Tata Capital Financial Services Ltd vs Unity Infraprojects Ltd And 2 Ors on 6 July, 2015

Author: S.C. Gupte

Bench: S.C. Gupte

1/25

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 800 OF 2014

Tata Capital Financial Services Ltd.
vs.

Unity Infraprojects Ltd. & Ors.
WITH
COMPANY PETITION NO.443 OF 2014
WITH

COMPANY APPLICATION (L) NO.746 OF 2014
IN
COMPANY PETITION NO.443 OF 2014
WITH
CHAMBER SUMMONS (L) NO.404 OF 2015

IN
ARBITRATION PETITION NO.800 OF 2014
....
Mr. D.D. Madon, Senior Advocate, i/b. Hiren Mehta, for Petitioner.

Mr. Navroze Seervai, Senior Advocate a/w. Mr. Ashish Kamat, Mr. S.G. Roy,

and Ms. Chinmayee Pendse, i/b. Vidhii Partners, for Respondent No.1.

Mr. Sagar Divekar, for Respondent Nos.2 and 3.

Mr. Kevic Setalvad, Senior Advocate, i/b. M/s. M.V. Kini & Co. Applicant in CHSL 405/2015.

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CORAM : S.C. GUPTE, J.

RESERVED ON : 9 APRIL 2015 PRONOUNCED ON : 6 JULY 2015 (Judgement) :

. This arbitration petition, filed under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act"), seeks interim protection in respect of the properties of the Respondents. It is in the nature of an application for 2/25 arbp 800-2014.doc attachment before judgment pending an arbitration reference. The accompanying Company Petition is for winding up of Respondent No.1 Company for its inability to pay debts. The Petitions are heard together and disposed of by this common order.

2. The Petitioner is a non-banking financial company who has granted a credit facility by way of term loan of Rs.50 crores to the Respondents. Respondent No.1 is the principal debtor, whilst Respondent Nos.2 and 3, who are directors of Respondent No.1, are guarantors for the advance. The transaction documents for the loan include a term loan agreement dated 24 June 2010 ("Term Loan Agreement") and a deed of hypothecation dated 13 July 2010, executed by Respondent No.1, and personal guarantees executed by Respondent Nos.2 and 3. The Respondents availed of the loan, but committed defaults in repayment of the same. A sum of Rs.29.68 crores is alleged to be due and payable by the Respondents to the Petitioner as of the date of the petition. The Petitioner has recalled the entire finance, invoked the personal guarantees, and also invoked the arbitration agreement contained in the Term Loan Agreement. Referring to the conduct of the Respondents, set out in the petition, and in particular, the attempts of the Respondents and their secured lenders to formulate a CDR scheme, it is the case of the Petitioner that the Respondents are in the process of arranging their affairs and assets in such a manner as to defeat the execution of any arbitral award that the Petitioner may obtain in the reference. The Petitioner further submits that the hypothecated assets, which form its security, are insufficient to satisfy the dues of the Petitioner. The Petitioner, in the premises, seeks a deposit order and in default of such deposit, an order for attachment before judgment and in the alternative, an interim injunction restraining the Respondents from selling their movable 3/25 arbp 800-2014.doc and immovable assets or even dealing with them as part of

the CDR Scheme.

3. The application is opposed by the Respondents and the consortium of their secured lenders, comprising of 20 banks and financial institutions led by the lead bank - State Bank of India, who have taken out the accompanying Chamber Summons for impleadment in the Arbitration Petition. The Respondents oppose the application on various grounds including insufficiency of stamp on the document containing inter alia the arbitration agreement, the CDR mechanism being put in place and balance of convenience. The Respondents contend that the application lacks merit. They also submit that there is a gross suppression and mis-statement on the part of the Petitioner. The Interveners - secured lenders oppose the application on the ground that there is a huge debt of over Rs.3000 crores owed by the Respondents to the secured lenders, which is sought to be restructured in the CDR Package involving the Respondents and the secured lenders. The CDR Package envisages a further finance to the tune of Rs.341 crores to be infused in Respondent No.1 towards working capital so as to revive the company from the debt trap and to enable the creditors to recover their dues. As a pre-condition for the Package, it is proposed that all current assets of the company (held as security by the CDR lenders together with the Petitioner) shall be pooled together and a single deed of hypothecation shall be executed in favour of the CDR lenders. It is submitted that the Petitioner as a first pari passu charge holder can continue to hold its security in the current assets of the company, but cannot obtain any blanket injunction or relief in respect of its dues so as to jeopardise the CDR scheme.

4. The Company Petition is filed by the Petitioner on the same 4/25 arbp 800-2014.doc facts as are urged in the Arbitration Petition No.800 of 2014, praying for winding up of the Respondent Company. It is submitted that a sum of Rs.29.68 crores is due and payable by the Respondent to the Petitioner as of 21 March 2013; that the Petitioner served a statutory notice on the Respondent under Section 434 of the Companies Act, 1956; and that despite such notice, the Respondent failed to discharge the debt and, accordingly, there is a deemed inability to pay the debt on the part of the 1st Respondent Company. The petition is opposed by the Respondents and the secured lenders led by State Bank of India on the same grounds as are contained in their submissions in the accompanying Arbitration Petition.

5. Before we take up the question of granting of interim relief to the Petitioner or admission of the winding up petition in the face of the CDR scheme, let us dispose of the objections of insufficiency of stamp duty, and suppression and mis-statement. It is firstly submitted by the Respondents that the arbitration clause is contained in a document (i.e. Term Loan Agreement) which is insufficiently stamped; the document cannot, in the premises, be led in evidence or acted upon by this Court and thus, no relief can be granted to the Petitioner under Section 9 of the Act. It is submitted that the Term Loan Agreement is executed between the parties in Delhi and bears the stamp in accordance with the law applicable in Delhi. It is submitted that within three months of the document or its copy being received in the State of Maharashtra, it is required to be stamped with the duty applicable in Maharashtra by virtue of Sections 18 and 19 of the Maharashtra Stamp Act, 1958 and the document not having been so stamped, is inadmissible in evidence and incapable of being acted upon by this Court. Learned Counsel for the Respondents relies upon the judgments of the Supreme Court in the case of SMS Tea Estates Pvt. Ltd. vs. 5/25 arbp 800-2014.doc Chandmari Tea Company

Pvt. Ltd.1 and of the Division Bench of our Court in the case of Lakdawala Developers Pvt. Ltd. vs Badal Mittal and Others2 in support of his submissions. In reply, it is submitted by the Petitioner that the document cast the duty of payment of stamp duty on Respondent No.1. It is submitted that the document has also been admittedly acted upon between the parties. In the premises, relying on the ratio of a judgment of a learned Single Judge of this Court in the case of Aditya Birla Finance Ltd. vs. Coastal Projects Ltd. 3 , learned Counsel for the Petitioner distinguishes the facts of the present case from the facts in the cases of SMS Tea Estate and Lakdawala Developers and submits that there is no merit in the case of inadmissibility of the document for want of requisite stamp duty.

6. In Aditya Birla Finance Ltd., a learned Single Judge of this Court held that the agreements in that case having been acted upon by both the parties and the obligation to pay the requisite stamp duty being on the respondent (who objected to the admissibility of the documents), the objection on account of non-payment of stamp duty was devoid of merit.

That is how the learned Single Judge distinguished the judgments in SMS Tea Estate and Lakdawala Developers. In the facts of the present case also, the Term Loan Agreement has been acted upon by both the parties and the obligation to pay the requisite stamp duty is squarely placed on Respondent No.1 under the agreement. The ratio of the decision of Aditya Birla Finance Limited would ordinarily apply to the facts of the present case. It is, however, submitted by Mr. Seervai, learned Senior Counsel appearing for the Respondents, that the judgment of Aditya Birla Finance 1 (2011) 14 SCC 66 2 APP(L)272.13 std. 25 June 2013, Coram: Dr. D.Y. Chandrachud & S.C. Gupte,JJ. 3 ARBPL-1603/13 dated 29 October 2013, Coram: R.D. Dhanuka, J.

6/25 arbp 800-2014.doc Limited is per incurium since it erroneously disregards two binding judgments, namely, the cases of SMS Tea Estate and Lakdawala Developers. Learned Counsel implores the Court to take a different view from that of the fellow learned Single Judge in Aditya Birla Finance Limited. I am not inclined to go any deeper in this controversy for the simple reason that in the present case, the agreement and its contents are not in any way disputed by the Respondents and in the premises, it is not really necessary to rely on the document, namely, the Term Loan Agreement or its contents for the purposes of considering the present interim application. Even if we were to disregard the contents of the Term Loan Agreement, the existence of the debt as well as the arbitration agreement between the parties, the due invocation thereof and the reference commenced by the Petitioner in pursuance thereof having been admitted by the Respondents, the Court would be within its rights to consider the interim application of the Petitioner pending the arbitration reference even in the absence of the Term Loan Agreement. So also, the questions regarding the existence of the debt and bonafide disputes in respect thereof, if any, which are the subject matter of the Company Petition, can also be considered without reference to the stipulations of the Term Loan Agreement in the facts of the present case.

7. It is alleged by the Respondents that the Petitioner has 'falsely' stated in the petition that the documents, including the Term Loan Agreement, were executed in Mumbai, whereas the documents were actually executed in Delhi. It is true that the documents appear to have been executed in Delhi and there appears to be an incorrect statement in the petition that they were executed in Mumbai. That, however, does not imply that the statement is 'false' or, much less, that the petition should be

thrown 7/25 arbp 800-2014.doc out on that ground. The word 'false' in this context implies 'deliberately intended to deceive' and only if a party indulges in such falsehood, that it is likely to be non-suited by the Court for the purposes of an equitable relief. In the face of the fact that the Respondents admittedly carry on business in Mumbai, this Court's jurisdiction in the matter was beyond question and there was nothing to be gained by the Petitioner's averment as regards execution of the documents in Mumbai for the purposes of such jurisdiction. It cannot be said that such a statement was deliberately intended to deceive or mislead this Court. Ditto for the other so called false statement or mis- statement regarding the pending dues. It is submitted that on 30 September 2014, a sum of Rs.10.30 crores was paid by Respondent No.1 to the Petitioner, but this fact was suppressed from the Court when the Court passed interim orders in the matter. The petition was declared on 30 April 2014. The statement in the petition about the dues of Rs.29.68 crores as of the date of the petition is correct. Though the orders passed by the Court on 26 November 2014 and 9 December 2014 do not reflect any statement on the part of the Petitioner as regards the payment of Rs.10.30 crores during the pendency of the petition (i.e. on or about 30 September 2014), there is an affidavit filed on 11 December 2014 by the Petitioner, where this payment is acknowledged and the total outstanding dues are shown as Rs.24.29 crores after adjusting the payment of Rs.10.30 crores. Under the circumstances, there is no case of suppression on this count either, so as to deny equitable relief to the Petitioner.

8. Let us now consider the merits of the petition in the face of the CDR Scheme. The petition seeks an attachment before judgment or relief in the nature thereof. It is settled law that the principles laid down in the Code of Civil Procedure, 1908 for grant for interlocutory reliefs as well as the 8/25 arbp 800-2014.doc underlying basis of Order 38 Rule 5 furnish a guide to the Court whenever similar reliefs are sought under Section 9 of the Act. At the same time, Courts must bear in mind the object of preserving the efficacy of arbitration as an effective form of dispute resolution behind a provision such as Section 9 of the Act. In other words, whilst deciding an application under Section 9 for reliefs in the nature of an attachment before judgment or an injunction, the Court will broadly bear in mind the fundamental principles of Order 38 Rule 5 and Order 39 Rules 1 and 2, but at the same time, will have the discretion to mould the relief on a case by case basis with a view to secure the ends of justice and preserve the sanctity of the arbitral process. That is the ratio of the case of Deccan Chronicle Holdings Limited Vs. L & T Finance Limited4, where a Division Bench of our Court reviewed the law on the subject including the Supreme Court decision in Adhunik Steel Ltd. Vs. Orissa Manganese & Minerals (P) Ltd. 5 and the decision of our High Court in Nimbus Communications Ltd. Vs. Board of Control for Cricket in India6.

9. In the present case, the reliefs are sought both on the basis that the principles of Order 38 Rule 5 are satisfied in the present case and that there is also a case for enforcement of a negative covenant under the principles behind Order 39 Rules 1 and 2. It is submitted that there is a clear case of an outstanding debt, which is not even seriously disputed by the Respondents. The debt is of a huge sum of over Rs. 25 crores. It is further submitted that the Respondents are organizing their affairs and assets in such manner as to defeat any award that may be passed in the pending reference. It is also submitted that the transaction documents 4 Appeal(L) No.130-&131/13 in Arb. Petn. 1095/12 & 1321/12, Coram: D.Y.Chandrachud & S.C.Gupte,JJ. dtd.8/8/13.

5 AIR 2007 SCC 2563

executed in connection with the term loan do not permit the Respondents to execute any transaction concerning, or deal with, the current assets of Respondent No. 1 except with the permission of the Petitioner. There is, thus, a case for interim enforcement of a negative covenant and the Respondents cannot be permitted to deal with their property or execute any document even as part of the CDR Scheme.

10. No doubt there is an admitted debt of over Rs.25 crores in the present case. There is a clear prima facie case of an enforceable money claim. Yet at the same time, the claim is secured by a charge over the current assets of the 1st Respondent company. This charge is held by the Petitioner along with other secured lenders, but the latter acknowledge the Petitioner's charge as the first pari passu charge. The grievance of the Petitioner is that it is an express term of its charge that the 1 st Respondent shall not, without obtaining a prior consent of the Petitioner, raise finances by way of loans, etc. from any other bank or financial institution against the security of the Petitioner created under the Term Loan Agreement and Deed of Hypothecation. The Petitioner admittedly holds a first pari passu charge over the current assets of the company, both present and future. The other secured creditors (who are participating in the CDR Scheme and described as CDR Lenders) also have hypothecation deeds executed in their favour, many of these being even prior to the date of the Petitioner's charge.

Presently, what is proposed in the CDR Scheme is that there would be a consolidated hypothecation deed and charge over the current assets of the 1st Respondent in place of these individual deeds, in favour of the CDR lenders. In other words, there is merely a restructuring of the existing charge in favour of the CDR lenders. No doubt there is an increased exposure to the extent of fresh Rupees 341 crores to be infused by the CDR 10/25 arbp 800-2014.doc lenders as part of the CDR Scheme. But that is something which is really to get the Respondent company out of the present debt trap and to revive it, and that is being closely monitored by a mechanism put in place by the Reserve Bank of India. In the premises, as long as the Petitioner's first pari passu charge is being recognized by the CDR lenders, the Petitioner cannot make any serious grievance out of the CDR scheme or its proposal of a consolidated hypothecation deed. As and when the security is realized, the Petitioner as the first pari passu charge holder will be entitled to participate in it. There is no case, thus, for granting any injunction by way of enforcement of the negative covenant claimed by the Petitioner.

11. As for the case under Order 38 Rule 5, in the facts of the case, noted above, there is hardly any likelihood of the Respondents disposing of their assets with an intention to obstruct or defeat any award that may be passed in favour of the Petitioner. In the first place, all properties of the Respondents are subject matter of security for the dues of secured creditors;

they are being closely monitored within the parameters of a CDR Scheme. Secondly, the disposal, if any, can only be under the CDR Scheme and such disposal can never be termed as disposal with an intention to defeat any award against the Respondents. This is particularly so, since the CDR lenders are owed a sum of over Rs.3900 crores by the 1 st Respondent Company as of date. Compared to these dues, the Petitioner's liability works out to hardly 0.64 per cent.

12. That is not to say that there is no case whatsoever for protecting the Petitioner's interest. Respondent No. 1 is in dire financial straits. It is likely that even after infusion of fresh funds, the company may not be able to satisfy fully the debts of its secured creditors including the 11/25 arbp 800-2014.doc CDR lenders and even these lenders will have to make further sacrifices. In that case, the Petitioner also may not be able to enforce fully the award it may obtain in the reference. Accordingly, there may be some case for making appropriate arrangements in the interest of the Petitioner. This aspect is dealt with later in this order. But one thing is clear. No attachment, receiver or even injunction, which may prejudicially affect the rights of the consortium of the secured creditors and the CDR Scheme, can be granted in favour of the Petitioner.

13. The consequences of jeopardizing the CDR Scheme involving secured creditors whose financial exposure exceeds over Rs.3900 crores as compared to Rs.25 crores owed to the Petitioner, by granting the reliefs prayed for by the Petitioner, are outrageous and disproportionate to the prejudice to be suffered by the Petitioner in the absence of these reliefs. It is a basic norm of RBI guidelines for a CDR package that no account can be taken up for restructuring by the banks unless the financial viability of the borrower company is established and there is a reasonable certainty of repayment from the borrower, as per the terms of the restructuring package.

It is a bonafide last ditch effort to assist the company to get back on rails, in the interest of all stakeholders. The CDR Cell established under the guidelines of RBI is an expert body, who, after assessing the merits of the restructuring proposal, has approved a final CDR package for Respondent No. 1 and appointed State Bank of India as the Monitoring Institution to oversee the implementation of the package, with a condition to furnish periodic reports to the CDR Cell. The CDR Scheme inter alia envisages (i) a cut-off date of 1 January 2014 at which the total debt outstanding is estimated at Rs.3170.67 crores, (ii) principal moratorium of 27 months from the cut-off date, (iii) infusion of additional funds of Rs.341 crores by 12/25 arbp 800-2014.doc CDR lenders into the company, and (iv) total loan tenure of 117 months, with repayment starting from 30 April 2016. The total sacrifice of CDR lenders on account of deferment of principal repayment and reduction of interest rate is estimated at Rs.290.84 crores. The Interveners/CDR lenders have placed on record the financials of the company and the various steps taken by the stakeholders in the matter of revival of the company. In the light of the foregoing, this Court would be loathe to pass any order jeopardizing the CDR Scheme without any compelling reason. It is neither in the interest of the company nor its creditors including the Petitioner herein. The balance of convenience weighs heavily in favour of allowing the CDR Scheme to have a full play, with a fair chance to all stakeholders to secure a survival for the company, so that its commitments are honoured.

14. Interests of justice would instead be served better if the Petitioner is either allowed to participate in the CDR Scheme or if it chooses not to, kept informed from time to time about the progress of the

implementation of the Scheme, with directions to the Monitoring Institution under the Scheme to not to allow any disposal of assets of Respondent No. 1 without intimation to the Petitioner and granting liberty to the Petitioner to apply for appropriate reliefs with respect to such disposal with a view to protect its interests.

15. The above discussion would have ordinarily disposed of the matter, but then there is the company petition, where the Petitioner is seeking winding up of the 1st Respondent company. It is submitted by Mr. Madon for the Petitioner that the statutory notice not having been complied with, there is a deemed inability to pay the debt on the part of the company. It is submitted that there is no bona fide dispute raised by the company 13/25 arbp 800-2014.doc regarding the debt and in the premises, the petition ought to be admitted.

Counsel submits that existence of a CDR Scheme applying to the secured creditors ought not to come in the way of an admission order. He relies on various judgments to support his contention that winding up proceedings are essentially meant as the only remedy of unsecured creditors if the company is unable to pay its debts (the Petitioner in the present case, though secured in respect of current assets of the company, such assets being insufficient to pay its debt, being effectively in the position of an unsecured creditor) and in these proceedings, the wishes of unsecured creditors must be accorded precedence over those of secured creditors . Our Court has held, Counsel contends, that secured creditors cannot oppose an admission order on the ground of an ongoing CDR Scheme, if there is otherwise a case for winding up. It is submitted that the Court may consider advisability of a winding up order after hearing all stakeholders at the final hearing of the petition, but that need not come in the way of admission of a petition for winding up. Learned Counsel relies upon the judgments of learned Single Judges of our Court in BNY Corporate Trustee Services Ltd. Vs. Wockhardt Limited7 and Sublime Agro Ltd. Vs. Indage Vintners Limited8 as also of Delhi High Court in Citibank, N. A. Vs. Moser Baer India Ltd.9 and Yes Bank Limited Vs. A2Z Maintenance & Engineering Services Ltd.10 in support of his contentions.

16. It is true that there is no defence to the Petitioner's debt and there is a clear case of deemed inability to pay it on the part of the company. But does that mean that the Company Court is obligated to admit 7 CP/971/09 dtd. 11 March, 2011, Coram: S.C. Dharmadhikari, J. 8 CP/960/09 dtd. 19 March, 2010, Coram: S.J. Kathawalla, J. 9 Co.Pet.558/2012 & Co.Appl.2301/2012 dtd. 17 July, 2013, Cora: R.V.Easwar, J.(Delhi High Court).

10 CS(OS) No.217/2014 dtd. 30 July, 2014, Coram: Manmohan Singh,J.

14/25 arbp 800-2014.doc a winding up petition. Is advisability of a winding up order not a matter to be considered by the Company Court. For there is no denying that the right to a winding up order is not an unqualified right. In Palmer's Company Law the rule is expressed in the following words: the Court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the Court in its discretion may refuse the order. The Supreme Court in the case of Madhusudan Gordhandas & Co. Vs. Madhu Woolen Industries Pvt. Ltd.11 explained the matter thus:

> "22. Another rule which the court follows is that if there is opposition to the making of the winding up order by the creditors the court will consider their wishes and may decline to make the winding up order. Under Section 557 of the Companies Act, 1956 in all matters relating to the winding up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered though perhaps the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st Edition, page 742 as follows : "This right to a winding up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order.
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> The wishes of the creditors will however be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case."

But are the wishes of the creditors to be considered only at the stage of final hearing of the petition and not at the time of admission. A 11 1971(3) SCC 632 15/25 arbp 800-2014.doc learned Single Judge of our Court considered this issue in the case of Bharat Petroleum Corporation Limited Vs. National Organic Chemical Industries Ltd.12 A judgment of Delhi High Court in the case of Bipla Chemical Industries Vs. Shree Keshariya Investment Ltd. 13 was cited before the learned Single Judge, which had taken a view that the creditors who are inclined to oppose a petition for winding up are not entitled to be heard at the stage of admission. Delhi High Court relied on Rule 96 of the Companies Court Rules, 1959 which enables the creditors to be heard after the petition is admitted and advertised, and observed that there was no rule envisaging such hearing before admission. The learned Single Judge in Bharat Petroleum Corporation (supra) respectfully disagreed with this view, holding as follows (part of para 6):

> "The circumstance that there is no rule which envisages that the creditors may be heard to oppose the admission of a petition does not interpose any bar to the Company Court even at the stage of admission in view of the clear mandate of section 557 that in all matters relating to the winding up of a company, the Court will have regard to the wishes of creditors and contributories. Sub-section (1) of section 557 provides a clear statutory principle for the Court to follow. As a matter of fact there is no reason why the mandate of sub-section (1) of section 557 should not be applied even to the stage of admission. Chawla, J.

held that the interests of creditors are not in any manner affected or prejudiced by a "mere" admission of the petition and that they have an opportunity to have their say at the time of admission. In my view, the interest of creditors has to be considered by the Court even at the stage

of admission. The reasons are not far to seek and the facts of the case are fairly typical. In the present case, in the affidavit in support of the company application(Company Application No.352 of 2003), it has been averred that State Bank of India leads the 12 2004(2) Mh.L.J. 114 13 (1977) 47 Company Cases 211.

16/25 arbp 800-2014.doc consortium of banks that advanced large sums of money to the respondent Company towards working capital facilities. The consortium consists of State Bank of India, Bank of Baroda, Canara Bank, Union Bank of India, State Bank of Indore, Corporation Bank, ABN Amro Bank N.V., Central Bank of India, Standard Chartered Bank, Bank of India, HDFC Bank and Barclays Bank. As of 31st March, 2002, an amount of approximately Rs.250 crores is stated to be outstanding from the company to the consortium.

The outstanding of the intervenor. State Bank of India, are estimated at Rs.79 crores exclusive of interest. Apart from this, it has been averred that a comprehensive restructuring proposal was prepared by the company and has been submitted by the Bank to the financial institutions. The State Bank of India has granted its in- principle approval by a letter dated 19th April 2003 for the acceptance of the restructuring package by other members of the consortium. State Bank avers that care has been taken to protect the interest of the petitioners, of the workers and of the banks and financial institutions. On these averments made by State Bank of India and in view of similar averments made by other creditors, the applications for intervention must be allowed. That is in consonance with the legal position. Whether, in fact, an order admitting the winding up petition should or should not be passed does not fall for consideration at this stage. At the present stage the Court has only to consider the question whether the creditors should be heard in the company petition. For the reasons recorded hereinabove. I am of the view that the creditors should be permitted to intervene.

17. If anything, these observations apply with even greater force to the facts of our case. Here the debt of the company sought to be restructured is much larger, the banks and financial institutions are more in number and their exposure much greater in value. In the circumstances noted above, there is a clear case for giving the CDR Scheme a proper chance with a view to get the company back on rails. At this sensitive and critical juncture, an order of admission would seriously affect the market 17/25 arbp 800-2014.doc position of the company. The confidence of the business and trade in the future of the company is likely to take a bad hit, if at this stage, when all stakeholders are focused on reviving the company, a winding up petition is admitted against the company. Besides, as noted by the learned Single Judge in Bharat Petroleum Corporation (supra), winding up is a matter of discretion for the Company Court and advisability of a winding up order, in the particular facts of each case, is very much a component of the sound judicial discretion to be exercised by the Court and there is no reason why it ought not to form part of the consideration of the Court at the admission stage, as explained above.

18. Let us now consider whether the judgments relied upon by the Petitioner's Counsel concerning CDR Schemes vis-a-vis winding up petitions, state the law otherwise. In BNY Corporate Trustee Services Ltd.(supra), a learned Single Judge of this Court was considering the question of maintainability of a company petition in the face of a CDR Scheme under implementation in respect

of the company. In that case, there was a CDR Scheme approved by a majority of the creditors of the company which provided for restructuring of the debts owed by the respondent company to the CDR lenders. The petitioner was not willing to join the CDR Scheme. It was contended on behalf of the petitioner that the CDR Scheme or its pendency by itself did not constitute a defence to the company petition. It was contended that in spite of the pending CDR Scheme approved by some of the creditors of the company, a petition for winding up at the instance of the creditor, who chose to remain outside the CDR Scheme, was maintainable. This Court held that the petitioner could not be forced to join the CDR Scheme; that the law did not postulate any such compulsion on the petitioner; and since the CDR package or postponement of the discharge of 18/25 arbp 800-2014.doc his debt to a future date was not acceptable to the petitioning creditor, a winding up petition could be presented by the petitioning creditor. The Court acknowledged that there was no absolute right to the creditor and he could not insist on a winding up order being passed but held that the Court could not refuse to entertain a petition merely because the CDR for settlement of its debts is proposed by a company. The Court held that the fact that a scheme is being proposed and the creditors will have to wait for settlement of their dues cannot by itself be a ground to refuse the admission of a winding up petition and something more would have to be set out and proved in that behalf. In Sublime Agro Ltd.(supra), when the petition for winding up came up for admission before this court, it was contended on behalf of the company that there was a proposal to restructure its debts and operations by the CDR Cell; that the proposal for admission of the Company under CDR mechanism was approved; and that ICICI Bank, as a monitoring institution, had agreed to convene a joint lenders' meeting and prepare a financial restructuring package for the company. This Court, in the first place, called upon the Respondent company to indicate the basis for the CDR lenders to have reached a decision that the company was viable and that the debt could be restructured. Though the decision was said to be on the basis of a "business plan" submitted by the company, the business plan was not produced before the Court despite the Court calling upon the company to do so. The Court noticed that the monitoring committee under the CDR mechanism comprised only of secured creditors and no unsecured creditor was on the monitoring committee. The Court held that the CDR Scheme was a voluntary scheme not binding on the unsecured creditors of the company, who were always free to pursue winding up proceedings. The court also took into account the statement of law in Palmer's Company Law to the 19/25 arbp 800-2014.doc effect that where the opposition(to a winding up petition) comes from creditors of a different class, e.g. secured creditors, the court may prefer the wishes of unsecured creditors, since in some cases refusal of the order will rob them of what is virtually their only remedy. The court held that the claim of unsecured creditors in that case amounting to Rs.200 crores could not be ignored on the ground that the CDR Cell was holding meetings for restructuring the debts of the secured lenders of the respondent company. The court noticed that the total liabilities, including debts owed to the secured creditors to the tune of Rs.200 crores and to the unsecured creditors also to the tune of Rs.200 crores, were far in excess of the assets of the company and the company appeared to be commercially insolvent. The court was of the view that the company had not paid even the statutory contributions for the benefit of its workers since the past one year; there was suppression of facts in the affidavit filed by the petitioners; and an attempt was made to simply take adjournment on the ground that the CDR Cell was in the process of preparing a financial restructuring package for the respondent company. The court, in the premises, was of the view that there was a case for winding up of the respondent company. The Delhi High Court in the case of Citibank, N. A. (supra) was considering the question

whether or not the winding up petition should be admitted in view of the CDR Scheme put in place under the supervision of the Reserve Bank of India and attempts to revive the company. The Delhi High Court noted the two judgments of our Court referred to above on the question as to whether the implementation of the CDR Scheme can be used as a bar on the right of the unsecured creditors to file a petition for winding up. The Court accepted the law laid down by our Court that a CDR Scheme was not a bar on the right of the unsecured creditors to file a winding up petition but, at the same time, made it clear that the effectiveness of the CDR Scheme and 20/25 arbp 800-2014.doc its impact on the ability of the respondent company to repay its debts was a matter that could be examined in detail once the petition was admitted.

The court in this behalf essentially went by the dicta of Chawla, J. (as he then was) in the case of Bipla Chemical Industries (supra), where the learned Judge held that at the admission stage the opposition of the other creditors of the respondent company did not merit consideration. (As I have noted above, the view of Chawla, J. has been dissented from by our Court in the case of Bharat Petroleum Corporations Limited (supra), holding that all relevant circumstances, including the opposition of the other creditors, are matters to be considered at the stage of admission.) In Yes Bank Limited (supra), another learned Single Judge of Delhi High Court considered an application of the plaintiff company, who had filed a suit for permanent and mandatory reliefs against four defendants. These reliefs were sought on the basis of certain agreements between them and the plaintiff. It was the grievance of the plaintiff in that case that a CDR package had been approved by the Corporate Debt Restructuring Committee in respect of defendant no.1. The CDR package inter alia contemplated restructuring of term loan. The package envisaged that defendant no.2, as shareholder of defendant no.1, shall pledge the entire shareholding in favour of the CDR lenders. Such pledge would have been in breach of an undertaking forming part of the agreement between the parties. The contention of the defendants was that the CDR package was not voluntary as contended by the plaintiff but that the framework and guidelines laid down by the Reserve Bank of India were binding on the plaintiff. The learned Single Judge of Delhi High Court did not accept the contention of the defendants. The court held that by virtue of documents executed between the parties, the plaintiff had a contractual right to see that no other or further charge was created in respect of the assets without the prior 21/25 arbp 800-2014.doc sanction of the plaintiff and that the defendant shall not dispose of, including by way of pledge, his shareholding in defendant no.1 without the plaintiff's consent. The court held that the CDR mechanism being a voluntary arrangement, no lender could be said to be bound unless he approved of the same. The court noted that the plaintiff in that case had no intention to stall the CDR package but that he was merely interested in protecting his contractual rights. The court, in the premises, granted various reliefs to the plaintiff.

19. A review of the law laid down by the learned Single Judges of our Court and Delhi High Court clearly indicates that, in the first place, a CDR mechanism is a voluntary arrangement and that other creditors, who opt to remain out of the package, could not be forced to either join or act on the same (except of course in accordance with the binding guidelines framed by the Reserve Bank of India in that behalf). Secondly, the mere fact that a CDR package has been approved by some of the lenders of the company and its implementation is pending, by itself, constitutes no defence to the maintainability of a winding up petition at the instance of other creditors, who choose to remain

outside the package. In fact, in BNY Corporate Trustee Services, our Court in terms held that a scheme is proposed and the creditors will have to wait for settlement of their dues, by itself, cannot be a ground to refuse the admission of winding up petition.

> "Something more will be set out and proved in that behalf". In other words, by itself and without anything more, the mere pendency of CDR package is no defence to a winding up petition but, at the same time, the Court is not prohibited from taking into account the viability of the company on the basis of the CDR package approved by various lenders and its effect on a winding up petition. As I have indicated above, broadly all aspects 22/25 arbp 800-2014.doc concerning advisability of a winding up order in the face of various circumstances, including a CDR package under implementation between a company and its secured or other lenders, is a matter which very much forms part of the consideration of the Company Court in a winding up petition not only at the stage of final disposal, but also, depending on facts of an individual case, at the time of admission of a winding up petition. A restructuring package in respect of a debt of a respondent company being under active implementation and reflecting materially on the viability of the company as also the effect of a winding up order, or even an order of admission of a winding up petition, on the implementation of such package and its effects qua the company and all the other stakeholders, are matters that may well be considered by the Company Court in a winding up petition, both at the stage of admission as well as final hearing. These elements were clearly absent in the case of Sublime Agro. In that case, there was no final CDR scheme actually under implementation. In a meeting of joint lenders, considering the feasibility of the revival of the company on the basis of a "business plan", a proposal for its admission under CDR mechanism was merely approved and the monitoring institution had agreed to convene a joint lenders' meeting and prepare a final restructuring package for the company. And even the so called "business plan" was not forthcoming despite the Court's demand. It is in these facts that our Court said that "the claim of unsecured creditors in the instant case amounting to Rupees Two Hundred Crores cannot be ignored or pushed back on the ground that the "CDR Cell" is holding meetings for restructuring the debts of the Respondent Company". The facts of our case are clearly distinguishable from the facts of Sublime Agro noted above. Even in Citibank N.A., Delhi High Court did consider it necessary to examine in detail the effectiveness of the CDR scheme and its impact on the 23/25 arbp 800-2014.doc ability of the company to repay the debts, but only at the stage of final hearing of the winding up petition and not at the stage of admission. That was on the basis of the view of that Court concerning the matters to be considered at the admission stage, which view has, as noted above, not found favour with our Court.

20. In our case, as noted in details above, the CDR package is the final CDR package approved by the Corporate Debt Restructuring Cell; there is a huge debt which is being restructured; such restructuring involves substantial financial sacrifice on the part of the secured creditors; it also envisages infusion of substantial funds into the company by the secured creditors so as to bring the

ailing company back on rails; and it is not advisable, in the premises, to rock the boat at this critical and sensitive juncture by admitting the winding up petition against the company. An admission order at this juncture is neither in the interest of the company and its workmen nor in the interest of its creditors including even the petitioning creditor. The need to allow the CDR scheme to have a full play in the interest of all stakeholders far outweighs the private interest of the Petitioner, who is, as noted above, not without a security and whose interests are also sought to be protected to the extent possible in the accompanying arbitration petition, to have the company wound up.

21. In the premises, the following order is passed :

(a) Arbitration Petition No.800 of 2014 is disposed of by directing State Bank of India - the Monitoring Institution under the CDR Package - to allow the Petitioner to participate in the CDR package if it so chooses, by amending the provisions and terms of the package appropriately. In the 24/25 arbp 800-2014.doc event the Petitioner does not choose to so participate, State Bank of India is directed to keep the Petitioner informed from time to time about the progress of the implementation of the CDR Scheme and not allow any disposal of assets of the Respondent Company without intimation to the Petitioner. The Petitioner will be at liberty to apply for appropriate reliefs with respect to the disposal, if any, of the assets as and when such intimation is given to it, with a view to protect its interests consistently with the other creditors including the CDR lenders.

(b) The Court Receiver appointed as receiver in respect of hypothecated assets described in the Schedule to the Deed of Hypothecation dated 13 July 2010 (Exhibit - H to the petition) in the order dated 26 November 2014, which is continued as an ad-interim arrangement in terms of the order passed by the Appeal Court on 9 December 2014, shall stand vacated.

(c) The injunction granted by the order passed on the Arbitration Petition on 26 November 2014 and continued by way of an ad-interim arrangement by the order of the Appeal Court dated 9 December 2014, shall also stand vacated but only with effect from the expiry of the period of 3 weeks from today.

(d) Mr. Seervai, learned Counsel appearing for the Respondents states that the Respondents shall furnish a statement on affidavit disclosing the particulars of dealings with the hypothecated assets in the ordinary and usual course of business as of the date of this order. The statement is accepted. Such affidavit shall be submitted within a period of 3 weeks from today.

25/25

(e) Since I have already heard the Interveners - secured lenders of

the Respondent Company in the matter and dealt with their submissions, there is no need to pass any separate orders on their Chamber Summons.

Chambers Summons (L) No.404 of 2015 is, accordingly, disposed of.

(f) Company Petition No.443 of 2014 is dismissed. The Petitioner, however, will be at liberty to apply for winding up of the Respondent Company on the same facts as are urged in this Petition, in the event the CDR Package fails or cannot be implemented in its existing terms.

(g) In view of the dismissal of the Company Petition, nothing survives in the Company Application and the same is also dismissed.

(h) There shall be no order as to costs.