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

COMPANY PETITION NO.32 OF 2015

Asset Care & Reconstruction Enterprise Ltd. ….Petitioner
Vs.
Nova Oleochem Limited ....Respondent

WITH
COMPANY PETITION NO.700 OF 2015

M/s. Oswal Minerals Limited ….Petitioner
Vs.
Nova Oleochem Limited ....Respondent

Mr. Nikhil Rajani i/b. V. Deshpande and Co. for petitioner in CP/32/2015.
Mr. Siddharth Murarka for petitioner in CP/700/2015.
None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 4th JANUARY, 2018

P.C.:

COMPANY PETITION NO.32 OF 2015

1 When this petition came up for admission, this Court was pleased to pass the following order on 21st March, 2016 :

> *This Company Petition has been filed by the Petitioner-DBS Bank Ltd to wind up the Respondent Company-Nova Oleochem Ltd. According to the Petitioner, the Respondent Company is indebted to the Petitioner Bank in the sum of Rs.3.04 Crores as on 31st October, 2014. There is no dispute that certain credit facilities such as Letter of Credit(L.C.), Buyers Credit(BCU), Packing Credit in foreign currency, Export Packing Credit and Foreign Bill Discounting were availed of by the Respondent Company from the Petitioner Bank. These facilities were unsecured. Admittedly, defaults were committed in repayment of these facilities, and therefore, the Petitioner herein filed Original Application No.157 of 2014 before the Debts Recovery Tribunal-I, Mumbai for recovery of its dues. In addition thereto, the Petitioner has also filed this Petition seeking to winding up the Respondent Company on the ground that it is unable to pay its debts. An affidavit-in-reply has been filed on behalf of the Respondent Company on the basis of which Mr. Fadia, the learned counsel for the Respondent Company, raised the following defenses:-*
>
> *(I) the winding up Petition is not maintainable in view of the fact that the Petitioner has already approached the Debts Recovery Tribunal by*

filing an Original Application for recovery of its dues;

(II) none of the agreements between the parties stipulate that the interest @12% would be charged on the facilities granted by the Petitioner Bank to the Respondent Company. In other words, the liability to pay interest is disputed.; and

(III) the deposit of Rs.1 Crore given by the Respondent Company to the Petitioner has been adjusted by the Petitioner Bank towards its dues without following the due process of law and without giving any particulars with reference to such adjustment.

2 For all the aforesaid reasons, Mr. Fadia would submit that this Petition is nothing but a pressure tactic to extract monies from the Respondent Company and therefore, ought not be entertained by this Court.

3 I have carefully gone through the papers and proceedings in this winding up petition including the affidavit-in reply filed by the Respondent Company. The record indicates that the Respondent Company, by its letter dated 25th July, 2014 has in fact admitted its liability to the Petitioner Bank. Paragraph(e) of the said letter reads as under:-

> *"(e):As such in line with our earlier requests for restructuring the account to enable us to meet our obligations honourably, we suggest to DBS Bank to consider the following:*
>
> *I) Our account is restructured as standard asset and we are permitted to pay DBS Bank within a maximum period of one year along with interest.*
>
> *II) To exhibit our earnestness in resolving the issue amicably, to convert the unsecured part of the Facilities of Rs. 3 Crores to FULLY SECURED by we offering eleven lakh shares or public listed company valued at about Rs.4.75 Crores as security"*

4 In view of the aforesaid clear admission on behalf of the Respondent Company, I am unable to accept the argument of Mr. Fadia that the interest is disputed or that the adjustment of Rs.1 Crore was without due process. Even if one were to assume that the amount of Rs.1 Crorre has not been properly adjusted and credit for the same has not been given, even then, as per the said letter dated 25th July, 2014 at least an amount of Rs.2 Crores would be due and payable by the Respondent Company to the Petitioner. In this view of the matter, these defenses raised by Mr. Fadia are of no substance and are therefore rejected.

5 As far as the contention of Mr. Fadia that the winding up Petition is not maintainable in view of the fact that the Petitioner Bank has already invoked the jurisdiction of the DRT, I find that this issue is squarely covered by a decision of this Court in the case of Viral

Filaments Limited v/s Indusind Bank Limited reported in 2001(3) ALL MR 737. This exact contention was raised before the Division Bench in the aforesaid case and the same was expressly negated in paragraphs 17 and 18 thereof. In view thereof, I find that there is no substance in the argument of Mr. Fadia that this winding up Petition is not maintainable merely because the Petitioner Bank has approached the DRT for recovery of its dues.

6 In view of what is stated earlier, the following order is passed:-

(I) The Respondent Company is directed to deposit a sum of Rs.2 Crores in the Debts Recovery Tribunal-I, in O. A. No.157 of 2014 within a period of eight weeks from today.

(II) If the said deposit is made within the aforesaid period, then, the present winding up Petition shall stand dismissed without further reference to the Court.

(III) On failure of the Respondent Company depositing the aforesaid sum of Rs. 2 Crores with the DRT as directed earlier, the Petition to stand admitted and made returnable on 25th July, 2016.

(IV) In the event the Petition stands admitted, the learned counsel appearing on behalf of the Respondent Company waives service of the Petition under Rule 28 of the Companies (Court) Rules, 1959.

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

(VI) In the event of default of deposit of Rs.2 Crores by the Respondent Company, the Petitioner shall, on or before 30th May 2016, deposit a sum of Rs.10,000/- towards publication charges with the Prothonotary and Senior Master, under intimation to the Company Registrar, failing which this Petition shall stand dismissed for non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the Petitioner.

(VII) In the event the amount of Rs. 2 Crores is not deposited as mentioned earlier, the Petitioner is at liberty to file a separate Application for appointment of Provisional Liquidator which shall be decided on its own merits and in accordance with law.

2 As could be noted above, respondent was given an opportunity to deposit a sum of Rs.2 Crores within a period of eight weeks. Respondent

did not deposit the amount. Petitioner, therefore, took out company application being company application (lodging) no.458 of 2016 for appointment of Official Liquidator as Provisional Liquidator which came to be disposed on 21st September, 2016. The Court was pleased to pass the following order on 21st September, 2016 :

> *1. The learned counsel appearing for the applicant-petitioner tenders affidavit of service dated 26th July, 2016. The application seeks an appointment of the Official Liquidator, High Court, Bombay as Provisional Liquidator of the respondent company and for other allied reliefs of injunction. Mr. Rajani relies upon the order dated 21st March, 2016 passed by this Court whereby the company petition came to be admitted. In paragraph 6(vii) of the order reads as follows:*
>
> > *"In the event the amount of Rs.2 crores is not deposited as mentioned earlier, the petitioner is at liberty to file a separate application for appointment of Provisional Liquidator which shall be decided on its own merits and in accordance with law."*
>
> *2. This application has been filed pursuant to the liberty so granted. The affidavit in support of the application sets out the reasons why the present application ought to be considered favourably. Mr. Rajani invites our attention to Exhibit B and C annexed to the affidavit in support of the company application. Having perused the record and having considered the averments, the affidavit in support and the submissions made by Mr. Rajani, I am of the view that the petitioner is entitled to interim relief.*
>
> *3. In the circumstances I pass the following order:-*
>
> *(i) The company application is made absolute in terms of prayer clauses (b) and (c).*
>
> *(ii) Till the Liquidator takes possession as Provisional Liquidator, the interim injunction in terms of prayer clause (c) will continue to operate.*
>
> *(iii) The Liquidator is directed to take possession of the assets, records of the company forthwith without awaiting any further notification and if necessary seek police help in case he meets with resistance.*
>
> *(iv) The advocate for the petitioner are also directed to serve a copy of this order upon the company and file an affidavit of service within a period of two weeks from the date of order becoming available.*
>
> *4. Application is disposed of in the above terms.*

3 Thereafter, the petition came up for hearing on 29th November, 2016 on which date as nobody appeared for respondent, the Court, to give one last opportunity to respondent to appear and show cause at the hearing of the petition, directed petitioner to give notice of the next date of hearing to respondent and adjourned the matter. The order dated 29th November, 2016 reads as under :

> *. After admission of the Company Petition, the petition has been duly advertised and an affidavit in proof of such publication has been filed by the Petitioner. After the admission order, a provisional Liquidator has also been appointed of the Respondent-company. Though the Respondent has contested the matter at the stage of admission, at the time of appointment of the provisional Liquidator and even thereafter, the Respondent has remained absent throughout. Even today, the Respondent is absent. However, with a view to give one last opportunity to the Respondent to appear and show cause at the hearing of the petition, the petition is adjourned.*
>
> *2 The Petitioner is directed to give notice of the next date of hearing to the Respondent, and also serve a copy of today's order on the Respondent. An affidavit of such service shall be filed by the next date.*
>
> *3 Stand over to 20 December 2016.*

4 On record there is an affidavit of one Mahesh Girkar affirmed on 1st March, 2017 confirming that petitioner had in compliance with the order dated 29th November, 2016 addressed a communication from petitioner's advocates to respondent company at its registered address as well as Managing Director of respondent company and the envelope sent to company came back undelivered with the endorsement “left” and the envelope sent to Managing Director has been delivered. On 21st December, 2017 respondent company was represented by one Vivek Phadke, who

given an undertaking to file Vakalatnama within one week and requested the matter to be listed today for final hearing. Today nobody is present for company and I do not find anything on record to show that Mr. Vivek Phadke has filed the Vakalatnama on behalf of respondent company.

5 There is also an affidavit on record of one Mahesh Girkar affirmed on 27th June, 2016 confirming advertising the petition in Free Press Journal (in English) and Navshakti (in Marathi). There is another affidavit of Mahesh Girkar affirmed on 7th July, 2016 confirming advertising the petition in Maharashtra Government Gazette. At the time of admission, respondent had also waived notice under Rule 28 of the Companies (Court) Rules, 1959. It is also stated that respondent has not preferred any appeal against the order of admission. Mr. Rajani, counsel for petitioner states that petitioner is not aware as to whether respondent has preferred any application before NCLT or there is any bar in proceeding with this petition.

6 This Court while admitting the petition had considered the submissions of respondent opposing the petition and concluded that there was no substance in the argument of respondent that the petition is not maintainable. The Court was also prima facie satisfied that there was a debt and the company is unable to discharge its debts. It should be noted that respondent company has also admitted its liability to petitioner. I have

heard Mr. Rajani, counsel for petitioner and also considered the pleadings, reply and the documents annexed to the petition. I am also satisfied that there is a debt and the company is unable to discharge its debts, is commercially insolvent and requires to be wound up.

7 Company petition is, therefore, allowed in terms of prayer clauses – (a) and (b), which read as under :

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

8 Official Liquidator shall forthwith act on an authenticated copy of this order without waiting for any notification.

9 Petition accordingly stands disposed.

<u>COMPANY PETITION NO.700 OF 2015</u>

1 In view of the above order passed in company petition no.32 of 2015 winding up respondent company, 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 4th January, 2018 in company petition no.32 of 2015 winding up respondent company – Nova Oleochem Ltd., is set aside in appeal, liberty is given to other petitioner to revive their petition and move once again for necessary orders including winding up of respondent company.

(K.R. SHRIRAM, J.)