

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

COMA No.5 of 2016

1. U C O Bank Through- Zonal Manager, U C O Bank, Telibandha, Raipur, P.S. Telibandha, Tah. And Dist.- Raipur, Chhattisgarh
2. U C O Bank, Through- Chief Manager, U C O Bank, Main Branch, Near Jaistambh Square, K.K.Road, Raipur, CG

---- **Petitioners**

Versus

1. M/s Khushi Funfood And Apparels India Pvt. Ltd. Regd. Office At 311 And 312 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh
2. Shri Ashish Kumar Jain S/o Late R.K. Jain, Director And Guarantor Of M/s Khushi Funfood And Apparels, India Pvt. Ltd., Regd. Office At 311 And 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh
3. Shri Vikas Kumar Jain S/o Late R.K. Jain, Director And Guarantor Of M/s Khushi Funfood And Apparels, India Pvt. Ltd., Regd. Office At 311 And 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh
4. Smt. Premlata Jain W/o Late R.K. Jain, Director And Guarantor Of M/s Khushi Funfood And Apparels, India Pvt. Ltd., Regd. Office At 311 And 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh,
5. Smt. Payal Jain W/o Shri Ashish Kumar Jain, Director And Guarantor Of M/s Khushi Funfood And Apparels, India Pvt. Ltd., Regd. Office At 311 And 312, 3rd Floor, Lalganga Shopping Mall, Dist.- Raipur, Chhattisgarh
6. Shri Paresh Kumar Maganlal Pomal, R/o House No.22, Prem Pushp, Jalvihar Colony, Telibandha, Raipur, Chhattisgarh
7. M/s R.K.Jain Construction Infia Pvt. Ltd. Registered Office At Shop No. 311 And 312, 3rd Floor, Lal Ganga Shoping Moll, G.E.Road, Raipur, Chhattisgarh

--- **Respondents**

For Appellants/Petitioners	:	Mr. Ravindra Sharma, Advocate
For Respondent/s	:	None appears

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor

Order on Board by Manindra Mohan Shrivastava, J.

09/06/2020

1. This appeal arises out of order dated 16.03.2016 passed by the learned

Single Judge dismissing appellant's application for winding up of the company as not maintainable.

2. Relying upon the Division Bench judgment of the Calcutta High Court in the case of **Kotak Mahindra Bank Ltd. V/s. Eastern Spining Mills & Industries Ltd., 2013 Lawsuit (Cal) 104**, pinpointed submission of learned counsel for the appellant is that merely because the appellant has a remedy of seeking execution of Recovery certificate issued in his favour by the Debts Recovery Tribunal, the remedy to seek winding up of the Company as is available under Section 433 of the Companies Act, 1956 is not extinguished.

3. We have gone through the order passed by the learned Single Judge, interpreting and harmoniously construing provision contained in Section 433(e) and 434(1)(b) of the Companies Act, 1956, concluded as below :

“9. Under Section 433 (e) of the Act, 1956, a Company may be wound up by the Court when the Company is unable to pay its debts. Under Section 434(1) (b), a Company is deemed to be unable to pay its debts if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor of the Company is returned unsatisfied in whole or in part.

10. A harmonious reading of Sections 433(e) and 434 (1) (b) compels this Court to take the view that when a decree or certificate of recovery has been issued against a Company, it can be presumed to be unable to pay its debts only when in execution or other process issued on such decree or order in favour of a creditor company is returned unsatisfied in whole or part. This deeming provision provides ample guidance to conclude that whenever a debt is secured by mortgage or hypothecation of goods, it cannot be presumed or deemed that the Company is unable to pay its debts.”

4. In taking the aforesaid view, learned Single Judge has relied upon the decision of the Gujrat High Court in the case of **UTI Bank Ltd. Vs. Shree Rama-Multitech Ltd., 2005 126 Company Cases 15**.

5. In our considered opinion, the view taken by learned Single Judge, based on construction of the provision as aforesaid does not appear to be incorrect in any manner.

6. Reliance placed on the Division Bench judgment of the Calcutta High Court in the case of Kotak Mahindra Bank Ltd. (supra) is distinguishable because in that case, the maintainability aspect was considered taking into

consideration the factual aspects of the said case wherein in para 31 of the said order, it was observed, on facts, that there were enough material to hold that the company was commercially insolvent. The said judgment is therefore distinguishable.

7. Learned counsel for the appellant submits that after the order was passed by learned Single Judge, subsequent developments have taken place in as much as the secured assets in respect of which, the petitioner was granted Recovery certificate by the Debt Recovery Tribunal, have already been transferred by the Allahabad Bank and the appellant would be in difficulty in realising its debt even if he puts into execution, the Recovery certificate issued in his favour by the DRT in the year 2015.

8. This aspect was not brought to the notice of learned Single Judge obviously because it was not existing at the time when the order was passed by the learned Single Judge. However, from the order of the learned Single Judge itself it is quite clear that in such eventuality where the secured creditor is able to satisfy that the secured assets is no longer available for being attached and sold towards realisation of debt, the application for winding up may be held maintainable. On this subsequent event, it would be open for the appellant to file fresh application for winding up on account of subsequent events that the secured assets is no longer available which could be sold towards realisation of debt in execution of secured assets.

9. However, the order of learned Single Judge taking a view based on interpretation of provision contained in Section 433(e) read with Section 434(1)(b) of the Companies Act, 1956 does not call for any interference.

10. With the liberty as observed herein above, the appeal stands dismissed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge