
(2017) 05 BOM CK 0140

BOMBAY HIGH COURT

Case No: 756 of 2014

Export-Import Bank Of
India, & Ors.

APPELLANT

Vs

GOL Offshore Ltd.

RESPONDENT

Date of Decision: May 5, 2017

Acts Referred:

- Companies Act, 1956, Section 434(1)(e) - Company when deemed unable to pay its debts.
- Banking Regulation Act, 1949, Section 6, Section 6(1)(a) - Forms

Hon'ble Judges: R.D. Dhanuka

Bench: SINGLE BENCH

Advocate: Kevic Setalvad, Anesa Cheema, Charles D'Souza, Kund Chheda, M.V. Kini, Arif Doctor, Nirali Chopra, Farhan Dubash, Ishita Advani

Judgement

1. The Company Petition No.756 of 2014 and Company Petition No.119 of 2015 are filed seeking winding up of the respondent on the ground that the respondent is unable to pay its debts. The Company Application (Lodging) No.98 of 2017 is filed by the applicant inter-alia praying for intervention and impleadment in the Company Petition No.756 of 2014. Both these company petitions and the company application were heard together for considering the admission of the company petitions and are being decided by a common order. Some of the relevant facts in the matter are as under :

The facts according to the petitioner in Company Petition No.756 of 2014 :

2. On or about December, 2009, the petitioner sanctioned a term loan of Rs.75.00 crores towards part financing amongst others to the respondent. The parties accordingly executed Dual Currency Loan Agreement on 12th January, 2010 on the terms and

conditions set out therein. Great Offshore (International) Limited, Cayman Islands, wholly owned subsidiary of the GOL Offshore Limited sought sanctioned of a foreign currency term loan of US \$ 46.40 million. The petitioner sanctioned the said loan. On 24th September, 2010, the petitioner and the said Great Offshore (International) Limited entered into a Facility Agreement whereby the petitioner agreed to lend and advance the said loan on the terms and conditions set out therein.

3. On 24th September, 2010, the said loan granted by the petitioner to the Great Offshore (International) Limited was guaranteed by Great Offshore Limited vide Deed of Guarantee dated 24th September, 2010 on various terms and conditions mentioned therein.

4. GOL Offshore Limited requested the petitioner for a Foreign Currency Term Loan / Standby Letter of Credit of US \$ 24.00 million. The petitioner sanctioned the said loan. On 26th July, 2011, the petitioner and the respondent herein executed a Dollar Loan Agreement whereby the petitioner agreed to lend and advance the said second GOL loan to the respondent on the terms and conditions set out therein. On 3rd June, 2011, the petitioner sanctioned another loan to the Great Offshore (International) Limited upto the amount of US \$ 46.40 million (second GOIL loan). The petitioner and the said Great Offshore (International) Limited executed a Facility Agreement (second Facility Agreement). The said second Facility Agreement was guaranteed by the respondent herein vide a Deed of Guarantee dated 7th September, 2011. On 31st March, 2014, the respondent and the said Great Offshore (International) Limited signed balance confirmation statement and acknowledged and admitted their respective liabilities towards the petitioner.

5. It is the case of the petitioner that in view of the respondent herein failed and neglected to repay the loan under the Dollar Loan Agreement, the first GOL loan and second GOL loan were classified as non-performing assets in the books of the petitioner. By a letter dated 13th May, 2014, the petitioner recalled the first GOL loan and second GOL loan and called upon the respondent to pay US \$ 34,852,084.96 which was outstanding as on 6th May, 2014 within a period of seven days from the date of the said letter.

6. It is the case of the petitioner that since the said Great Offshore (International) Limited committed default in adhering to the repayment conditions set forth in the first Facility Agreement and the second Facility Agreement, the petitioner by a letter dated 29th May, 2014 recalled the said loans and called upon the said Great Offshore (International) Limited to pay an amount of US \$ 44,572,935.60 which was outstanding as on 31st December, 2014 within a period of seven days from the date of the said letter. It is the case of the petitioner that since the Great Offshore (International) Limited failed to comply with the demand made by the petitioner in the letter dated 29th May, 2014, the petitioner invoked the first Deed of Guarantee and second Deed of Guarantee issued by the respondent herein and by a letter dated 10th June, 2014 called upon the respondent to pay an amount of US \$ 44,572,935.60 outstanding as on 31st March, 2014 within seven

days from the date of the said letter. The respondent however, failed and neglected to comply with the said demand made vide letter dated 10th June, 2014.

7. The petitioner accordingly issued a statutory notice upon the respondent at its registered office address on 11th June, 2014 and called upon to pay an amount of US \$ 79,903,524.81 within twenty days from the date of the said notice.

8. The respondent vide their letter dated 5th August, 2014, responded to the said statutory notice admitted that according to the respondent total outstanding amount was approximately US \$ 80.00 million, including interest as on July, 2014 against a total debt sanctioned of US \$ 131.80 million. It was alleged that the respondent had been discussing with the bank at various times about position of the respondent and the fact that the respondent was facing up temporary liquidated mismatch. The respondent recorded various reasons in the said letter, which according to the respondent created liquidated mismatch of the respondent temporarily. The respondent made various proposals to the petitioner. It was mentioned that some of the properties of the respondent could not be sold due to various reasons and that the respondent was taking all requisite steps to solve those critical outstanding issues in best possible manner.

9. Some time in the year August, 2014, the petitioner filed this petition inter-alia praying for winding up of the respondent.

Facts according to the petitioner in Company Petition No.119 of 2015 :-

10. On 9th December, 2011, the petitioner (Punjab National Bank) sanctioned and granted Term Facility of US \$ 12.00 million on the terms and conditions set out in the facility letter and executed the Facility Agreement dated 9th December, 2011 with Great Offshore (International) Limited. The respondent herein executed a Corporate Guarantee to secure the said loan in favour of the petitioner. It is the case of the petitioner that since the principal debtor as well as the guarantor defaulted in making repayment of the principal amount of US \$ 18,00,000 which fell due on 9th December, 2013, an event of default had occurred under the Facility Agreement. The petitioner accordingly issued a demand notice dated 3rd June, 2014 upon the principal debtor and demand notice dated 13th June, 2014 to the respondent herein and recalled the said facility. The petitioner called upon the respondent to pay a sum of US \$ 93,66,276.43 together with interest and legal costs. By another email dated 7th June, 2014, the petitioner called upon the respondent to remit the amount with respect to the admitted liability. The respondent however, failed and neglected to pay any amount to the petitioner. The petitioner accordingly issued a statutory notice on 21st July, 2014 and called upon the respondent to pay US \$ 94,31,252.31 within three weeks from the date of the receipt of the said notice. The respondent through its advocate's letter dated 8th August, 2014 informed the

petitioner that they were obtaining instructions in the matter from the respondent and in the meantime nothing contained in the statutory notice issued by the petitioner shall be deemed to be admitted or accepted by the respondent. There was no further reply sent by the respondent to the said statutory notice.

11. Mr. Setalvad, learned senior counsel for the petitioner invited my attention to the various annexures to the company petition and submits that the respondent had not only availed of the loan from the petitioner but had also stood guarantor in respect of the facility granted by the petitioner in favour of the said Great Offshore (International) Limited. He submits that in the reply to the statutory notice also the respondent herein has admitted its liability and had expressed the difficulty to pay the amount. The respondent though assured to pay the dues of the petitioner in future, the respondent did not make any payment. Insofar as the Company Petition No.119 of 2015 is concerned, it is submitted by the learned senior counsel that the respondent did deny the liability of the petitioner vaguely and did not send any detailed reply.

12. During the pendency of these two company petitions, eight banks and/or financial companies filed a company application inter alia praying for intervention and impleadment in the Company Petition No.756 of 2014. Along with the said company application for seeking intervention and impleadment, the applicant also tendered a compilation of minutes of various meetings held by the Joint Lenders' Forum (for short "JLF") held between 18th April, 2014 and 3rd February, 2017. Learned senior counsel for the petitioner thus invited my attention to some of these minutes of meeting of the JLF. In the JLF meeting held on 16th April, 2014, the petitioner in Company Petition No.756 of 2014 brought to the notice of the JLF that the petitioner and DBS had declared the facilities extended to the respondent as NPA. In the meeting held on 29th April, 2014, it was decided to form a Core Group of Bankers to formulate a detailed corrective action plan.

13. It was decided that Axis Bank, Exim Bank, L & T Finance, Punjab National Bank and ICICI bank shall constitute a core committee. In the meeting held on 13th May, 2014, it was recorded that since the petitioner had classified the account of the respondent and Great Offshore (International) Limited as NPA, they refused to participate in the corrective action plan till the time those accounts were regularized.

14. In the JLF meeting held on 4th June, 2014, the petitioner raised various issues and made it clear that the petitioner was not agreeable for the proposed CAP as the account of the respondent was NPA. The petitioner requested that the dues of the petitioner be cleared out of Rig Sale Proceeds.

15. In the JLF meeting held on 23rd June, 2014, it was decided that Axis Bank, Exim Bank, L & T Finance, IDBI and ICICI Bank Limited shall form Asset Sale Committee. The Exim Bank voted against the Corrective Action Plan. It was decided that since the Corrective Action Plan was approved by more 75% banks by exposure and 60% banks

by numbers, it would be binding on all and banks will have to sanction their share within time lines agreed in meeting.

16. In the JLF meeting held on 25th July, 2014, it was decided that all banks should execute the JLF agreement by 5th August, 2014. In the JLF meeting held on 3rd September, 2014, the respondent was informed to expedite the sale of M 29 to upgrade the Exim Bank account.

17. In the JLF meeting held on 18th February, 2015, Mr.Kapoor, the promoter of the company refused to infuse any money in company stating that the promoters did not possess the required resources. The JLF member banks requested the promoters to atleast arrange for the initial US \$ 3.20 contribution from promoters required to prevent an immediate default. The promoters however refused to commit any resources for the same.

18. In the JLF meeting held on 15th September, 2015, it was recorded that the lenders were insisting that the company shall pass an enabling resolution for SDR in line with recent RBI guidelines. However, Mr.Vijay Kumar insisted that he will need some time to consider the same. In the JLF meeting held on 27th October, 2015, the lenders insisted that company shall pass an enabling resolution in the upcoming Board meeting for undertaking SDR.

19. In the JLF meeting held on 27th January, 2016, the promoters informed the JLF members that due to outstanding statutory and other critical payments, the operations of the respondent had become very difficult and accordingly the respondent requested the lenders to support by extending the facilities. The lenders however did not consider the said request favorably and reiterated that the company needs to quickly implement SDR. The Bank of India, Union Bank of India and Central Bank of India had declared the accounts of the company as NPA.

20. In the JLF meeting held on 18th March, 2016, it was recorded that the respondent had at the board meeting held on 29th February, 2016 had approved SDR subject to approval of the shareholders, for conversion of debt upto 51% of the post issue share capital. The respondent also made various proposals. The lenders discussed the said request of the respondent and considering the present financial situation, rejected those proposals and advised the respondent to explore the alternate option. It was opined by the JLF that the company needs to convert the debts of banks" stake upto 74%.

21. In the JLF meeting held on 5th July, 2016, the Board of Directors of the respondent approved the conversion of debt into equity upto 74% of the post issue share capital of the company under the provisions of SDR scheme.

22. In the JLF meeting held on 28th July, 2016, it was brought to the notice of the JLF

that the petitioner herein has filed the winding up petition before this Court against the respondent. In the said meeting, it was recorded that the SDR had been invoked by JLF and reference date for the same was fixed as 27th January, 2016. The shareholders have passed the SDR resolution with requisite majority. The circular dated 25th February, 2016 issued by the Reserve Bank Of India has allowed the time upto 210 days for completion of individual activities upto conversion of debt into equity in favour of lenders. Accordingly the last date is 24th August, 2016.

23. It was recorded that the JLF had received a Non-Binding Expression of Interest on 26th July, 2016. The JLF also decided the share of the Bank of India lenders under SDR package and confirmation of debt to equity at 74%. The percentage of share of all India lenders under the said SDR package comes to around 72.28%. In the JLF meeting held on 7th September, 2016, it is recored that no funds were available for basic necessity like wages, food, water, fuel, transport, crew sign on / off, flight tickets, lubricating oil for machineries, no insurance cover for Hull and Machinery etc. The assets were overdue for annual surveys / special surveys / dry - docking cash not being available in time resulting in higher operating cost.

24. In the said meeting, it was also recorded that the respondent had requested the lenders to consider for funding for various critical issues recorded therein as well as critical dues towards salary and statutory payments. The lenders however, communicated to the respondent that the lenders had helped the company by converting a portion of their debt into equity and cannot consider further funding requests. The company was directed to take immediate steps to deploy the assets gainfully and generate the funds to finance those issues. The respondent was directed to submit a detailed plan of action. In the said minutes, it was stated that as on 6th September, 2016, outstanding statutory dues were Rs.63.00 crores which comprised majority of TDS of Rs.27.00 crores, corporate tax of Rs.20.00 crores. Besides this, unpaid wages since December, 2015 were to the tune of Rs.78.00 crores. It was recorded that as on 31st July, 2016, there were 14 lenders to the company with overall debt of Rs.1795.00 crores. Out of 14 lenders, 6 lenders have declared the account as NPA. The petitioner herein as well as DVB have already filed the proceedings against the respondent before this Court.

25. In the JLF meeting held on 23rd January, 2017, it was recorded that the Bank of Baroda has filed recovery proceedings in the Debt Recovery Tribunal at Ahmedabad against the respondent. The Punjab National Bank also has filed a winding up proceedings against the respondent in this Court. It was decided that the lenders shall file an intervention application before this Court. In the JLF meeting held on 23rd January, 2017, the promoters of the respondent suggested that the respondent was exploring to file an application under the provisions of the Insolvency and Bankruptcy Code. It was also recorded that the ONGC may take advantage and cancel the existing contract under the insolvency clause in its contract and not entertain the new contracts in future.

26. The Axis Bank pointed out the increase in piling up of the creditors' dues, salary dues and statutory payments and that the recovery for the banks may be very limited. The investors, if any, are assigning values only for the vessels under charter without even considering residual value. It is recorded that in the current scenario, Axis Bank is under discussion with Mr. Atul Agarwal (Ex-Managing Director) of Mercator for investing in the company, who had expressed his preliminary interest, subject to detailed due diligence and may infuse Rs.600.00 crores.

27. In the JLF meeting held on 30th January, 2017, a Non-Binding Expression of Interest received from Asmara Resources Private Limited for the respondent was circulated to all the lenders and was discussed in the said meeting. It appears that the said investor informed the JLF that Rs.400.00 crores fund infusion will go towards Badrinath dry-docking (Rs.100.00 crores), Kedarnath drydocking (Rs.60.00 crores), statutory dues / taxes (Rs.55.0 crores), wages / salaries (Rs.85.00 crores), working capital (Rs.50.00 crores) and contingencies / other expenses (Rs.50.00 crores). It was mentioned that in addition, there were creditors pending for Rs.150.00 crores which had not been considered. The said investor however, clarified that they were not interested in both the vessels and the liabilities. The Axis Bank suggested that profit sharing should be till the life of the vessels in case, charters were renewed. The investor however did not agree to that idea on the ground that they were already offering Rs.600.00 crores. The investor however, informed that they had assumed no value for other vessels as there was age restriction of 22 years for all vessels except Rigs and the respondent has largely old fleet. In the said meeting, the lenders made various suggestions.

28. During the course of argument, Mr. Dubash, learned counsel appearing for the applicant informed this Court that on 7th March, 2017, the said Asmara Resources Private Limited has withdrawn their expression of interest for the respondent dated 25th January, 2017 on the ground that the said proposal was given by the respondent with the condition that the ONGC extends the contract delivery date of Rig of Badrinath at least for 90 days. However, it was learnt that the contract has not got any further extension from ONGC. Mr. Dubash, learned counsel for the applicant tendered a copy of the said proposal dated 25th January, 2017 made by the said investor, letter dated 7th March, 2017 withdrawing the said proposal and the letter dated 24th March, 2017 issued by ONGC terminating the contract for charter hire of drilling unit, Badrinath on 10th April, 2017.

29. Mr. Setalvad, learned senior counsel for the petitioner invited my attention to the above referred documents, including various minutes of meeting of JLF and would submit that the respondent has admitted its liabilities not only towards the petitioner but also towards other large number of creditors. He submits that there is no scope of any restructuring or revival of the respondent which is demonstrated by the petitioner. The respondent has not met the milestone and thus the recovery proceedings have been initiated and pursued. He submits that the respondent has not met with the requirement of

the circular dated 8th June, 2015, which is invoked by the respondent for restructuring of the respondent. He invited my attention to the circular issued by the Reserve Bank of India on 26th February, 2014.

30. It is submitted that the said circular is also not binding on the petitioner since the account of the respondent had already become NPA on 11th October, 2013. He submits that no JLF Master Agreement is placed on record by the intervenors. He submits that the promoters of the respondent have not agreed to contribute any funds for revival of the respondent and have not taken any concrete steps in restructuring or revival. He submits that number of creditors" requirement for availing such benefit for the purpose of restructuring are not met with by the respondent.

31. Learned senior counsel placed reliance on clause 5.2 of the circular dated 26th February, 2014 and submits that even according to the said circular, the process of revival has to be completed by the JLF within the time limit. In this case the debts of the respondent company are more than Rs.2500.00 crores. He placed reliance on section 6 of the Banking Regulation Act and would submit that the business of the respondent does not fall under any of the categories mentioned under section 6(1)(a) of the Banking Regulation Act. He also invited my attention to the submissions made in paragraph 15 of the company application filed by the intervenors and would submit that various banks have already classified the account of the respondent as NPA. He submits that in the minutes of meeting dated 28th July, 2016 produced on record, there is no reference to any Term Sheet alleged to have been executed by the respondent and the Deutsche Bank. He submits that the shareholding of the creditors by value is about 72.28% and not 75%.

32. Learned senior counsel submits that the minutes of meeting dated 7th September, 2016 of the JLF clearly indicates that there were several major operational issues. Wage bill of the respondent is pending to the tune of Rs.90.76 crores. He submits that the debt of the petitioner itself is about 40%. The respondent is suffering heavy losses. Learned senior counsel invited my attention to the rejoinder filed by the intervenors in the company application, admitting that there is no funding by the applicant to the respondent. It is also admitted that the respondent has no financial conditions to repay. There is huge arrears of statutory dues. He submits that the petitioner has already refused to accept the term sheet of Deutsche Bank by a circular resolution. He submits that there is no possibility of any revival of the respondent.

33. Leaned senior counsel for the petitioner placed reliance on the judgment of this Court in the matter of Advent Corporation Private Limited, decided by this Court on 19th September, 1968 in Company Petition No.80 of 1968 and in particular paragraphs 7, 8, 11, 12 and 14. He submits that since the respondent is unable to pay its debts, this Court has to pass appropriate orders of winding up against the respondent under section 434(1)(e) of the Companies Act, 1956.

34. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of IBA Health (I) Pvt. Ltd. vs. Info-Drive Systems Sdn.Bhd. (2010) 10 SCC 553 and in particular paragraphs 21, 22, 26 to 28. He submits that since the respondent has admitted the liability of the petitioner and is unable to pay its debts and if the application for liquidation is filed under section 439, law should take its own course and appropriate order of winding up has to be passed.

35. Learned senior counsel placed reliance on an unreported judgment of this Court in case of Life Insurance Corporation of India vs. Varun Global Limited, decided on 23rd December, 2016 in Company Petition No.892 of 2014 and in particular paragraphs 24 to 26, 29, 31, 33, 36, 37 and 53. It is submitted that in this case all the attempts made by the intervenors for revival of the respondent by various means have failed. This Court thus has no option other than to wind up the respondent company.

36. Learned senior counsel for the petitioner distinguished the judgment of this Court in case of IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited, decided on 14th February, 2017 in Company Petition No.570 of 2016 on the ground that in the said matter before this Court the lenders had satisfied that the conditions of the circular issued by the Reserve Bank of India and the process of revival of the lenders was at the advanced stage, whereas in this case the promoters of the respondent have failed to infuse any further funds. The intervenors have also refused to bring any additional money. There are thus no chances of the revival of the respondent. He submits that only two vessels of the respondent were secured in favour of the petitioner. Out of those two vessels, one of the vessel is already under arrest. The debt of the petitioners is about Rs.653.00 crores as on date. He submits that the stage of restructuring of the respondent is over. There is no viable action available for revival of the respondent either by the respondent or by the intervenors.

37. Mr.Doctor, learned counsel for the respondent on the other hand submits that the petitioners in both the company petitions are secured creditors. No application for enhancement of the security is made by any of the petitioners. The respondent has already made payment of about Rs.6.5 million towards the principal amount to the petitioner in both the matters. He submits that the assets of the respondent company are more than Rs.3,000/- crores. There are 83,000 shareholders and 1,300 employees of the respondent. 67% of the revenue generated by the respondent is from the Government project. The respondent earns 70% of the income from the charter hire from the ONGC. He submits that if the company petitions are admitted by this Court, the ONGC may terminate the contract. It is submitted that insofar as the Company Petition No.510 of 2013 is concerned, the respondent has already cleared all the liabilities of the petitioner in that matter. He submits that the company proceeding is not a recovery proceeding.

38. Learned counsel for the respondent invited my attention to the various allegations

made in the affidavit in reply. He submits that all the JLF meetings were regularly attended by the petitioner and in view of the fact that the time for taking appropriate decisions by the JLF has not expired, no order can be passed by this Court in these company petitions at this stage. Learned counsel for the respondent placed reliance on the judgment of the Madras High Court in case of Karnatak Vegetable Oils & Refineries Ltd. vs. Madras Industrial Investment Corporation Limited, XXIV Company Cases 249 (Madras) and on the relevant paragraphs on pages 251 to 253 and would submit that the petitioner being secured creditor, cannot be granted prayer for winding up. He submits that large number of other lenders have opposed these winding up petitions and thus this Court has to take into consideration the wishes of the majority of the creditors.

39. Learned counsel for the respondent placed reliance on the judgment of this Court in case of Tata Capital Financial Services Limited vs. Unity Infraprojects Limited & Ors., 2015 SCC OnLine Bom. 3597. He submits that even if the liability of the petitioner is admitted by the respondent that does not mean that the Company Court is obligated to admit the winding up petitions. He submits that this Court cannot ignore the opposition of the intervenors even at the admission stage of these petitions.

40. Learned counsel for the respondent also placed reliance on the judgment of the Gujarat High Court in case of Rishi Enterprises, In. re, (1992) 73 Company Cases 271 (Gujarat), on the judgment of this Court in case of Bharat Petroleum Corporation Limited vs. National Organic Chemical Industries Limited, 2004(2) Mh.L.J. 114 and in particular paragraphs 2 and 3 and on the judgment of the Supreme Court in case of M/s.Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Private Limited, 1971(3) SCC 632 and in particular paragraph 22 in support of the submission that the wishes of the shareholders and the creditors have to be considered by the Court before passing any order for winding up of the company and whether winding up order will benefit any of the creditors generally or the petitioners or not.

41. It is submitted that from September, 2014 onwards, most of the loans given by the lenders forming part of JLF, some of whom are intervenors in the company application, their debts are already converted into equity shares. The promoters of the respondent has now only 2% shareholding in the respondent company.

42. Mr.Dubash, learned counsel for the intervenors invited my attention to the minutes of various meetings held by JLF referred to aforesaid and submits that 52.78% of shares are now held by the JLF in the respondent company. He disputes the submissions made by the learned senior counsel for the petitioner that the conditions of various circulars issued by the Reserve Bank of India for revival of the company are not met with by the intervenors. He submits that eight banks who were parties to the company application for intervention have participated in the restructuring process. He also invited my attention to the proposal made by the investors on 30th January, 2017. It is submitted that if the petitioner did not want to participate in the JLF meetings, the petitioner had an option to

solve its exposures to the other lenders.

43. Learned counsel for the intervenors heavily placed reliance on the judgment of this Court in case of IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited (supra) and in particular on paragraphs 100, 101 and 114. He does not dispute that the claims of both the petitioners cumulatively is about 40% of the total debts of the respondent. He submits that eighteen months period provided to the intervenors for restructuring of the respondent would expire on 27th July, 2017 and thus at this stage no order can be passed by this Court even for admission of the company petitions.

44. Upon raising a query by this Court, learned counsel for the intervenors fairly informed this Court that the expression of interest by Asmara Resources Private Limited dated 25th January, 2017 for infusing about Rs.600.00 crores is withdrawn by the said investor vide letter dated 7th March, 2017. He also informed the Court that the ONGC Limited vide its letter dated 24th March, 2017 has terminated the contract for charter hire drilling unit Badrinath. Upon raising a further query by this Court, the learned counsel for the intervenors on instructions, states that his clients are not infusing any further funds in the respondent. The debts of the intervenors are already converted into equity shares. Learned counsel agreed to tender a copy of the proposal given by Asmara Resources Private Limited and the letter of termination issued by the said company. He also agreed to furnish the copy of the termination letter issued by the ONGC Limited. Learned counsel accordingly tendered those documents before this Court on 10th April, 2017.

45. Mr.Setalvad, learned senior counsel for the petitioner in rejoinder submits that the petitioner had not attended all the meetings of the JLF. Neither the respondent, nor the intervenors have produced any sheets containing any signature of the petitioner for perusal of this Court. He submits that neither the respondent nor the JLF has complied with any guidelines issued by the Reserve Bank of India. He submits that the JLF has not produced anything on record to show the date of conversion of its debts into equity. The respondent or the applicant has no answer to non-compliance of section 6 of the Banking Regulation Act. He submits that approval of all the lenders was required in view of the debt of the respondent being above Rs.500.00 crores. The intervenors have also not produced any Master Restructuring Agreement for perusal of this Court. He submits that there is total non-compliance of the conditions imposed by the Reserve Bank of India in various guidelines issued by it and thus the period of 18 months would not apply.

46. Insofar as the issue raised by the learned counsel for the respondent that the petitioner in both the company petitions are fully secured is concerned, learned counsel invited my attention to page 536 i.e. rejoinder of the petitioner and would submit that the securities granted in favour of the petitioner in both the matters by the respondent are totally jeopardized. He relied upon the document at page 669 of the rejoinder to show that the petitioner had applied for enhancement of the security. The insurance policy has also lapsed. He submits that the petitioner had placed on record that on 2nd September, 2013

itself, that the sales of vessels by the respondent were without the knowledge of the petitioner. The petitioner had from time to time called upon the respondent for enhancement of security or for furnishing additional security. He submits that in view of the admitted fact that the ONGC Limited has cancelled the contract of the respondent, the question of generating any income from the ONGC contracts by the respondent also does not arise.

REASONS AND CONCLUSIONS :

47. A perusal of the record, including the minutes of various meetings of the JLF clearly indicates that the respondent has admitted the liability of the petitioner from time to time. The respondent is heavily indebted not only to the petitioner in the aforesaid two petitions but large number of other creditors. The liabilities of the respondent are much more than the assets. A perusal of the minutes of the meeting of the JLF clearly indicates that the liabilities of the respondent, including the statutory liabilities and towards the arrears of wage is also substantial in addition to the liabilities of the other secured and unsecured creditors. The promoters of the respondent have admitted before this Court that the shareholding of the promoters is now reduced to 2%. Upon raising a query by this Court to the learned counsel for the respondent whether the respondent would be in a position to infuse any funds to revive the company, learned counsel for the respondent, on instructions, states that in view of the fact that the shareholding of the promoters is now reduced to 2%, there is no possibility of the promoters infusing any further funds.

48. This Court thereafter raised a query upon the learned counsel for the intervenors, who are the members of the JLF whether any further funds would be infused by the intervenors, Mr.Dubash, learned counsel for the intervenors, on instructions, states that it would not be possible for the intervenors to infuse any further funds. Their debts are already converted into equity share capital.

49. A perusal of the minutes of meeting of the JLF clearly indicates that the promoters were as well as the intervenors have refused to infuse any funds in the respondent and were totally dependent upon the infusion of funds, if any, by the investors. Asmara Resources Private Limited had submitted Non-Banking Expression of Interest vide letter dated 25th January, 2017 and had agreed to infuse about Rs.600.00 crores on various terms and conditions. The JLF members did not accept various conditions imposed by the said investors. Be that as it may, it is now an admitted position that the said investors also vide its letter dated 7th March, 2017 has withdrawn the said Non-Banking Expression of Interest dated 25th January, 2017 on the ground that the ONGC Limited had not granted any extension of delivery date for Rig Badrinath, which was one of the key condition in the offer made by the said investor.

50. Neither the respondent nor the intervenors could produce before this Court any other such proposal, if any, made by any of the investors. The submission made by the learned counsel for the respondent as well as the investors is that 180 days period available with the JLF had not expired and would expire only on 27th July, 2017. A perusal of the record clearly indicates that neither the promoters nor the investors are now agreeable to infuse any funds in the respondent for its revival. None of these parties have made any offer before this Court also though repeatedly asked to infuse any funds even at this stage. The ONGC Limited has already terminated the major contract awarded to the respondent. In these circumstances, I do not find any scope of any revival of the respondent company in the facts and circumstances of this case highlighted aforesaid.

51. The judgment of this court in case of IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited (supra) heavily relied upon by the learned counsel for the respondent as well as by the intervenors would not assist their case in any manner whatsoever. The petitioner before this Court in the said company petition was having about 2% of debts of total debts of other lenders and large number of debts of the total creditors. In this case, the debt of the petitioner in the aforesaid two petitions is about 40% of the total debts. In that matter, the petitioner had participated in the JLF meetings, whereas in this case the petitioner has been objecting to the said JLF proposals on the ground that the respondent was declared as NPA even before the date of circular issued by the Reserve Bank of India. This Court in the said judgment also has not considered the effect of section 6 of the Banking Regulation Act. The lenders, who were the members of the JLF were 98% of the creditors in value of the total debts of the respondent and were opposing the petition for winding up. The JLF before this Court in the said matter had agreed to take steps to revive the respondent company therein by taking corrective action plan. In this case, the intervenors have refused to infuse any amount to the respondent. The investor has withdrawn its proposal for infusing Rs.600.00 crores. The judgment of this Court in case of IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited (supra) thus would not assist the case of the respondent or the intervenors.

52. Insofar as various judgments relied upon by Mr.Doctor, learned counsel for the respondent in support of the submission that the Court has to take into consideration the wishes of the creditors and the shareholders before even passing any order of admission of the company petitions are concerned, there is no dispute about the proposition of law laid down by various Courts in the said judgment. The respondent in this case has not only admitted the liability of the petitioner but of large number of other creditors. Though there was an attempt made by the intervenors by holding large number of meetings from time to time during the period between 18th April, 2014 and February, 2017, the members of the JLF could not revive the respondent. These two petitions are pending in this Court since 2014. The respondent however, could not make any other proposal also for clearing the dues of these petitioners. In the facts and circumstances of this case and more particularly when there are no chances of revival of the respondent even remotely, in my view, the judgments relied upon by the respondent and the intervenors would not assist

their case. Before the assets of the respondent are frittered away, the same are required to be protected by this Court in the interest of all the creditors, including the petitioners by passing appropriate orders including by appointing the Official Liquidator as a Provisional Liquidator.

53. Various judgment relied upon by Mr.Setalvad, learned senior counsel for the petitioner referred to aforesaid would clearly assist the case of the petitioner. In these circumstances, this Court cannot exercise any discretion in favour of the respondent or the intervenors and against the petitioner. Though both the petitioners are secured creditors, a perusal of the record indicates that the securities granted in favour of the petitioners by the respondent are jeopardized. The petitioners have repeatedly called upon the respondent to enhance the security furnished to the petitioners but was of no avail.

54. A perusal of the record further indicates that though the JLF gave various opportunities to the respondent to infuse the additional funds, the promoters of the respondent have refused to infuse any funds. The liabilities of the respondent are mounting. In these circumstances, the lenders who are the members of the JLF also refused to infuse any funds. In my view, the respondent as well as the intervenors have not complied with the conditions of various circulars relied upon by the Reserve Bank of India and thus cannot avail any benefits / protection under those circulars. Though this Court called upon the respondent as well as the intervenors to infuse further funds if they propose to do so as to revive the respondent even at this stage, neither the respondent nor the intervenors agree to infuse any further funds. In my view, the petitioners have thus made out a case not only for admission of the petitions, but also for appointment of the Official Liquidator as pressed by the learned counsel for the petitioners.

55. This Court in the matter of Advent Corporation Private Limited (supra) has held that if a company petition for winding up is filed with a view to enforce the payment of the disputed debt, it would amount to abuse of process of Court and should be dismissed, unless it is shown that the alleged dispute is not a bonafide one. The Supreme Court in case of IBA Health (I) Private Limited (supra) has held that if there is no dispute as to the company's liabilities, the insolvency of the company might not constitute a stand alone 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 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.

56. It is held that if there no dispute as to the company's liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the

debts. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent.

57. In the facts of this case, it is clearly beyond reasonable doubt that the respondent has not only admitted the liabilities of the petitioner, but is heavily indebted to large number of creditors. In spite of several opportunities the respondent had for its revival, the respondent is not in a position to revive. In this situation, I am not inclined to accept the submission of the learned counsel for the respondent and the intervenors that these petitions are filed with a view to pressurize the respondent company and are not bonafide. In my view, the principles of law laid down by this Court and the Supreme Court in the above referred judgments squarely apply to the facts of this case. I am respectfully bound by the said judgments.

58. I therefore, pass the following order :-

a). The Company Application (Lodging) No.98 of 2017 for intervention is allowed.

b). The Company Petition No.756 of 2014 and Company Petition No.119 of 2015 are admitted. There shall be interim reliefs in terms of prayer clause (c) in the Company Petition No.756 of 2014. There shall be interim relief in terms of prayer clause (d) of the said company petition, excluding the words "dealing with" till the Official Liquidator takes possession as Provisional Liquidator in terms of prayer clause (c).

c). Company Petition No.756 of 2014 shall be advertised in two local newspapers, namely (i) Free Press Journal (in English) and Navshakti (in Marathi) as also in the Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959.

d). Both the company petitions are made returnable on 3rd July, 2017 and shall be heard together. The petitioner shall deposit Rs.10,000/- towards publication charges with the Prothonotary & Senior Master, under intimation to the Company Registrar, within three weeks from the date of admission, failing which the petition shall stand dismissed for the non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the petitioner.

e). The service of the petition under Rule 28 of the Companies (Court) Rules, 1959 shall be deemed to have been waived.

f). In view of the interim relief granted by this Court in Company Petition No.756 of 2014, separate interim relief in Company Petition No.119 of 2015 is not warranted at this stage.

g). Official Liquidator to act on the authenticated copy of this order.

59. At the request of the learned counsel for the respondent, which is vehemently opposed by the learned counsel for the petitioner, the petition shall not be advertised by the petitioner for a period of four weeks from today. It is made clear that this Court has not granted any stay of the interim relief granted by this Court in prayer clause (b) of the operative part of this order.