

GAHC010124672015



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Co.Pet. 10/2015

1:HDFC BANK LIMITED

A COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956 AND CARRYING ON BANKING BUSINESS UNDER LICENSE GRANTED BY RESERVE BANK OF INDIA AND HAVING ITS REGISTERED OFFICE AT HDFC BANK HOUSE, SENAPATI BAPAT MARG, LOWER PAREL WEST, MUMBAI- 400013 AND AMONGST OTHERS, HAVING ONE OF ITS OFFICES AT 11, U.N. BRAHMACHARI STREET, KOLKATA- 700017 AND CENTRAL PLAZA, 2/6, SARAT BOSE ROAD, P.S.- BALLYGUNGE, KOLKATA- 700020.

VERSUS

1:CHOTATINGRAI TEA ESTATE PRIVATE LIMITED

A COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956 AND HAVING ITS REGISTERED OFFICE AT JALANAGAR, DIBRUGARH, ASSAM.

Advocate for the Petitioner : MR.M SHARMA

Advocate for the Respondent : MS.B DAS

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM

JUDGMENT AND ORDER (CAV)

Date : 29-05-2019

Heard Mr. D. Senapati, learned counsel appearing for the petitioner. I have also heard Mr. D. Mazumdar, learned senior counsel assisted by Mr. S. Biswas, learned counsel representing the respondent.

2. This petition has been filed under sections 433, 434 and 439 of the Companies Act, 1956 seeking an order for winding up the respondent company due to its inability to discharge the admitted debt towards the petitioner.

3. The facts leading to the filing of the present petition, briefly stated, are that M/s Maikaal Fibres Limited, a company registered under the Companies Act, 1956, had obtained credit facilities to the tune of Rs.4 Crores (approx.) in the month of November, 1997 from the then existing Times Bank Limited. In order to facilitate the above, M/s Maikaal Fibres Limited i.e. the borrower, had executed a demand promissory note for an amount of Rs.3,00,00,000/- (Rupees Three Crores) and hypothecation agreement with regard to its moveable properties and books of debts amounting to Rs.4 Crores. Subsequently, Times Bank Limited was amalgamated with HDFC Bank Limited i.e. the petitioner herein. The scheme of amalgamation was sanctioned by the Reserve Bank of India by its circular dated 17.02.2000 and the effective date of amalgamation of Times Bank Limited with HDFC Bank Limited was notified as 26.02.2000. The principal borrower i.e. M/s Maikaal Fibres Limited had adopted a resolution in the meeting of its board of directors resolving to open fixed deposit accounts with the petitioner Bank and by the resolution dated 12.01.2001, the respondent company had agreed to provide corporate guarantee of Rs.55 Million (5.5 Crores) so as to indemnify the liability of the principal borrower. As per the decision taken in the board meeting, the respondent company had executed a letter of "continuing guarantee" (corporate guarantee) with the petitioner Bank. On 06.02.2002, the petitioner bank had informed the borrower M/s Maikaal Fibres Limited informing it about the outstanding dues. However, despite acknowledging the debt, no steps were taken by the borrower to repay the loan. Situated thus, on 20.09.2004, the petitioner bank had issued a notice recalling the loan facility and demanding payment of a sum of Rs.3,07,32,000/- from the borrower and each of the guarantors including the respondent company. Be it mentioned herein that the respondent company and its directors, besides few other individuals, stood guarantors with regard to the loan provided by the petitioner bank to the respondent company.

4. When the notice demanding payment of the aforesaid amount was not responded to by the borrower, the petitioner bank had approached the Debts Recovery Tribunal, Kolkata by filing an application under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (herein after the Act of 1993) being registered as Original Application No.12/2005 praying for issuance of a Certificate of Rs.2,55,67,902.31 P. along with interest at the rate of 18% per annum. Around that time, M/s Sungrace Finvest Private Limited had moved an application before the Madhya Pradesh High Court at Indore Bench under sections 433, 434 and 439 of the Companies Act, 1956

registered as Company Petition No.08 of 2005 praying for winding up of M/s Maikaal Fibres Limited. By the order dated 06.01.2010 passed by the Madhya Pradesh High Court, the prayer for winding up of M/s Maikaal Fibres Limited was allowed. Accordingly, winding up proceedings were initiated by the Official Liquidator. In the meantime, the proceeding being O.A. No.12/2005 pending before the DRT, Kolkata had culminated into Certificate of Recovery dated 24.11.2008 wherein, the learned Tribunal had directed the respondent company, along with other parties therein, to pay a sum of Rs.2,55,67,902.31 P. to the petitioner together with interest at the existing commercial rate, recoverable from 01.11.2004 till realisation. Although the respondent company had filed an appeal before the learned Debts Recovery Appellate Tribunal, Kolkata, which was registered as Appeal No.43/2009, yet, the appeal was not entertained by the learned Appellate Tribunal due to the failure on the part of the respondent company to deposit even the reduced amount of Rs.2 Lakhs as per the direction of the learned Tribunal. As such, no challenge was pursued against the Certificate of Recovery dated 24.11.2008 as a result of which, the same has attained finality in the eye of law.

5. A recovery proceeding being R.C. No.56/2008 was thereafter, started by the petitioner bank for execution of the Certificate of Recovery dated 24.11.2008 and the said proceeding is pending disposal before the learned Recovery Officer. The principal debtor i.e. M/s Maikaal Fibres Limited has, in the meantime, been wound up in terms of the order dated 06.01.2010 passed by the Madhya Pradesh High Court wherein the petitioner bank has been able to recover an amount of Rs.66,84,017/- through the Official Liquidator. For the recovery of the balance amount, the petitioner bank is pursuing the execution proceeding. However, taking note of the stand of the respondent in the affidavit filed before the Recovery Officer as regards its assets, along with the audited balance-sheet for the financial years 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11, wherein the respondent company has admitted that there is no business activity of the company and the same is practically closed for all purposes, the present petition has been filed under Section 433, 434 and 439 of the Companies Act, 1956 with a prayer for winding up the respondent company on the ground that it does not have the ability to pay its admitted debts.

6. By referring to the materials available on record, Mr. Senapati submits that save and except the respondent company, the remaining guarantors are all individuals and therefore, the petitioner bank is pursuing its remedy for recovery of the dues through the process of execution of the Certificate dated 24.11.2008. However, the present proceeding being distinct and different from the one initiated under the provisions of the Act of 1993 and the relief prayed for being one that cannot be granted by the Debts Recovery Tribunal or the Recovery Officer, the present proceeding for winding up of the

respondent company has been instituted. Mr. Senapati has further argued that the respondent has not denied the execution of the agreement with the petitioner bank standing as one of the guarantors or the loan facility availed by the principal debtor. Moreover, the Certificate of Recovery dated 24.11.2008, which was passed by the learned Debts Recovery Tribunal, Kolkata in presence of the interested parties including the respondent company has also attained finality in the eye of law. As such, submits Mr. Senapati, there can be no doubt about the fact that the petitioner bank stands in a stranger footing than that of a secured creditor in this case and therefore, the respondent company cannot deny or dispute its debt. Since the respondent has itself stated in the affidavit filed before the learned Debts Recovery Tribunal that there is no business activity in the company and the same is existing merely for the names sake, hence, according to Mr. Senapati, this is a fit case where the prayer for winding up of the respondent company should be allowed by this Court.

7. In support of his above argument Mr. Senapati has relied upon a decision of the Delhi High Court rendered in the case of **Bank of Nova Scotia vs. Rpg Transmission Limited** reported in (2005) **3 CompLJ 287 Del** to contend that the pendency of the proceeding before the learned Recovery Officer shall not be a bar for this Court to pass an order in terms of the prayer made in this petition, if otherwise satisfied on merit.

8. Mr. Mazumdar, learned senior counsel appearing for the respondent, has not denied the fact that the respondent stood as one of the guarantors in respect of the loan availed by M/s Maikaal Fibres Limited (now wound up) from the petitioner bank but contends that after the borrower company has been wound up as per the order of the Madhya Pradesh High Court, the guarantors including the present respondent stood discharged of their liability by operation of law. In so far as the stand taken by the respondent company in the affidavit filed by it before the Debts Recovery Tribunal No.2, Kolkata, in connection with R.C. No.56/2008 is concerned, Mr. Mazumdar submits that the said affidavit was filed by taking note of the financial status of the company upto the year 2010-2011. However, in the meantime, there has been a change in the financial status of the company and therefore, submits Mr. Mazumdar, as on date the position has altered substantially to the extent that the respondent company is in a position to discharge its debt in accordance with law.

9. The learned counsel for the respondent has also argued that as per section 433(e) of the Act of 1956, the order for winding up of a company is required to be passed only when the company is unable to pay its admitted debt. Having regard to the consequences that such an order is likely to have on the company and its employees, an order for winding up would be passed by the court only in rare

circumstances and when the facts and circumstances of the case so justifies. Based on such argument, the learned counsel for the appellant has prayed for dismissal of the petition.

10. I have considered the submissions advanced by the learned counsel for both the parties and have also meticulously gone through the materials available on record.

11. As noted above, the basic facts in this case are not in dispute. The respondent has not denied the fact that it stood as one of the guarantors with regard to the credit facilities availed by the principal debtor M/s Maikaal Fibres Limited from the erstwhile Times Bank Limited which subsequently stood merged with the petitioner bank. The respondent company is neither disputing the claim of the petitioner bank to recover the said amount nor has it contested the claim of the petitioner that the Certificate of Recovery dated 24.11.2008 has attained finality in the eye of law. The only ground on which the respondent is resisting the order of winding up of the company is that after the winding up of the borrower company i.e. M/s Maikaal Fibres Limited whereby a sum of Rs.66,84,017/- was recovered by the petitioner bank through the official Liquidator, the claim of the petitioner bank with regard to the remaining amount stood discharged in as much as no further liability can be attached upon either the borrower or the guarantors including the respondent.

12. I find from the record that two of the individual guarantors who are the Certificate Debtor (CD) No.2, Sri Mrigendra Jalan and CD No.5 Sri Dipak Nagar had earlier filed an application before the Debts Recovery Tribunal at Kolkata in connection with R.C. No.56/2008 contending that after the liquidation of the borrower company, their liability under the Certificate of Recovery as guarantors also stood discharged. By the order dated 08.08.2018, the aforesaid application was rejected by the learned Tribunal. It has also been submitted at the bar that the respondent company herein has also filed a separate application before the learned DRT, Kolkata, raising a similar plea regarding discharge of its liabilities and the said application is pending disposal before the learned Tribunal. Taking the plea of pendency of the aforesaid application, the respondent's counsel has contended that the reluctance on the part of the respondent company to make any payment to the petitioner bank is on account of the aforesaid legal objection raised before the appropriate forum which is pending disposal and not on account of its inability to pay the debts.

13. From the facts narrated herein before, it would be apparent that the respondent company is making an attempt to wriggle out of its liabilities by raising a technical plea regarding discharge of its liability in the manner noticed herein before. In order to address the said issue it may be useful to refer to the terms and conditions of the guarantee agreement signed by the respondent with the petitioner

bank. As per clause 10 of the agreement dated 12.01.2001 signed by the respondent with the petitioner bank agreeing to stand as a guarantor with regard to the loan, the liability of the guarantor shall not stand discharged on the happening of any of the events mentioned therein including winding up or bankruptcy. Clause 10 of the agreement dated 12.01.2001 would be relevant for the purpose of this case and therefore, is reproduced herein below :-

“10. And Notwithstanding the Bank receiving payments from the Borrower the Guarantor or any person or persons as aforesaid liable to the Bank, or from any security held by the Bank of the whole or any part of the amount hereby guaranteed, if the Borrower shall become bankrupt or insolvent or being a corporation or any incorporated company shall pass a resolution for voluntary winding-up or shall be ordered to be wound-up by an order of the court, or shall enter into any arrangement scheme including rehabilitation scheme approved by Banks/Financial institutions/BIFR etc., compromise with its creditor or creditors, the Bank shall be at liberty without discharging the Guarantors liability to make or assent to any compromises, compositions or arrangements and to rank as creditors for the Bank's total claim hereunder and to receive dividends, composition or other payments thereupon to the entire exclusion and surrender of all the Guarantor's rights as surety/sureties in competition with the Bank, notwithstanding the statutes of bankruptcy or any rule of law or equity to the contrary, unless all the Bank's dues as aforesaid have been satisfied in full.”

14. A plain reading of Clause 10 of the agreement dated 12.01.2001 signed by the respondent company leaves no room for doubt that the liability of guarantor under the said agreement shall not stand discharged even if the borrower becomes bankrupt, insolvent or is wound-up by an order of the court.

15. While dealing with a question of similar nature in the case of **Maharashtra State Electricity Board, Bombay vs. Official Liquidator, High Court, Ernakulam and another** reported in AIR 1982 SC 1497 the Hon'ble Supreme Court has held that the liability of a guarantor is absolute and unconditional and the fact that the company in liquidation i.e. the principal debtor had gone into liquidation would not have any effect on the liability of the bank i.e. guarantor. The observations made in paragraph 7 are quoted herein below for ready reference :-

“7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum upto Rs. 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty eight hours of such demand the Bank has to pay the amount

to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under section 128 of the Indian Contract Act, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (See Jagannath Ganeshram Aggarwala v. Shivnarayan Bhagirath & Ors.(1). See also In re Fitzgeorge Ex parte Robson(2). In view of the unequivocal language of the letter of guarantee, no reliance can be placed by the Company in liquidation on the decision of this Court in Punjab National Bank Limited v. Bikram Cotton Mills & Anr.(3) in which the surety's liability was limited to the 'ultimate balance' found due from the principal debtor and the said balance had not been ascertained before the institution of the suit.....”

16. From a careful analysis of the law laid down by the Hon'ble Supreme Court in the case of **Maharashtra State Electricity Board, Bombay** (supra) it would be evident that the liability of a guarantor shall not stand discharged merely on the ground that the principal debtor has gone into liquidation. Having regard to Clause 10 of the agreement dated 12.01.2001, I am of the view that the ratio laid down in the case of **Maharashtra State Electricity Board, Bombay** (supra) would be squarely applicable to the facts of the present case. Merely because the principal debtor i.e. M/s Maikaal Fibres Limited has gone into liquidation under the order of the court, the guarantors including the present respondent cannot claim to be discharged of their liabilities as guarantors, more so when the guarantee agreement itself contains a specific clause to the contrary.

17. After the decision of the Delhi High Court in the case of **Bank of Nova Scotia** (supra) it is no more res integra that a parallel proceeding for recovery of debts before the Debts Recovery Tribunal would be maintainable along with a petition filed before the Company Judge under sections 433, 434

and 439 of the Companies Act, 1956 for winding up of the company. In the present case, as noticed above, the legal objection raised by the respondent regarding discharge of its liability as a guarantor due to liquidation of the principal debtor cannot be accepted in view of the decision of the Supreme Court in the case of **Maharashtra State Electricity Board, Bombay** (supra) as well as the provisions in the form of Clause 10 in the guarantee agreement dated 12.01.2001. Therefore, the only other question that would fall for consideration of this Court is as to whether this is a case where the respondent company does not have the ability to discharge its admitted debt.

18. As mentioned above, the respondent has filed an affidavit in connection with R.C. No.56/2008 wherein it has been categorically stated that the company does not have any business activity. The affidavit was sworn by the Manager Finance of the respondent company. The statements made in paragraphs 5, 6, 7 and 8 of the affidavit would be relevant for the purpose of this case and are therefore, reproduced herein below :-

“5. The Company respectfully states that it has no business activity and is practically closed for all purposes. The Company does not possess and or own any movable or immovable assets whatsoever, other than those reflected in the Audited Balance Sheet. The Audited Balance Sheet for the last five financial years i.e. 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11 (as on date) are annexed hereto are collectively marked with the letter “A-1”.

6. The Income Tax Return for the years 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11 (as on date) further confirm that Company is in loss condition. Copies of the Income Tax Return duly submitted with the Income Tax Authorities are annexed hereto and collectively marked with the letter “A-2”.

7. It is respectfully submitted that the Company is in complete doldrums and is existing only for the name sake and has nothing to be proceeded against by this Ld. Bench in the instant Recovery proceeding save and except as aforesaid.

8. The Company respectfully submits that in view of the poor and or grave financial condition as reflected from the Balance Sheet and Income Tax Returns, the company had to forgo its right to proceed further with its Appeal being No.43 of 2008 preferred before the Hon’ble Debts Recovery Appellate Tribunal against the judgment passed by this learned Tribunal. The Company even failed to avail the benefit granted by the Hon’ble High Court to deposit a lesser amount than that was directed by the Hon’ble Appellate Tribunal. Thus fettering its right to proceed with the appeal and get its genuine grievance redressed i.e. the

Company never guaranteed to the loans availed by the Certificate No.1.”

19. Although the learned senior counsel appearing for the respondent has argued that the financial condition of the company has improved since the time of filing the affidavit dated 10.02.2011, yet, save and except making a bald claim, in paragraph 13 of the affidavit-in-opposition to the effect that “the respondent company still has the financial sub stratum” there is nothing on record to indicate in any manner that the respondent company is a going concern and that it is engaged in any regular business activity. There is also nothing on record to show as to the kind of financial activities undertaken by the respondent. Therefore, the claim of the respondent company resisting the prayer for winding up of the company does not appear to be a bonafide claim. In other words, this Court is of the view that the respondent does not have the financial capacity to discharge its admitted debt.

20. In so far as the petition filed by the respondent before the DRT, Kolkata seeking discharge of its liability is concerned, as noted above, similar petition filed by the other two guarantors has already been rejected by the learned Tribunal by a reasoned order, which is a part of the record of this case. After going through the order passed by the learned Tribunal, I do not see any reason why a different view should be taken on the same issue in an application filed by a co-guarantor. Moreover, the order passed by the learned Tribunal can at best have a bearing in the recovery proceeding pending against the respondent company and other guarantors but the same cannot have any bearing in the present proceeding wherein the prayer for winding up of the company is under consideration by the court.

21. For the reasons stated herein above, I am of the considered opinion that the petitioner has succeeded in making out a strong case for admission of this petition.

The petition, therefore, stands admitted.

Petitioner to take steps under Rule 99 of the Companies (Court) Rules, 1959 for advertising the petition by following the provisions of Rule 24 of the Rules. The advertisement be published in two daily newspapers, one in English and one vernacular (Assamese) having wide circulation in the State of Assam by giving 14 days clear notice of the date of hearing.

The advertisement shall be in Form No.48.

Considering the facts and circumstances of the case and the oral prayer made by the petitioner’s counsel, the requirement of publishing the advertisement in the Official Gazette of the State is hereby dispensed with.

List the petition for hearing on 29.07.2019.

JUDGE

Comparing Assistant