

(2014) 03 BOM CK 0119**Bombay High Court****Case No:** Company Application (L) No. 68 of 2014 in Company Petition No. 510 of 2013

ICICI Bank Limited and The Bank
of New York Mellon

APPELLANT

Vs

GOL Offshore Limited

RESPONDENT**Date of Decision:** March 5, 2014**Acts Referred:**

- Companies Act, 1956 - Section 557

Citation: (2014) 6 BomCR 103**Hon'ble Judges:** G.S. Patel, J**Bench:** Single Bench

Advocate: Virag Tulzapurkar and Mr. Ashish Kamat, instructed by Desai and Diwanji, Mr. J.D. Dwarkadas and Mr. R. Narichania, s, Ms. Jyoti Singh, Mr. Srisabari Rajan, instructed by Phoenix Legal, for the Appellant; D.D. Madon , Mr. A.S. Doctor, instructed by y M/s. Junnarkar and Associates, for the Respondent

Final Decision: Dismissed**Judgement**

G.S. Patel, J.

The applicant, ICICI Bank Limited ("ICICI Bank"), is not a party to the Company Petition. The Company Petition was brought by the Bank of New York Mellon, London Branch, formerly known as the Bank of New York, London Branch ("BNYM") against GOL Offshore Limited ("GOL Offshore") for winding up. BNYM filed the petition as a trustee for some holders of unsecured foreign currency convertible bonds issued in 2007 by GOL Offshore. In the Company Petition, BNYM filed Company Application (L) No. 549 of 2013. That application sought relief's inter alia in relation to 352 sq. ft. jack-up rig known as Rig V-351 or Rig Somnath.

2. BNYM's Company Application was taken up by this court. Three orders were passed on 28th October 2013, 29th November 2013 and 11th December 2013. ICICI Bank's present application seeks leave to be impleaded as a respondent to the

Company Application; alternatively, leave to intervene; a modification of the order dated 11th December 2013 in BNYM's Company Application; and further relief's in relation to Rig V-351.

3. Having heard Mr. Tulzapurkar, Mr. Dwarkadas, Mr. Narichania and Mr. Madon, learned senior counsel for the three contesting parties, I am not persuaded to grant any relief's on this Company Application. In my view, what ICICI Bank seeks is the creation of an additional security in its favour over Rig V-351, although there is no such pre-existing security, and although ICICI Bank is otherwise sufficiently secured for any claim that it might have against GOL Offshore. I have also found that ICICI Bank's claim is not yet due. The application here is not only premature but is a hasty and unjustified attempt to defeat the resolution of at least part of BNYM's claim against GOL Offshore. The only basis for ICICI Bank's claim appears to be that some of the funds that it may available to GOL Offshore were used in the construction of this rig.

4. I will consider first the three orders passed in BNYM's Company Application (L) No. 549 of 2013 in the Company Petition. The order of 28th October 2013 notes the submission on BNYM's behalf that GOL Offshore proposed to sell Rig V-351 to pay off its creditors. BNYM contended that it was uncertain what GOL Offshore proposed to do with the proceeds of this sale and whether GOL Offshore's creditors would, in fact, be paid. As GOL Offshore sought time to file a reply, the matter was on that day adjourned. However, an ad-interim order was passed directing GOL Offshore to place on record before the court and before the next date of hearing all particulars along with the progress reports of the construction of Rig V-351 including its creation. GOL Offshore was also required to disclose details of its assets and liabilities. It was restrained from disposing of the rig and from entering into any transaction in respect of it without leave of the Court except in the usual course of business. This ad-interim order was continued on 29th November 2013.

5. On 11th December 2013, the Court considered BNYM's application for various relief's including an injunction against GOL Offshore from disposing of, *inter alia*, Rig V-351. It noted that the application was based on the apprehension that should the rig be sold, there would be no money left to pay BNYM, whose application for was opposed *inter alia* on the ground that the Rig in question belonged to a subsidiary company and not to GOL Offshore itself, and that, therefore, no injunction could be issued in relation to that Rig. On affidavit, GOL Offshore said that a potential buyer had offered a substantial price to purchase this Rig. The proceeds of this transaction would be used to pay various creditors including the bond-holders represented by BNYM.

6. In paragraph 5 of the 11th December 2013 order, the Court noted GOL Offshore's commitment, made on affidavit, to pay BNYM US\$ 45.2 million from the sale proceeds of the Rig "upon requisite permission [being obtained] and latest by 31st July 2014, even if the Rig is not sold by that date". In other words, GOL Offshore

would pay BNYM this amount of US\$ 45.2 million whether or not the Rig was sold. Holding that granting an injunction as sought would, at this stage and in these circumstances, only drive GOL Offshore further to the brink of a financial crisis, and that too before the Company Petition was heard on merits, the Court declined the injunction. In short, the Court permitted GOL Offshore (and, presumably, its subsidiary) to continue with its proposed sale transaction of Rig V-351. GOL Offshore was required to place on affidavit details of this transaction and amount received after the sale was completed. The ad-interim order granted earlier was vacated. Paragraph 8 of that order notes the commitment by the Chairman and Executive Director of GOL Offshore, one Prakash Chandra Kapoor, that a security would be created over the rig in favour of the bondholders represented by the BNYM:

8. Since the ad-interim order is being vacated entirely upon an express undertaking given by the Chairman and Executive Director of the respondent company and the same Chairman and Executive Director has represented to the bond holders that there will be security of the said Rig for the purpose of repayment to the bondholders, the undertaking given in the affidavit which is reiterated by the learned senior Advocate in the court, will also to be treated as an undertaking given by the Chairman and Executive Director himself, apart from the undertaking of the Company.

(emphasis supplied)

7. It is this order of which ICICI Bank now seeks what it calls a modification. Although this is the language of ICICI Bank's prayer in this Company Application, the relief sought is actually for a recall of the entire order and its substitution by the relief's set out in prayers 1(c), (d) and (e). These read as follows:

1c. this Hon"ble Court be pleased to modify the order dated 11 December 2013 such that (i) the Applicant also has security over Rig V-351 for repayment/pre-payment of all amounts due to the Applicant from the Respondent under the Credit Facility Agreements; and (ii) any proceeds, from the sale of Rig V-351 shall first be utilized by the Respondent for pre-payment of all amounts advanced by the Applicant to the Respondent under the Short Term Loan Facility Agreement dated 24th December 2013;

1d. any proceeds arising from the transfer (in any form) including sale, lease, license, hire or charter or otherwise of Rig V-351 and/or other rigs, owned by the Respondent or its subsidiaries or group companies, be ordered to be forthwith deposited with this Hon"ble Court;

1e. no amount from the proceeds arising from the transfer (in any form) including sale, lease, license, hire or charter or otherwise of Rig V-351 and/or other rigs, owned by the Respondent or its subsidiaries or group companies, be disbursed to the Petitioner or any other person unless the amounts payable by the Respondent to the Applicant under the Credit Facility Agreements, are paid by the Respondent to

the Applicant, out of such proceeds.

8. These relief's are based on one clause of one document securing one of ICICI Bank's many credit facilities to GOL Offshore. There are four such facilities: (a) a Rupee Term Loan Facility; (b) a Non-Fund Facility (Letter of Credit/Bank Guarantee); (c) a Derivative Facility; and (d) a Short Term Loan Facility ("STL Facility") for Rs. 400 million. We are concerned only with the last of these, the STL Facility. An agreement dated 24th December 2013 was executed in respect of the STL Facility. Clause 11 of the Schedule to the facility says:

11. Repayment

The Borrower shall, unless otherwise agreed to by the Bank, repay the Facility to the Bank in a single bullet payment on the day falling 12 months from the date of the first disbursement.

Mandatory Prepayment

The Borrower shall immediately within 7 (seven) days, prepay the whole or any part of this Facility from:

(i) Proceeds of disposal/sale of any of the rigs owned by the Borrower or its subsidiaries/group companies;

(ii) * * *

(iii) * * *

(emphasis supplied)

9. Now ICICI Bank has no security over the rig in question, Rig V-351/Somnath. That rig is also not an asset of GOL Offshore, but of its subsidiary; and ICICI Bank has extended no credit facilities to the subsidiary that owns the rig. ICICI Bank is also admittedly otherwise fully secured. Repayment under the STL Facility is not due till 15th November 2014, though interest of over Rs. 56 lakhs has fallen due. Mr. Tulzapurkar, learned senior counsel for ICICI Bank, says that clause 11 of the STL Facility Agreement is a covenant by GOL Offshore that, to all intents and purposes, earmarks for repayment of ICICI Bank's dues under that agreement all sale proceeds of every rig owned by GOL Offshore or any of its subsidiaries. That would include the rig in question too. He also draws attention to an email dated 20th December 2013 from GOL Offshore's Nitin Bhojani to various persons including ICICI Bank that it would charge Rig V-351 to the bondholders BNYM represents in the main petition. The "trigger event", he says, is the proposed sale of the rig. He emphasizes paragraphs 8(a) and 8(d) of GOL Offshore's affidavit in reply to the present Company Application to say that, admittedly, on GOL Offshore's own admissions in these paragraphs, it is in default of payment of an installment under the Rupee Term Loan Facility and of payment of interest of about Rs. 56.36 lakhs under the STL Facility. ICICI Bank must, he says, be made a party to the petition (or

allowed to intervene), but also to interpose its rights as a secured creditor over Rig V-351 to the exclusion of others.

10. The foundation of this claim, says Mr. Madon, learned senior counsel for GOL Offshore, with a considerable amount of indignation, is utterly incorrect. ICICI Bank claims, in paragraph 15 of its affidavit in support of the application, to have become aware of the court order of 11th December 2013 only in January 2014. The impression ICICI Bank tries to create, especially in para 12 of the affidavit in support, is that it was wholly unaware of the orders on the petition. This is demonstrably incorrect. The very email that ICICI Bank relies on, of 20th December 2013, indicates that GOL Offshore shared the court orders with all its lender banks, ICICI Bank included. Notably Article V of the STL Agreement, clause 5.1(iv), expressly mentions the present petition by its title, the amount of the claim and its registration number. There was, therefore, nothing hidden or kept from ICICI Bank, and nothing for it to discover or "learn" only in January 2014.

11. Even more pertinently, he says, the order of 11th December 2013 predates the STL Facility Agreement of 24th December 2013; and it was in the order of 11th December 2013 that the Chairman's undertaking was accepted. What ICICI Bank also does not disclose, says Mr. Madon, is that on 6th December 2013, there was a joint meeting in Mumbai of GOL Offshore's lenders. ICICI Bank was represented at this meeting. Following an initial discussion between the lenders, GOL Offshore's Chairman and its General Manager were invited to the meeting. GOL Offshore disclosed that it had taken some facilities from Yes Bank and offered this very rig as security. It also promised to clear all critical over dues by December-end and to share with its lenders its undertaking to this Court. ICICI Bank therefore could not have been unaware either of the court orders or of GOL Offshore's proposal in relation to the rig. Mr. Madon then turns to the relief's that ICICI Bank seeks. Prayer (c) makes it clear, he submits, that ICICI Bank now seeks to have the rig made a security for the repayment of its dues under all four agreements, not just the STL Facility, and it does so on the basis of its alleged innocence, a state of affairs as distanced from the facts as it is possible to be.

12. Mr. Dwarkadas, learned senior counsel for BNYM, also weighs in against ICICI Bank. How, he asks, is ICICI Bank concerned with a private treaty between the petitioning-creditor and its debtor? ICICI Bank has filed no petition of its own. The bonds of which BNYM is a trustee were due in October 2012. What ICICI Bank asks, Mr. Dwarkadas says, is that bondholders should defer their date of repayment, only because ICICI Bank has now decided it is time to step in. There is absolutely no justification for this. He points to my own order of 5th February 2014, when this Company Application was mentioned though not listed that day. In paragraph 5 of that order, I noted that though ICICI Bank had no security over the rig, its apprehension was that a sale of the rig would leave it without remedy in respect of the amounts due to it. Now that all the affidavits have been filed, Mr. Dwarkadas

says, the incorrectness of this so-called "apprehension", and its lack of any basis at all, are both immediately apparent.

13. Faced with this, Mr. Tulzapurkar relies on the decisions of this Court in Bharat Petroleum Corporation Ltd. v. National Organic Chemical Industries Ltd. & Ors.¹ and in Hy-Line International v. C & M Hy-Line Farms P. Ltd., In Re: C & M Farming Ltd.,² to say that at the very least, following the mandate of Section 557 of the Companies Act, 1956, ICICI Bank Ltd. must be allowed to intervene as it is a secured creditor. Bharat Petroleum says that there is no reason why the mandate of Section 557 should not be followed at the stage of admission, and a creditor be asked to wait till a final order on the petition before he is heard. Hy-Line International, a later decision by a few months, relies on Bharat Corporation but states the law slightly differently, in that it says that a court has the discretion to allow interested persons to participate in the proceedings so as to oppose the admission of the petition. Thus, secured creditors such as ICICI Bank can be permitted to intervene and be heard even at the stage of admission. I believe the legal position is correctly stated in Hy-Line International. But the emphasis here is on the word "discretion", and that is clear from the language of Section 557 itself, which says that "in all matters relating to the winding up of a Company, the Court may" inter alia "have regard to the wishes of creditors or contributories of the company, as proved to it by any sufficient evidence." Does this mean that a court is bound to allow every creditor to intervene, no matter how it places its case? That would, surely, do violence to the language of both the section, which uses the word "may", and the dictum in Hy-Line International, which speaks of "discretion". There is, clearly, a discretion in the Court. That discretion must be exercised judiciously. I must see whether the case is reasonable. More importantly, I must see what the creditor seeking intervention seeks: does he support the winding up? Does he oppose it? Is there candour in his application? A fidelity to facts? Are the relief's he seeks, at least *prima-facie*, for the benefit of a defined class, be it of creditors or workmen, or even the company itself? Or it is merely self-serving?

14. As far as I can tell, ICICI Bank's application fits only this last description. It attempts to secure an order by which it will exercise dominion over the asset of one of GOL Offshore's subsidiaries in satisfaction of its claim, otherwise fully secured, against GOL Offshore. That claim, as Mr. Madon and Mr. Dwarkadas are quick to point out, is based on a wholly incorrect statement and a deliberate distortion of the facts. ICICI Bank's application, read without the traverses from GOL Offshore and BYNM, gives the distinct impression that it was somehow being bamboozled by the sale of the rig. Its application does not disclose its prior knowledge of the filing of the main petition, or the implications of the fact that the order of 11th December 2013 predates the STL Facility Agreement. Curiously, the STL Facility Agreement is not appended to the affidavit in support. Only one clause is extracted. The document itself was produced by GOL Offshore, and it shows, unequivocally, that the filing of the main company petition in this very matter was specifically made

known to ICICI Bank and its details incorporated in the body of the STL Facility Agreement. ICICI Bank also elides the joint meeting of GOL Offshore's lenders, held well before this application was filed, and at which ICICI Bank was represented. Finally, there is the matter of the peculiar cast of ICICI Bank's prayers, expansive in scope and far-reaching in consequence. They seek nothing less than a complete sequestration of the rig to ICICI Bank to the exclusion of all others. Mr. Dwarkadas and Mr. Madon may not be entirely incorrect in saying, therefore, that the present application is mala fide and mischievous, and is nothing but an attempt to hijack the jack-up rig. In this scenario, where it does not appear that ICICI Bank's application has any semblance of bona fides, and is, *prima-facie*, nothing but an attempt to steal a march on a large body of creditors, both secured and unsecured, I do not see why I should exercise any discretion at all in favour of ICICI Bank. It is not enough, in my view, for an applicant to show that it is a secured creditor and to therefore claim intervention as a matter of right. Were that so, there would be no question of discretion u/s 557 of the Companies Act; every creditor would be instantly legally entitled to intervention. Where an application is found not to bona fide, that discretion cannot be exercised. So it is in this case. The application must, in my view, be dismissed in its entirety. Such an applicant, wholly wanting in bona fides, cannot claim the exercise of discretion in its favour.

15. When this matter was mentioned on 5th February 2014, I granted a temporary restraint preventing the sale of the rig or the creation of any third party rights till further orders on this application. I also restrained GOL Offshore from disposing of its assets except in the usual course of business till that time. On 11th February 2014, while reserving the matter for orders, I vacated this restraint order.

16. Now that the application is itself being dismissed, there remains the question of costs. Mr. Madon and Mr. Dwarkadas are both emphatic that such an application cannot be allowed to pass without an order of costs. Those costs, they say, should be exemplary so that they may serve as a deterrent to all those who attempt such mala fide actions. The application, they submit and with quite considerable justification, is not merely misguided. It is not the action of an individual unsecured creditor desperate to secure repayment. It is the studied and deliberate action of a financial behemoth, one with no paucity of legal resources, certainly one that ought to have known better. Its application proceeded on a demonstrably bowdlerized version of the facts. Therefore, the application must not only be dismissed, but it must be dismissed with costs. I agree. The application is dismissed. ICICI Bank shall pay to BNYM and GOL Offshore each costs quantified at Rs. 2.5 lakhs. These costs shall be paid within four weeks from today.

¹ [Bharat Petroleum Corporation Ltd. Vs. National Organic Chemical Industries Ltd. and State Bank of India](#), , per Dr. D.Y. Chandrachud, J., as he then was.

² [In Re: C and M Farming Ltd.](#), , per A.M. Khanwilkar, J., as he then was.