ashish,*
> *I had been trying to reach you since last one week but not getting any response/call back.*
> *Would like to know when the account is expected to be regularised. In last meeting, you had informed me that you are going abroad to settle the matter with Porsche and Porsche has already agreed to settle the dispute at Rs.780.00 mio which will come to your account in Barclays Bank Plc by mid November. You had assured that the settlement proceeds will be utilised to liquidate your outstanding dues with us.*
> *However, nothing has happened till date. Would like to meet you urgently to discuss and understand the position as the account can not be allowed to remain in default state for such a long time."*

11 At Exh.B6 is an email from the company to petitioner which reads as under :-

"As reported to me by my office, the dues are as follows as on 21/1/13:
OD Outstanding : 34,33,38,207
LC Dues : 15,90,89,396
Total dues : 50,24,27,603
Excess Interest : 1,41,71,716
Net dues : 48,82,55,887
I need your support as follows :
1) Interest to be set at 12% for the previous and on-going
2) The limit to be kept at INR Rs.50,00,00,000.00 once the security is created
3) Upon your confirmation and approval for the above, we sign and submit the undertaking to you by today as agreed.
4) The account to be shown as regular.
5) We will clear interest monthly to not go over the limit.
6) Depending on the outcome of the case, we may be in a position to either clear everything by June 2013 or if it drags it could take up to June 2015 to clear the entire dues, we will ensure regular interest servicing until such time that the dues are fully paid.
7) SBLC's to be returned upon creating of charge on immovable property.
8) In the future if an SBLC is given with approved format for the value of the facility then immovable property to be released.

Apart from the undertaking, we are also ready and willing and able to create the extension of charge on an immediate basis upon confirmation and approval of the above understanding."

12 It is also to be noted that the company also sent an email dated 10.6.2014, copy whereof is at Exh.B to an affidavit of Rajneesh Parihar affirmed on 5.3.2018 whereby the said Ashish Chordia forwarded 5 cheques for a total sum of Rs.12,90,00,000/-

from the account of Shreyans Motor Pvt. Ltd. promoted and controlled by the same promoters. In all the cheques there was an endorsement “security check”. It is immaterial whether it was security check. The fact is that the company has acknowledged its liability to petitioner. Therefore, the defence that petitioner could have invoked the SBLCS and failure to invoke the SBLCS by the petitioner absolved the company by its liability, is dishonest and cannot be accepted. It is nothing but purely after thought. I would add that the Division Bench in paragraph-7 as quoted above, has also expressed its views that merely because the SBLCs were executed in favour of petitioner by the sub-dealers of the company, the same would not absolve the company of its liability, which in fact it has accepted. Division Bench has endorsed the view of the learned single Judge at the time of admission in recording the finding that defence of the company is not bonafide. I am bound by am in respectful agreement with the view taken by the Division Bench.

13 If one considers all the documents, almost all the documents have been signed and communication has been sent to petitioner by one Ashish Chordia who was the director of the company. This Ashish Chordia has been declared an absconder by this court.

14 On record is the affidavit of one Vijay Kanade affirmed on 13.10.2017 confirming advertising the admission of petition in `Free Press Journal' and `Maharashtra Times'. Further affidavit of Vijay Kanade affirmed on 10.1.2018 is filed confirming advertising the petition in Maharashtra Government Gazette for the period 31.8.2017 to 6.9.2017 at serial no.M-17172. At the time of admission, notice under Rule 28 has been waived. Therefore, all the formalities have been completed. There is no objection received from any party to the petition.

15 In the circumstances, having perused the petition and the documents annexed thereto once again and having heard counsel for the petitioner, I am satisfied that the company is indebted to petitioner, unable to pay its debts and is commercially insolvent and requires to be wound up.

16 Therefore, the petition is allowed in terms of prayer clauses-(a) and (b) which read as under :-

> *(a) that the Respondent viz. M/s.Precision Cars India Private Limited, a Company within the meaning of Companies Act, 1956 having its registered office at 401C, Poonam Chambers, Worli, Mumbai-400 018, be ordered to be wound up ;*

(b) that the Official Liquidator, High Court, Bombay or some other fit and proper person as this Hon'ble Court may deem fit and proper, be appointed as Liquidator of M/s.Precision Cars India Private Limited, with all powers under the provisions of Companies Act, 1956.

17 The advocate for petitioner shall, within 2 weeks, furnish a copy of this order, duly authenticated by the Associate of this court to the office of Official Liquidator. The Official Liquidator shall forthwith act thereupon without waiting for any notification appointing him as liquidator.

18 Registry to return the amount of Rs.10,000/- deposited by petitioner subject to any deductions if any.

19 Petition disposed accordingly.

(K.R.SHRIRAM,J)