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

COMPANY PETITION NO. 378 OF 2010

Abhyudaya Co-operative Bank Ltd. .. Petitioner
Vs.
M/s. J. Square Steels Pvt. Ltd. .. Respondent

Mr.Madhur Rai i/b PRS Legal for petitioner.

Mr. Jaivardhan Singh i/b V. M. Thorat for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 8TH MARCH 2018

P.C.

1. The petition is filed to wind up respondent company-M/s. J. Square Steels Private Limited (the company) on the ground that the company is indebted to petitioner, is unable to discharge its debt, is commercially insolvent and therefore, requires to be wound up.

2. Petitioner is a multi-state scheduled co-operative bank. The company was incorporated with the main object to carry on business in steels. In or around November 2005, the company approached petitioner for sanction of term loan facility. In March 2006, petitioner sanctioned term loan for Rs. 215 lakhs for the purpose of purchase of land, building, machineries etc. The company had also approached petitioner in the meanwhile for cash credit facility and petitioner had made available to company cash credit

facility of Rs. 200 Lakhs in January 2006. This facility was renewed from time to time and was finally enhanced to Rs.10 crores.

3. In addition, petitioner had also made available to company letter of credit facility of Rs.200 lakhs, i.e., 2 crores which was renewed from time to time and ultimately enhanced to Rs.4 crores. In November 2006, petitioner sanctioned to the company a term loan of Rs. 23.52 lakhs. In June 2007, petitioner sanctioned another term loan of Rs.2.10 crores. In December 2007, petitioner sanctioned to the company letter of credit facility of Rs.4 crores which was in renewal and cancellation of the existing letter of credit facility. In December 2007, petitioner sanctioned to the company term loan for Rs. 6.83 crores in addition to the term loan available of Rs. 2.15 crores availed in March 2006 and Rs.23.52 lakhs availed in November 2006 and term loan of Rs. 210 crores availed in June 2007. In April 2008, petitioner sanctioned to the company Cheque Discounting Facility of Rs. 125 lakhs.

4. For securing these facilities, the company, as principal borrower and seven persons in their capacity as guarantors for respective facilities executed various security documents from time to time including documents for hypothecation charge over assets such a stocks and book

debts, plant and machinery etc., demand promissory notes etc. The list of documents executed by the company can be found in Paragraphs 13 and 14 of the petition. Immovable properties mortgaged can be found in Paragraph 15 of the petition.

5. The company did not repay the amounts payable when they fell due and petitioner, in view of all its irregularities and defaults, did not renew the limits and the company's accounts were classified as "Non-Performing Assets" on 15th December 2008. Thereafter, the petitioner had issued a notice to company on 16th April 2009 for regularisation of the accounts. Petitioner issued a recall notice on 27th May 2009 and also commenced proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*SARFAESI Act*). The company had filed Writ Petition No. 3956 of 2009 before the Aurangabad Bench of this Court. The Court, in its order dated 26th February 2010, observed, "*In our opinion, the fact that the petitioners have availed of loan facility in each of the cases, is not in dispute. The petitioners are liable to pay at least the principal amount and the contractual interest thereon to the respondent banks. Even if the petitions are admitted, that does not mean that the liability to pay the amount to the respondent bank is ceased."* The Court also directed to deposit 50% of petitioner's dues with interest as on 26th

February 2010 within four weeks and non-payment would render the petition dismissed for non-prosecution. The company did not comply with the condition laid by this Court and the said writ petition was dismissed on 30th March 2010.

6. Considering the continuous default, petitioner caused a notice under Section 433 and 434 of the Companies' Act, 1956 dated 8th May 2010 to be issued to the company. In the meanwhile, petitioner had also issued a letter dated 16th April 2009 to the company calling upon the company to make payments. In reply, the company, by its letter dated 20th April 2008, copy whereof is at Exh.'D2' to the petition, has admitted that its total exposure to petitioner as on 1st September 2008 was around Rs.2706 lacs.(Rs. 27.06 crores). Admittedly, thereafter, no amount has been paid and interest has only been mounting. Moreover, petitioner commenced arbitration under Section 84 of the Multi-State Co-operative Societies Act, 2002 and the Arbitrator gave an Award on 25th August 2010 in favour of petitioner holding the company and the guarantors jointly and severally liable to repay a sum of Rs.31,88,23,876.49.

7. Against this order, the company preferred an appeal under Section 34 of the Arbitration and Conciliation Act, 1996 (The said Act) in the Court of Principal District Judge at Aurangabad. The Principal District Judge, set

aside the impugned award for want of fair and reasonable opportunity of hearing to the other side and remanded the matter back for fresh hearing on all points. Against this order, petitioner preferred appeals under Section 37 of the said Act before Aurangabad Bench of this Court being Arbitration Appeal Nos.1 of 2015 and 2 of 2015 challenging the order dated 24th November 2014.

8. These appeals and various other writ petitions filed by the company and its ex-directors/guarantors came to be dismissed by a common order dated 13th October 2017 whereby the Division Bench set aside the order of the Principal District Judge passed under Section 34 of the said Act and upheld the Award. Against this order of the Division Bench, the company states it has preferred a Special Leave Petition (SLP) before the Supreme Court of India. The counsel states that the SLP was lodged on 27th November 2017. In addition, I am informed by the counsel for the company that they have also preferred a review petition before the Aurangabad Bench. The counsel states that though the SLP was filed almost four months ago, the company has not moved for any urgent ad-interim oder/stay of hearing this petition by this Court. Mr. Rai appearing for petitioner states that petitioner has not even been served a copy of the SLP or the review petition.

9. On 6th November 2017, the matter was stood over at the request of the company because the counsel for the company stated that company was going to file SLP in the Apex Court against the order passed by the Division Bench. The matter was stood over to 20th November 2017.

It was made clear to the company that if SLP was not filed, the order dated 10th December 2010 admitting the petition will be confirmed as order in the petition and petition will be allowed in terms of prayer clauses (a) and (b) and if SLP was filed then petition be listed for directions on 4th December 2017.

10. On 4th December 2017, the counsel for the company stated that SLP has been filed and they will be moving the following week for urgent circulation. The matter was therefore stood over to 5th January 2018 for directions. On 5th January 2018, the counsel for company stated that the company has not moved for any stay. Therefore, petition was directed to be listed on 11th January 2018 for final hearing. On 11th January 2018, none appeared for petitioner and the matter was stood over to 12th January 2018. On 12th January 2018, once again the counsel for the company stated that company has not moved the Supreme Court for stay. Thereafter, the petition has been getting listed for final hearing on 25th January 2018, 2nd February 2018, 15th February 2018 and 1st March 2018 and today. Even today, the status has not changed so far as the SLP is concerned. For the

first time, the counsel for company stated that they have also preferred a review petition but there is no stay. Hence, there is no fetter for this Court to proceed with the hearing of this petition. The company has filed two affidavits in reply, both by one Rajendra Ekambe, affirmed on 5th January 2008 and 16th March 2017, respectively.

11. In the first affidavit, the defences are (a) the loan advanced to the company was claimed to have been secured by mortgage which has to be proved and therefore petition is not maintainable; (b) disbursement of the loan is against the express provisions of RBI Guidelines and therefore the contract itself is void; (c) Section 34 application which was then pending is pending; (d) the company was prompt and regular in repayment of loan but could not make payment post September 2008 due to global recession; (f) all banks in India were restructuring the loan accounts of the industrial units but petitioner did not restructure the repayment to be made by the company.

In the second affidavit, all irrelevant points have been raised and the way it is worded, it is not important to even list out what are the points of defences raised to oppose the petition. Even if one goes through the entire affidavit, there is no case made out as to why the amount repayable by the company, cannot be considered as a debt under the provisions for the companies Act, 1956 and why the company should not be held as unable to discharge those debts and is commercially insolvent. All the defences raised can be dealt with together.

12. The company, by its letter dated 20th April 2008, has admitted that as on 1st September 2008, the liability of the company to petitioner was Rs. 2706 lakhs (Rs. 27.06 crores). This letter is wrongly typed as '20th April 2008'. It should be read as '20th April 2009' because it is in response to the petitioner's letter dated 16th April 2009 received by the company on 20th April 2009. Even the inward stamp put by petitioner on the copy of the letter indicates date of receipt to be '21st April 2009'.

13. There is also an award against the company in the sum of Rs.31,88,23,876.49 carrying further interest at 14% per annum from 1st August 2009 till the date of full and final payment. It is not the company's case that they have made any payment after 20th April 2009 when they addressed a communication acknowledging their liability as on 1st September 2008 as Rs.27.06 crores. Petitioner had also declared the company as Non-performing Asset. The stand of the company that loan disbursement was against RBI guidelines is also a bald statement without any details. In any event, that would not permit a company to escape from its liability of repaying the loan. The company has also stated that it was unable to pay back the amount due to global recession which in other

words means that the company admitted its liability to petitioner but states was unable to pay bank due to global recession. The final point that petitioner should have restructured the repayment of the loan also does not help the company. It was open for the company to approach any financial institution to settle the petitioner's claim and take over the liability.

14. The Aurangabad Bench of this Court, while dismissing writ petition No 3956 of 2009 filed by the company, in its order dated 26th February 2010, has observed that the company has availed loan facility and this is not in dispute and the company is liable to pay the principal amount and contractual interest and the company was directed to deposit at least 50% dues of petitioner which also was not done by the company.

15. In Paragraph 21 of the petition, petitioner has alleged that the company had not even filed the statements for the financial years 2008-09 and 2009-10 to which there is not even a denial by the company. In fact, in Paragraph 17 of the further affidavit, the company is blaming petitioner for non-filing of the financial statements with the Registrar of companies. There can be nothing more absurd than this.

16. In the circumstances, having heard the counsel, having considered the petition, affidavits in reply and the documents annexed thereto, I am

convinced there is a debt payable to petitioner and the company is unable to discharge its debt, the company is commercially insolvent and requires to be wound up.

17. On record is the affidavit of one Jyoti S. Ghorpade affirmed on 8th March 2011 confirming advertising the petition in Free Press Journal and Maharashtra Times and also in Maharashtra Government Gazette for the period January 6-12, 2011 at Serial No. 1126.

17. I am unable to find anything in the records and proceedings regarding service of notice under Rule 28 of the Companies (Courts) Rules, 1959. At the same time, Shri Singh appearing for the company states that since the company has been appearing in the matter except on the date of admission and has even filed affidavits in reply, the Court can proceed on the basis that the company has waived notice under Rule 28 of the Companies (Courts) Rules, 1959. Statement accepted.

18. In the circumstances, the petition is allowed in terms of prayer clauses (a) and (b) which read as under :-

> *(a) That the Respondent Company be ordered to be wound up by and under orders of this Honourable Court under the provisions of the Companies Act, 1956;*

(b) That Official Liquidator of the High Court, Bombay be appointed as Liquidator of the Respondent Company with all powers under the provisions of the Companies act, 1956.

19. The official liquidator to take further steps upon receiving a copy of this order from the advocate for petitioner authenticated by the Associate of this Court.

20. Company petition disposed.

(K.R. SHRIRAM, J.)