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

COMPANY PETITION NO.829 OF 2003

SICOM Limited)....Petitioner

V/s.

Splendour Gems Limited)....Respondent

Mr.Prakash Panjabi for petitioner.
Mr.T.N.Tripathi for respondent.

CORAM : K.R.SHRIRAM,J
DATE : 6.6.2019

P.C.:-

1. Respondent was ordered to be wound up by an order dated 21.6.2018. Respondent carried the order of winding up in appeal and the appeal Court by a judgment pronounced on 26.9.2018 set aside the winding up order only on the ground that the public notice given did not reflect the changed name of respondent from `Beautiful Diamonds Limited' to `Splendour Gems Limited'. The appeal court made it clear that it had not examined the merits of the matter and kept all rights and contentions open. Subsequently, pursuant to an order dated 19.10.2018 read with order dated 20.11.2018 and 29.11.2018 petitioner has re-advertised the petition in `Free Press Journal' and `Navshakti' on 1.12.2018. Petition has also been advertised in the Maharashtra Govt. Gazette dated 6.12.2018 under Serial No.M-18211.

2. On record is the affidavit of one Vishakha Tambe of petitioner affirmed on 13.12.2018.

3. As noted in the order dated 21.6.2018, respondent had also waived notice under Rule 28 of the Companies (Court) Rules 1959.

4. This petition is for winding up of respondent company – Splendour Gems Ltd. (the company), (earlier called Beautiful Diamonds Ltd.) under the provisions of the Companies Act, 1956 on the ground that the company is unable to discharge its debts and is commercially insolvent.

5. Paragraph nos.3, 4, 5, 6 & 7 of the order dated 21.6.2018 read as under :-

> *"3. Petitioner, at the request of one Fabrigem Creations Pvt. Ltd.(Fabrigem) which is in liquidation, had lent and advanced a sum of Rs.7 crores as and by way of Corporate Loan under a Loan Agreement dated 4th October 2000. That loan was secured with various properties as well as on personal guarantees of two persons, viz., Shri Prashant Mehta and Shri Kishor Mehta, Directors of the company and by irrevocable and unconditional corporate guarantee of the company. To secure the amount of Rs.7 crores, the company executed a corporate guarantee in favour of petitioner. By the said Deed of Guarantee, dated 4th August 2000, the company agreed and declared that its liability shall be irrevocable, joint and several with the liability of Fabrigem for payment of loan together with interest,*

costs, charges and expenses and further agreed that in order to give effect to the guarantee, petitioner shall be entitled to act as if the company was and is the principal debtor, for all payments and covenants guaranteed by it and it will not be necessary for petitioner to sue Fabrigem before suing the company for the amount due under the agreement. Clause 6 and clause 8 read as under :

> *"6. The Guarantor hereby agrees and declares that its liability under these presents shall be irrevocable joint and several with the liability of the company for repayment of the said loan together with interest, costs, charges and expenses.*
>
> *.....*
>
> *8. The Guarantor hereby agrees that in order to give effect to the Guarantee herein contained SICOM shall be entitled to act as if the Guarantor was and is the principal debtor to SICOM for all payments and covenants guaranteed by it as aforesaid to SICOM and that it will not be necessary for SICOM to sue the Company before the Guarantor for the amount due under the said Agreement."*

Therefore, the company had agreed in no uncertain terms that petitioner need not even sue Fabrigem to recover its money and the company will be liable as if the company itself was a principal debtor.

4. At the time of admission, on 18th February 2005, the following order came to be passed :

> *"1. The present petition is filed by the petitioner who is financial Institution against the respondent company for the recovery of a sum of Rs. 10,14,45,820/. The said amount is sought to be recovered with interest in respect of the Corporate Loan lent and advanced by the petitioner to the respondent company. In so far as the receipt of the loan*

and the liability to repay the same is concerned, there are no serious dispute. However, the learned counsel for the respondent has contended that the present petition should be dismissed since the petitioner has suppressed the fact that they have already filed suit prior to filing of the present petition. According to him, the petition is not maintainable once Civil remedy is adopted by the petitioner herein. I do not find any substance in the aforesaid contention. It is already well settled that the petitioner can move both the Company Petition as well as suit and adopt both the remedies simultaneously. It is also equally well settled that the company proceedings are not for the recovery of the debt but for winding up of the company whereas the Civil suit is action in personem for the recovery of the amount due and payable. In view of the aforesaid proposition in law, I do not find any merit in the said contention and I reject the same accordingly.

2. The next submission advanced by the learned counsel for the respondent is that there are various securities in favour of the petitioner securing the said loan amount lent and advanced. It is further contended that till and until the said securities are realised and amount due and payable is crystalised, petitioner is not entitled to file and maintain the petition. Therefore, the said petition should be rejected. On the other hand the learned advocate for respondent has relied upon the Judgment of this Court in the case of Canfin Homes V/s Lloyds Steel Industries, Canfin Homes V/s Lloyds Steel Industries, Canfin Homes V/s Lloyds Steel Industries, 2001(4) Bom.C.R. 84 2001(4) Bom.C.R. 84 2001(4) Bom.C.R. 84 and has contended that at the stage of admission of the petition,

> *Court is not required to go into whether there is securities in respect of the claim and that the petition*
> *should not be entertained till securities are realised. In view of the aforesaid Judgment of this Court, I also do not find any merit in the second contention advanced by the learned counsel for the*
> *Respondent.*
>
> *3. The third and the last contention of the the learned counsel for the respondent is that the petitioner has suppressed the material fact that there are various securities in their favour in respect of the claim in the present petition and therefore, petition should be dismissed on the ground of suppression of material fact. I do not find any serious suppression of material facts calling dismissal of the present petition. The present petition is not for enforcement of the securities. Therefore, nondisclosure of the securities would not tantamount to material suppression of the facts in the present case. I therefore pass the following order.....”*

The petition was advertised in Free Press Journal and Navshakti on 7th April 2005 and in Maharashtra Government Gazette on 21st April 2005 and there is an affidavit of one Mrs.Kalpana Harshan Peringayil, affirmed on 18th August 2010 in support thereof. Respondent waived notice under Rule 28 of the Companies (Court) Rules, 1959 as recorded in the order dated 18th February 2015.

5 It is necessary to note the subsequent development. Admittedly petitioner had filed application with the Debt Recovery Tribunal, II, Mumbai (DRT) being O.A.No. 151 of 2005 [High Court Summary Sit No.1505 of 2003]. The DRT has decreed petitioner's suit/O.A. by an order and judgment dated 22nd July 2009. That order has attained finality.

> *6. Hence, there is no need to go into various points that Shri Khandeparkar was trying to canvas as they are also dealt with in the order of admission.*
>
> *7. In these circumstances, as the claim of petitioner under which petitioner had filed this petition having already been decreed and the company has not paid the decretal amount or any part thereof and the decree remains unsatisfied in whole, in my view, the company is unable to pay its debts. It would be useful to note that Section 434 of the Companies Act, 1956 also provides that the company shall be deemed to be unable to pay its debts, if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part. It is also to be noted that there is nothing on record from the company showing the company is financially very solvent. Therefore, the petition is allowed in terms of prayer clauses (a) and (b).*

6. Therefore, all the prerequisites like Public notice etc. having been completed, there is no impediment in the petition being disposed.

Indisputably, the claim of petitioner for which petitioner has approached this Court having already been decreed and the Company not having paid the decretal amount or any part thereof and the decree remains unsatisfied in whole, in my view, the company is unable to pay its debts. The decree has been passed on 22.7.2009 and that has attained finality. Section 434 of the Companies Act 1956 also provides that the company shall be deemed to be unable to pay its debts, if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part. There is also nothing on record from the company showing the company financially is very solvent. Therefore, petition is allowed in terms of prayer clauses-(a) and (b) which read as under :-

> *"(a) that the Company Splendour Gems Limited (earlier called Beautiful Diamonds Ltd.) having its registered office at 101-103, Mittal Court, "A" wing, 10th floor, Nariman Point, Mumbai400 021 be would be under the provisions of the Companies act, 1956.*
>
> *(b) that the Official Liquidator be appointed the Liquidator of the Company to take charge of the assets, books of account and properties of the Company with all powers under the provisions of the Companies Act, 1956."*

7. Petitioner's advocate within two weeks, to forward an authenticated copy of this order to the Official Liquidator who shall take immediate steps without waiting for any notification. The counsel for petitioner also to forward a copy of this order to the National Company Law Tribunal, Mumbai for information.

8. Upon receipt of the authenticated copy from petitioner's advocate, the Official Liquidator shall forthwith cause notice to alll 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 statements of affairs as required under Section 454 of the Companies Act, 1956, failing which, the 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. The company petition accordingly stands disposed.

(K.R.SHRIRAM,J)