

Jose

IN THE HIGH COURT OF BOMBAY AT GOA

COMPANY APPEAL NO.4 OF 2010

Putzmeister Concrete Pumps Gmbh
A company incorporated under
the laws of Germany
Having its registered office at
Max-Eyth-Strabe 10,D-72631 Aichtal
Republic of Germany.
(Registered Office)

... Appellant.

Versus

Putzmeister India Pvt. Ltd.
115, Kamat Towers, Patto Plaza,
Panaji, Goa (India) 403 001
(Registered Office)

... Respondent.

Mr Parag Rao with Mr Rohin Dubey, Mr Akhil Parrikar, Ms S. Drago and Mr Ajay Manon, Advocates for the Appellant.

Mr Akshay Patil with Mr Rajesh Vaidhya, Mr H.D. Naik and Mr A. Naik, Advocates for the Respondent.

CORAM:

**PRAKASH D. NAIK &
BHARAT P. DESHPANDE, JJ.**

RESERVED ON:

19 August, 2023

PRONOUNCED ON:

01 September, 2023

JUDGMENT: (Per Bharat P. Deshpande, J.)

1. Appellant preferred present appeal under Section 483 of Companies Act, 1956 read with Rule 9 of Company (Court) Rules, 1959 thereby challenging the Judgment passed in Company Petition No.6/2007 dated 30.07.2010 by the learned Single Judge of this Court.
2. The Appellant filed Company Petition No.6/2007 against the Respondent under Clauses (e) and (f) of Section 433 of the Companies Act, 1956, which was decided by the learned Single Judge of this Court vide impugned order dated 30.07.2010. By the said impugned order, the learned Single Judge rejected the said Company Petition and refused to admit it for winding up of the Respondent Company.
3. The petition was admitted vide order dated 16.03.2011 and thereafter, it was taken up for final disposal.
4. Heard Mr Parag Rao appearing with Mr Rohin Dubey, Mr Akhil Parrikar, Ms S. Drago and Mr Ajay Manon for the Appellant and Mr Akshay Patil appearing with Mr Rajesh Vaidhya, Mr H.D. Naik and Mr A. Naik for the Respondent.
5. Mr Parag Rao, learned Counsel for the Appellant, strongly urged that the Appellant provided bank guarantee to the C.C. limit for the Respondent Company. However, subsequently, Respondent defaulted in paying the instalments. The bank recalled the said facility and directed Respondent Company to repay the entire loan. Since the Respondent Company failed to repay the entire loan within the stipulated period, the bank invoked bank guarantee given by the Appellant and accordingly, the loan account was closed. Thereafter, the Appellant Company issued

letter to the Respondent to repay the said amount, however, the Respondent refused on one or the other ground and deliberately avoided paying the said amount and hence notice was issued to the Respondent Company for winding up. In spite of this, the Respondent Company failed to repay the entire amount. The Appellant was then left with no other alternative but to approach this Court for winding up.

6. Learned Counsel Mr Rao would then submit that it was an umbrella guarantee issued by the Appellant to the concerned bank for all the companies associated with the Appellant in the world which includes the Respondent Company and accordingly, loan facility was extended to the Respondent under such umbrella bank guarantee. He then submitted that such guarantee was issued in December, 2004 which includes future advances and since the Respondent received loan on the basis of such bank guarantee given by the Appellant, the said Respondent was duty bound to repay such amount collected by the Appellant from the bank. He would submit that when the recall notice was issued by the bank, Respondent Company paid part of the amount whereas balance amount of around ₹2.5 crores remained unpaid. The Respondent Company was financially incapable of paying the said loan and accordingly, bank encashed the guarantee given by the Appellant of ₹2,83,68,657/-. A certificate to that effect has been issued. Accordingly, the loan of Respondent was cleared on the basis of payment made by the Appellant and thus, the Appellant is entitled to recover entire amount from the Respondent.

7. Mr Rao would then submit that the learned Single Judge of this Court failed to consider clear admissions on the part of Respondent about the bank guarantee and thereby committed error in rejecting the claim for liquidation.

8. Mr Rao would then submit that at various places including the statement of accounts/ balance sheets, Respondent admitted that the loan was sanctioned against the bank guarantee issued by the Appellant. According to him, such admission is sufficient enough to hold that the loan given to Respondent was only on the basis of bank guarantee which was furnished by the Appellant to the concerned bank. He would submit that the question of which is the bank guarantee and whether the Appellant produced such bank guarantee in the proceedings of winding up, is irrelevant, on the basis of clear admission on the part of Respondent. He would submit that once the payment is made by the Appellant, discharging the entire liability of the Respondent, on the basis of invoking bank guarantee, the Appellant stepped into the shoes of the bank and therefore, Respondent is liable to pay such amount which was recovered from the Appellant by the said bank.

9. Mr Rao would submit that as per Section 210 of the Companies Act, the balance sheet of Respondent is a document wherein there is an admission on the part of Respondent about the liability which is secured on the basis of bank guarantee. He would submit that as per the Companies Act, the balance sheet requires authorisation and the same has to be filed before the Registrar. There is also an audit report which shows that such loan was secured by a bank guarantee. On this count, he would submit that the defence raised by the Respondent is only a

moonshine defence and not bona fide defence and there is absolutely no suspicion about the bank guarantee, which the learned Single Judge of this Court failed to consider.

10. Mr Rao would then submit that the bank guarantee was produced along with the petition, however, annexures were subsequently produced and the same were genuine. Reasons were disclosed for non-production of such annexures to the bank guarantee which were not at all considered by the learned Single Judge. He would submit that suspicion was raised on such annexures without any sufficient material though such annexures to the bank guarantee show all the details including the bank account number under which the loan was sanctioned to the Respondent. He submits that there was no reason for raising any suspicion about such annexures.

11. Mr Rao placed reliance on the following decisions:-

M.K. Mahajan and Anr. vs. Indo Rollhard Industries Private Limited; 2009 SCC OnLine Del 359, Rath Bars Ltd. vs. Deepak Casting Ltd.; 2007 (94) DRJ 178(DB), Gopal Krishnaji Ketkar vs. Mohamed Haji Latif & Ors.; (1968) 3 SCR 862, M/s. Madhusudan Gordhandas & Co. vs. Madhu Woolen Industries Pvt. Ltd.; 1971 (3) SCC 632 and IBA Health (India) Private Limited vs. Info-Drive Systems SDN. BHD.; (2010) 10 SCC 553.

12. Per contra, learned Counsel Mr Akshay Patil appearing for the Respondent would submit that the scope of the present appeal is very limited as the learned Single Judge was required to conduct a prima facie inquiry to find out whether there is any material to admit the petition for

winding up. He would submit that defence raised by Respondent was found to be substantial and when the learned Single Judge found suspicion with regard to the bank guarantee and the annexures, valid defence was raised and therefore, the impugned order does not suffer from any illegality or impropriety so as to interfere in the Appellate jurisdiction.

13. Mr Patil would then submit that for the purpose of considering the petition and the appeal, the Appellant was duty-bound to show that there was a valid bank guarantee executed by the parties. He submits that there has to be a tripartite agreement for the bank guarantee and in absence of such agreement produced on record, the contention of the Appellant has been rightly rejected.

14. Mr Patil would submit that the bank guarantee which is produced by the Appellant is of the year 2004 whereas the loan given to the Respondent by the concerned bank was in the year 2005. He further submits that sanction letter issued in favour of Respondent would clearly go to show that Respondent was liable to furnish the security independently. He would then submit that such sanction letter nowhere refers to the bank guarantee furnished by the Appellant in the year 2004 to the concerned bank.

15. Mr Patil would then submit that annexures produced on record subsequently by the Appellant creates suspicion which has been expressed by the learned Single Judge in the impugned Judgment which cannot be faulted with. In this respect, he would submit that the bank guarantee was of the year 2004 whereas loan issued in favour of the

Respondent Company was of the year 2005 and hence, there was no possibility of mentioning the account number, the amount of loan, etc., in such annexure which was allegedly executed in the year 2004 itself. According to him, such annexure was a fabricated document and therefore, the learned Single Judge has rightly rejected such document.

16. Mr Patil would then submit that the guarantee is a tripartite agreement and it cannot be a guarantee of future loan. He then submits that there is no document placed on record by the Appellant to show that the Respondent, Appellant and the concerned bank executed any such agreement thereby agreeing to guarantee the loan issued in favour of Respondent.

17. Mr Patil would then submit that there was a collusion between Appellant and the bank in recalling the loan. According to him, relationship between the Appellant and the Respondent was in the form of joint venture and when differences arose, the Appellant sought to withdraw from the joint venture in June, 2005. The Respondent even invoked arbitration clause and the matter was pending. He then submitted that immediately after the withdrawal of Appellant from the joint venture, the bank recalled the loan under Clause 3 of the sanction letter. There was no default committed by the Respondent in repaying the said loan. There was absolutely no reason for the bank to recall the entire loan but it appears from the circumstances that when Appellant withdrew from the joint venture, the concerned bank recalled the loan without giving any reason.

18. Mr Patil would then submit that Respondent even paid more than half of the loan amount and requested the bank to grant some more time, however, without any plausible reason, the said bank refused further time and then invoked the bank guarantee allegedly given by the Appellant. He then submitted that the entire material clearly goes to show that it was collusion between the Appellant and the bank.

19. Mr Patil would then submit that the bank even issued notice under Section 434 of the Companies Act for the purpose of winding up of the Respondent Company. Respondent issued reply and requested the bank to furnish a copy of bank guarantee. Surprisingly, bank refused to furnish any copy without any sufficient reason.

20. Mr Patil would then submit that the bank guarantee which is produced by the Appellant was given as per the German laws, in Germany wherein the office of Appellant is situated. Such bank guarantee is not under the Indian Contract Act. He further submits that even after filing of the petition before this Court, the Appellant was directed to furnish the bank guarantee and the annexures. However, initially, the Appellant refused to produce the annexures on one or the other ground but later on, produced it along with translations which were found to be suspicious.

21. Mr Patil would then submit that such bank guarantee produced by the Appellant nowhere refers to the loan of the Respondent and therefore, as per the Contract Act, Appellant cannot invoke such bank guarantee against the Respondent. He would submit that there is no subrogation

and therefore, the Appellant is not entitled to recover such amount from the Respondent.

22. Mr Patil would then submit that the balance sheet and other documents which the Appellant is claiming as having admissions, are not the admissions with regard to the bank guarantee produced by the Appellant on record. He submits that it is for the Appellant to show that there is an agreement between the Appellant, Respondent and the bank wherein the Appellant executed such guarantee for the fulfilment of the loan amount issued to the Respondent. According to him, there is no admission qua the bank guarantee produced by the Appellant and therefore, observations of the learned Single Judge in the impugned Judgment cannot be faulted with.

23. Finally, Mr Patil would submit that the Companies Act, 1956 is now repealed. The Respondent Company is flourishing and is having turnover of ₹140 crores. The Respondent is a solvent company whereas proceedings filed against it are malicious and therefore, no purpose would be served by remanding the matter.

24. Mr Patil placed reliance on the following decisions:-

Neelkanth Devansh Developers Private Limited vs. Urban Infrastructure Venture Capital Limited; 2016 SCC OnLine Bom 399, Ramchandra B. Loyalka vs. Shapoorji N. Bhowmagree; 1940 SCC OnLine Bom 21 and Wander Ltd. and Another vs. Antox India P. Ltd.; 1990 (Supp) SCC 727.

25. In rejoinder, learned Counsel Mr Rao first of all claimed that there are no findings in the impugned order regarding malicious prosecution. He submits that the admissions on the part of Respondent in their balance sheets are not explained. It is for the Respondent to come up with further details as to which bank guarantee they refer to in their balance sheets, for the purpose of said loan. If the Respondents fail to explain, the contentions raised by the Appellant need to be accepted. Mr Rao would submit that in respect of tripartite agreement, the same could be implied for the purpose of considering guarantee.

26. The rival contentions fall for our determination.

27. In the case of *Neelkanth Devansh Developers* (supra), a Division Bench of this Court while dealing with Company Appeal wherein the order of learned Single Judge in Company petitions was challenged. While dealing with the powers of the Court in Intra-Court appeal, a reference is made to the decision of Supreme Court in the case of *Wander Ltd. vs. Antox India (P) Ltd.*; (2013) 1 SCC 641 which is found in para Nos.35 and 36 and reads thus:-

“35. The Apex Court in Wander Ltd. v. Antox India (P) Ltd. has observed in para 14 as under:-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle.

Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph, (1960) 3 SCR 713 : AIR 1960 SC 1156 : SCR 721).

“... These principles are well established, but as has been observed by Viscount Simon in Charles Oseinton & Co. v. Jhanaton, ([1942] A.C. 130) ‘... the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.’”

36. This Court therefore while exercising its appellate jurisdiction under Clause 15 of the Letters Patent Act is not expected to interfere with the order passed by the learned Single Judge, unless it comes to the conclusion that the finding is perverse or is based on material which is not part of the record. As mentioned hereinabove we are of the view that finding of the learned Single Judge is neither perverse nor is based on the material which is not there on record. The question No. (iv) is therefore answered in the negative.”

28. Keeping in mind such settled proposition while dealing with appeal thereby assailing the order of learned Single Judge in Company Petition, the limited aspect which we are required to consider and which the Appellant has to establish is about the arbitrary, capricious or

perverse findings in the impugned order and where the learned Single Judge ignored settled principles of law, while dismissing such petition. We also need to keep in mind that while considering the appeal, we are not supposed to replace our findings with that of the learned Single Judge as recorded in the impugned order. If the findings of the learned Single Judge are considered to be in accordance with the settled principles, it is not permissible for this Court to substitute its own findings with that of the learned Single Judge when it is not found to be perverse or arbitrary in any manner.

29. Mr Rao placed reliance on the decision in the case of *M.K. Mahajan* (supra) wherein Delhi High Court observed about the undisputed position emerging from the documents that the company in its balance sheet showed outstanding and payable amount and such balance sheet was signed by the Managing Director of the company. It is no doubt true that the balance sheet shows the amount to be payable in that matter. However, the so-called admissions which Mr Rao wants to refer are with regard to some security given by the Appellant in respect of loan facility. Therefore, the so-called admissions in the balance sheet will have to be considered on case to case basis and whether such admissions are in respect of the alleged bank guarantee which was invoked by the concerned bank for settlement of the outstanding amount of the Respondent in the present matter.

30. In the case of *Rathi Bars Ltd.* (supra), similar observations are found with regard to admission of liability in the balance sheet or the books of accounts. There is no quarrel with regard to such proposition,

however, in what context the admission could be considered, needs to be appreciated on the basis of documents, averments of each case. It cannot be considered as unilateral admission for all purposes.

31. In the case of *M/s. Madhusudan Gordhandas* (supra), the Supreme Court while dealing with the application for winding up under Section 433 (c) of the Companies Act, 1956, observed in para Nos.20 and 21 as under:-

“20. Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corporation; (1874) LR 19 Eq 444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Re. Brighton Club and Horfold Hotel Co. Ltd.; (1865) 35 Beav 204)

21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See Re. A Company; 94 SJ 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re. Tweeds Garages Ltd.; 1962 Ch 406). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.”

32. In the case of *IBA Health (India) Private Limited* (supra), the Supreme Court while dealing with winding up petition under Sections 433 (e) & (f) and 434 of the Companies Act, 1956, the observations of the Apex Court from paras 20 to 24 are relevant and therefore, quoted for ready reference:-

“Substantial dispute — As to liability

20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.

21. In this connection, reference may be made to the judgment of this Court in Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami [(1965) 35 Comp Cas 456 (SC)] in which this Court held that: (Comp Cas p. 463)

“It is well settled that ‘a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure

will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court....’ ”

22. The abovementioned decision was later followed by this Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries (P) Ltd. [(1971) 3 SCC 632] The principles laid down in the abovementioned judgment have again been reiterated by this Court in Mediquip Systems (P) Ltd. v. Proxima Medical System GmbH [(2005) 7 SCC 42] wherein this Court held that the defence raised by the appellant Company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The abovementioned judgments were later followed by this Court in Vijay Industries v. NATL Technologies Ltd. [(2009) 3 SCC 527]

23. The principles laid down in the above mentioned cases indicate that if the debt is bona fide disputed, there cannot be “neglect to pay” within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as “neglect to pay” so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

Commercially solvent

24. The appellant Company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the

company might not constitute a stand alone ground for setting aside a notice under Section 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.”

33. Mr Patil, learned Counsel for the Respondent placed reliance on the observations in para Nos. 33 to 35 of the above decision which are also relevant for the matter in case of petition for winding up and the same are quoted below for ready reference.

“Malicious proceedings for winding up

33. We may notice, so far as this case is concerned, there has been an attempt by the respondent Company to force the payment of a debt which the respondent Company knows to be in substantial dispute. A party to the dispute should not be allowed to use the threat of winding-up petition as a means of enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced as a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt. Of late, we have seen several instances where the jurisdiction of the Company Court is being abused by filing winding-up petitions to pressurise the companies to pay the debts which are substantially disputed and the courts are very casual in issuing notices and ordering publication in the newspapers which may attract adverse publicity. Remember, an action may lie in appropriate court in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company and later dismissed when a proper

defence is made out on substantial grounds. A creditor's winding-up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public.

Public policy considerations

34. A creditor's winding-up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the newspaper of the filing of winding-up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of the public at large.

35. We have referred to the above aspects at some length to impress upon the Company Courts to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurise the company to pay a debt which is substantially disputed. A Company Court, therefore, should be guarded from such vexatious abuse of the process and cannot function as a debt collecting agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere.”

34. The entire dispute revolved upon the aspect as to whether the defence raised by the Respondent in the Company Petition was genuine and whether there was a serious dispute about the debt. In other words and as claimed by the Appellant, whether such defence was a moonshine defence and was taken only to defeat the repayment of the outstanding.

35. Future some relevant dates are material for the purpose of considering the dispute raised before this Court. The Respondent Company was incorporated under the Companies Act, 1956 somewhere in January 1998. There was some joint venture agreement executed between the Directors of the Respondent with that of the Appellant. The memorandum refers to a meeting dated 19.12.1997 concerning joint venture agreement. It thus shows that the Respondent Company was in existence prior to the joint venture agreement between its Directors and the Appellant somewhere in December, 1997. There is another joint venture agreement purportedly signed on 04.11.2004 wherein Clause 7.2 refers that the Appellant shall take over the entire responsibility for the loans and other financial assets/facilities taken by Respondent as of the date of execution of these precincts; The Appellant shall sign and conclude appropriate guarantees, etc. securing the repayment of the said loans; favouring the banks concerned. Similarly, upon execution of guarantees, as aforesaid, the guarantees, etc. already concluded by the IGP in respect of existing loans of the Respondent, etc, shall stand liquidated.

36. The above clause clearly goes to show that the Appellant undertook to take over entire responsibility for the loans and other financial assets of the Respondent and was supposed to sign and conclude appropriate guarantees securing repayment of such loans favouring the banks concerned. It further shows that the Respondent had already obtained loan/finances from their bankers for the purpose of running of their business, which the Appellant undertook to guarantee by

separately signing guarantee agreements in favour of the concerned bankers. In this joint venture agreement, there is absolutely no reference to the loan which Respondent availed from the concerned bank and were supposed to repay it as per the terms and conditions.

37. The Appellant heavily placed reliance on the bank guarantee dated 20.12.2004 which is claimed to be an umbrella guarantee executed by the Appellant in favour of the said bank wherein it is mentioned that the Appellant issues this guarantee as security for all existing, future and conditional claims resulting from the respective banking business relation and in order to ensure that the Lender shall receive payment of all amounts expressed to be payable by the Borrower under the agreement (“the indebtedness”) up to the amount of EUR 48,000,000 in the currency and at the place provided therein. Such guarantee is considered to be irrevocable and unconditional guarantee to pay. Admittedly, this document nowhere refers to the loan issued in favour of Respondent.

38. It is no doubt true that when the notice of winding up was issued by the bank as well as by the Appellant referring to such bank guarantee, the Respondent called upon the bank and the Appellant to furnish copy of such bank guarantee. Such demand on behalf of Respondent was obvious as such bank guarantee was executed in Germany by the Appellant with a German bank and that it is not a tripartite agreement between the Appellant, Respondent and the concerned bank for the purpose of securing loan granted to the Respondent by the concerned bank having a branch at Mumbai.

39. It is a fact that bank refused to hand over copy of such document. Even the Appellant in its reply, refused to hand over such document on the ground that such document is not relevant for the purpose of notice of winding up.

40. When the petition was filed before this Court for winding up, though the document of bank guarantee was enclosed, it was not complete as enclosures as referred to in the said bank guarantee were not attached. The Respondent in their reply specifically raised the aspect that the bank guarantee produced by the Appellant is not a guarantee for which the bank could recover entire outstanding amount and thereafter called upon the Appellant to produce the enclosures. It is a matter of record that the Appellant initially refused to produce the annexures on the precise ground that such enclosure is a confidential document and that same is not required for the purpose of deciding the petition.

41. It is again a matter of record that subsequently by an additional affidavit, the Appellant produced translated copies of annexures claiming to be annexures of the bank guarantee dated 20.12.2004. While producing such translated copies of the annexures by way of additional affidavit, the Appellant claimed that subsequently they were able to locate such document and accordingly they are tendering it in the Court.

42. At this stage, it is pertinent to note that the Appellant as well as the concerned bank flatly refused to hand over such bank guarantee to the Respondent when demanded. The Appellant though placed on record the bank guarantee dated 20.12.2004 but without enclosures. When the Appellant was directed, it was claimed that such annexure was

confidential in nature and that the same cannot be produced in the interest of the Appellant's business. Another stand was taken that such annexure was not relevant for the present proceedings.

43. Subsequently, by additional affidavit, another story was put forth while producing translated copies of such annexure that the Appellant somehow was able to locate the document. These stances taken by the Appellant are contrary to each other. First of all, it is claimed that such annexure is confidential and that the same is not relevant for deciding the petition. However, subsequently, such stand was given up and the copy of annexures in a translated manner was produced along with additional affidavit thereby claiming that the Appellant somehow located it. Thus, the earlier contention that such document is confidential and that it is not required for deciding the petition was totally given up.

44. Perusal of such annexure and more specifically the translation would go to show that it was translated somewhere on 03.09.2007. The annexure is to the guarantee of 20.12.2004 totalling to EUR 48,000,000 given by the Appellant in connection with the promise of loan dated 20.12.2004 regarding facilities totalling to EUR 48,000,000. Thereafter, it refers to the branches of affiliates of the said bank listed in the chart having business connections with the groups/affiliates of the Appellant in connection with credit facilities of the umbrella facility and in accordance with promise of loan dated 20.12.2004 for the Appellant so as to be used by the below listed companies. The list of credit margins within Germany and abroad for the Appellant Company group is mentioned therein. The name of Respondent appears in the said list with account number, loan of

₹6 crores with working capital and other details. The said annexure shows the date as 20.12.2004.

45. The sanction letter issued in favour of one of the Directors of Respondent by the concerned bank having branch at Mumbai is dated 10.01.2005. It refers to the credit facilities wherein the first paragraph itself shows that the said bank is having pleasure in offering following increased facilities on the terms and conditions set out therein. Clause 2 of the letter reads about condition precedent wherein it was informed to the Respondent that they shall utilise the facilities only after receipt by the bank of the following form and substance reasonably satisfying the bank:

- a. Certified true copy of the Board Resolution accepting the facilities and authorising particular person to deal with the bank in connection with it and execute required documents.
- b. A certified true copy of each of your current constitutive documents (such as the Memorandum and Articles of Association).
- c. Demand promissory note for ₹60,000,000/- to be executed under the common seal in terms of Articles of Association of the Company, in bank's prescribed format.
- d. Letter of Continuity to be executed on ₹100/- stamp paper in bank's prescribed format.

- e. Counter Guarantee in respect of the guarantee facility to be executed under the common seal in bank's prescribed form on ₹300/- stamp paper.
- f. Kredirsufung of Putzmeister AG, Germany in the format acceptable to the bank to secure the entire facility to remain valid during the entire tenor of the facility (on hand) .
- g. Consent Letter in the format prescribed by Reserve Bank of India for the disclosure by the bank of information and date relating to you or the facilities.
- h. Such other documents as we may reasonably consider to be relevant.

46. Clause 3 of such letter further refers to the security of Putzmeister AG, Germany in the format acceptable to the bank to secure entire facility to remain valid during the entire tenure of the facility. Thus it is clear that the sanction letter issued by concerned bank is subsequent to the bank guarantee given by the Appellant to the German bank. The branch at Bombay in their sanction letter did not specifically refer to the bank guarantee given by the Appellant to the German bank dated 20.12.2004, as the guarantee for such loan.

47. The question remains as to how in the enclosure to the bank guarantee dated 20.12.2004 reference to advance/loan of ₹6 crores of the Respondent by the branch of the same bank at Mumbai appears. Admittedly, on 20.12.2004, there was no sanction letter issued by the Mumbai branch of the said bank offering loan of ₹6 crores to the

Respondent. Thus, the annexure wherein reference to the Respondent appears as on 20.12.2004 and in connection with loan of ₹6 crores appears to be seriously doubtful. The same aspect has been considered by the learned Single Judge in the impugned judgment. We do not consider that such observations of the learned Single Judge are in any way arbitrary or perverse. Such observations are based on the record and more particularly, when the Appellant and the concerned bank initially refused to hand over copy of such bank guarantee to the Respondent. Though the bank guarantee was produced along with the petition, the annexure was not attached. Admittedly, the bank guarantee dated 20.12.2004 nowhere refers to the Respondent or the alleged loan. It is only mentioned in the annexure. Since on 20.12.2004, there was no loan of ₹6 crores sanctioned by the Mumbai branch, the question of referring it in the annexure allegedly attached to bank guarantee dated 20.12.2004 appears to be highly suspicious.

48. The next aspect which has been highlighted by the Appellant is regarding the so-called admissions on the part of Respondent regarding the bank guarantee.

49. Mr Rao forcefully submitted that the learned Single Judge failed to consider such admissions and therefore, the impugned order needs to be interfered with.

50. We are unable to accept such contention since a detailed discussion is found with regard to such submissions including the balance sheet wherein it is claimed that Respondents admitted to the bank guarantee. The learned Single Judge categorically referred to such

admissions in the balance sheet and the documents and observed that though there is reference to some guarantee issued by the Appellant, it nowhere refers to bank guarantee dated 20.12.2004. Particularly, the learned Single Judge has observed that the so-called admissions nowhere relates to the guarantee dated 20.12.2004. On this count, it was observed that the defence raised by the Respondent regarding such guarantee dated 20.12.2004 having no connection with the credit facilities granted under letter of sanction dated 10.01.2005 appears to be bona fide defence.

51. Upon considering such documents as referred by Mr Rao containing admissions on the part of Respondent, we also find that though there is some reference to the guarantee issued by the Appellant for the said loan, it does not specifically refer to the guarantee dated 20.12.2004. The Appellant approached the Court with a specific case that the loan issued in favour of Respondent was secured by a bank guarantee dated 20.12.2004 and therefore, it was incumbent upon them to satisfy this Court that such bank guarantee in fact refers to the loan issued in favour of Respondent on 10.01.2005.

52. Thus, the defence raised by the Respondent cannot be considered as moonshine defence and there appears to be substantial defence raised with regard to claim of the Appellant for recovery of the amount of more than ₹2 crores which the Mumbai branch allegedly recovered from the Appellant on the basis of bank guarantee dated 20.12.2004.

53. Though Respondent raised other aspects with regard to malicious attempt on the part of Appellant, collusion between the Appellant and the bank, such aspects were not raised before the learned Single Judge

and further, such aspects were not considered and decided in the impugned order. We, therefore, are unable to consider such aspects raised on behalf of Respondent in this appeal.

54. However, one thing we have to observe is the timing of the recalling of the entire loan by the Mumbai branch without any default being committed by the Respondent. Such timing is very close to cancellation of joint venture by the Appellant with the Respondent Company. We do not want to deliberate upon such aspects since we are convinced that observations of the learned Single Judge cannot be faulted with on the grounds which have been raised in the present appeal.

55. Having said so, the appeal fails and hence the following:-

ORDER

- i. The Appeal stands rejected.
- ii. Parties shall bear their own cost.

BHARAT P. DESHPANDE, J.

PRAKASH D. NAIK, J.