HIGH COURT OF DELHI AT NEW DELHI

Present : Justice Justice Manmohan.

M/S. GLOBAL INFOSYSTEM LTD. ..... Petitioner

Versus

M/S. LUNAR FINANCE LTD. .....Respondent

CO.PET. 94/2000

Reserved on : 16th May, 2012, Date of Decision: 28th May, 2012

Through: Mr.Virender Ganda, Senior Advocate with Mr. S.K. Giri, Ms. Runjita Das &Mr. Amarjit Singh, Advocates. Through: Mr. Niraj Kumar Singh, Advocate

JUDGMENT

1. Present winding up petition has been filed under Section 433(e) read with Sections 434 and 439 of the Companies Act, 1956 (for short „Act") stating that respondent is unable to pay its debts.

2. The facts as stated in the petition are that on 04th September, 1996, the respondent company (Lunar Finance Limited) passed a Board Resolution guaranting the loan amount of ` 52,55,500/- advanced by the petitioner to the principal debtor. By virtue of the said Board Resolution, the respondent company pledged certain shares as Collateral Security. On 09th September, 1996, a Tripartite Agreement cum Pledge was executed between the petitioner (Lender), Lunar Diamonds Limited (Principal Debtor) and respondent-guarantor.

3. However, as the cheques issued by the principal debtor were dishonoured, the parties on 09th September, 1996 entered into a fresh Agreement cum Pledge amongst the petitioner, principal debtor and respondent-guarantor. Two cheques were also issued by the principal debtor towards the principal amount and interest.

4. In June, 1999, the petitioner"s name was changed from M/s. CRA Global Securities to M/s. Global Infosystems Limited.

5. As the principal debtor defaulted in repaying the loan, on 12th February, 2000, petitioner issued statutory winding up notice to the respondent.

6. Since no reply was received by the petitioner, on 07th March, 2000, present winding up petition was filed.

7. On 09th August, 2004, proceedings were stayed as the principal debtor had become a sick company under Sick Industrial Companies (Special Provisions) Amendment Act, 1993

(„SICA").

8. On 13th May, 2010, as the principal debtor was ordered to be wound up by BIFR, present proceedings were revived.

9. Mr. Virender Ganda, learned senior counsel for petitioner submitted that respondent had guaranteed repayment of loan obtained by the debtor by way of bill discounting facility and the same was recoverable from the respondent independent of the principal debtor. He further stated that respondent-guarantor"s liability was co-extensive with that of the principal debtor.

10. On the other hand, Mr. Niraj Kumar Singh, learned counsel for the respondent submitted that as the statutory winding up notice had not been served upon the registered office of the respondent company, the presumption of inability to pay debts under Section 434 of the Act did not arise in the present case. According to him, in view of the admitted fact that the statutory notice had not been served on the registered office of the respondent company, the present petition had to be dismissed at the threshold. In this connection, he relied upon a judgment of the Punjab & Haryana High Court in Nuchem Ltd. v. C.S. Modi And Co. Pvt. Ltd. 2002 Vol. 109 Company Cases 715 (P&H) wherein it has been held as under:-

"It is clear from the aforesaid clause that requirement under the Negotiable Instruments Act is only of giving notice. There is no requirement of ensuring effective service of the said notice. For the aforesaid reason, it cannot be said that the deliberation of the Apex Court in the judgment relied upon by learned counsel for the petitioner can be applied to the facts and circumstances of the present case. So far as the issue of giving notice is concerned, the same would definitely be governed by the observations made by the Supreme Court.

The Companies Act requires that a company which is to pay a debt must be informed of the same, and must be called upon to discharge its debt through a notice. The notice must actually be served on the respondent-company. Thereafter, if despite service of notice, the company does not discharge its debt, it is open to the creditor to file a winding up petition. Since I have already recorded above that in the facts and circumstances of the instant case, notice cannot be deemed to have been actually served on the respondent, it is, therefore, futile to proceed any further with this petition. Accordingly this petition is dismissed, as the statutory notice has not been served by the petitioner before filing the instant petition.

Learned counsel for the petitioner at this stage has brought to my notice that the petitioner has approached the Registrar of Companies and has been informed of the latest address of the respondent. He further states that he would now serve the notice on the respondent as contemplated under Section 434 of the Companies Act at its present address. In case the petitioner is able to effect service of the notice under Section 434 of the Companies Act upon the respondent even after disposal of this petition, it would be open to the petitioner to revive this petition by placing on record the averments of having effected service on the respondent.

11. Mr. Niraj Kumar Singh further submitted that though the respondent had been

described in the Agreement-cum-Pledge dated 09th September, 1996 as a guarantor, it was a cardinal principle of law that it was not the nomenclature or designation which would determine the true status of a party. According to him, the respondent was not a guarantor under the said agreement as the borrower was solely responsible for the liability arising out of the loan facility along with an additional obligation to replenish the security in the event its value fell. He stated that other than the Agreement-cum-Pledge, there was no agreement either between the principal debtor and surety or between the creditor and surety to show that a contract of guarantee had been executed. In this connection he relied upon a judgment of the Bombay High Court in Ramchandra B. Loyalka vs. Shapurji N. Bhownagree, AIR 1940 Bombay 315 wherein it has been held as under:-

“It is I think true that a contract might fall within both those definitions, but it is clear from Section 126 that a contract of guarantee involves three parties,- the creditor, the surety and the principal debtor-, and I agree with the view taken by the Madras) High Court in Periamanna Marakkayar v. Banians & Co. 1925 I.L.R. 49 Mad.156 that a contract of guarantee involves a contract to which those parties are privy. Of course, the contract need not be embodied in a single document, but I think there must be a contract or contracts to which the three parties referred to in Section 126 are privy. There must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and no doubt the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, in my opinion, the case is one of indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible in my view to work out the rights and liabilities of the surety under the Indian Contract Act. Section 145 provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. It is impossible to imply a promise by the principal debtor to indemnify the surety, unless the principal debtor is privy to the contract of suretyship. A promise cannot be implied against a stranger to the transaction of guarantee. Again, the right of a surety to call upon the principal debtor to discharge the debt of the creditor which has become due,-a right which is referred to in Mulla’s note to Section 145 of the Contract Act, and is illustrated by the English case there referred to, Asckerson v. Tredegar Dry Dock and Wharf Company, Limited, 1909 2 Ch. 401 cannot be worked out, unless the principal debtor has authorized the contract of suretyship. Unless he has done that, the surety is not in a position to compel the principal debtor to pay the debt. In my view, therefore, exhibit A is a contract of indemnity and not a contract of guarantee the principal debtors, namely the constituents introduced by the plaintiff not only knew nothing of the alleged guarantee, but were unascertained when the contract was made.”

12. Mr. Niraj Kumar Singh also submitted that under the Agreement- cum-Pledge, the respondent‟s liability was limited only to the extent of shares pledged by the respondent debtor. In this connection, Mr. Niraj Kumar Singh relied upon the preamble and Clauses 5 and 7 of the Agreement-cum-Pledge. The said clauses are reproduced hereinbelow:-

“AND WHEREAS THE GUARANTOR has agreed to provide security to secure the said bill

discounting facility by way of pledging of certain marketable securities.

xxx xxx xxx

5. The market value of all such securities included in the schedule / supplementary schedule attached hereto would be monitored by the LENDER at intervals of 15 days If at any time the value of the said securities falls so as to create a deficiency in the margin requirement as specified in the Schedule hereto, specified by the LENDER from time to time or if there is an excess bill discounting facility, the BORROWER shall within seven days of notice from the LENDER deposit with the LENDER additional security in the form of cash or such other securities which may be acceptable to the LENDER failing which the LENDER may at its discretion sell, dispose off or realise any or all of the said securities without being liable for any loss or damage or diminution in value sustained hereby.

xxx xxx xxx

7. In case of expiry of term or in case of any of the events happening as stated herein above or in case of failure by the BORROWER to repay the bill discounting facility within the agreed period of time or to fulfill the terms & conditions of this against or expiry of the terms or in case of any of the events happening as stated herein before, the LENDER would have the full rights to sell, dispose off or realise the said securities on such terms and for such price that the LENDER thinks, and apply the proceeds towards the satisfaction of the bill discounting facility amount, bill discounting charges and penal bill discounting charges outstanding against the said penal bill discounting charges outstanding against the BORROWER including legal charges and incidental expenses etc."

13. Lastly, Mr. Niraj Kumar Singh submitted that the present petition was not maintainable as the petitioner had failed to first encash the securities furnished in its favour by the principal debtor inasmuch as it had failed to act upon the Bills of Exchange as well as cheques given by the principal debtor.

14. In rejoinder, Mr. Virender Ganda, learned senior counsel for petitioner submitted that Section 434 had to be read with Sections 51 and 53 of the Act. The relevant portion of the said Sections are reproduced hereinbelow:-

"51. Service of documents on company.–A document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by post under a certificate of posting or by registered post, or by leaving it at its registered office.

[Provided that where the securities are held in a depository. The records of the beneficial ownership may be served by such depository on the company by means of electronic mode or by delivery of floppies or discs.] xxx xxx xxx

53. Service of documents on members by company.–

xxx xxx xxx (2) Where a document is sent by post–

(a) service thereof shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, provided that where a member has intimated to the company in advance that documents should be sent to him under a certificate of posting or by registered post with or without acknowledgement due and has deposited with the company a sum sufficient to defray the expenses of doing so, service of the document shall not be deemed to be effected unless it is sent in the manner intimated by the member;"

15. According to Mr. Ganda, statutory notice sent in the present case in accordance with the said Sections by properly addressing, prepaying and posting the notice by registered A.D. constituted proper service. In support of his submission, he relied upon a judgment of the Bombay High Court in Ispat Industries Limited, In Re. 2005, 2 CLJ, 235 Bombay, wherein it has been held as under:-

"15. The judgment would apply to a notice under Section 434(a)(1) of the Companies Act with greater force. Section 138 of the Negotiable Instruments Act entails criminal consequences, whereas Section 434(1)(a) involves only civil consequences. Moreover the requirements of a notice under Section 138 of the Negotiable Instruments Act are stricter and wider. Despite the same, the Supreme Court held that a person who properly addresses a notice and mails it would be deemed to have fulfilled his obligation of sending the notice even if the same is returned unclaimed. On a parity of reasoning, it must be held that a notice though returned unclaimed, if duly mailed by registered post addressed to the registered office of the company, must be deemed to have been "delivered" within the meaning of that expression in Section 434(1)(a) of the Companies Act.

16. I would come to this conclusion even or principle. Any other view would permit a dishonest company to avoid service of a notice in a variety of ways by refusing to claim the same from the postal authorities despite intimation of the delivery thereof. Take a simple example. Companies are known to have their registered office in premises where they do not carry on any significant manufacturing, trading or administrative activities. The premises are used as a registered office only for the purpose of convenience and for complying with statutory provisions. In such a case, the company could well avoid service of notices and then refuse to claim the same despite notification from the postal authority to do so.

17. In K. Bhaskaran (supra) the Supreme Court in paragraph 21 held that Section 138 of the Negotiable Instruments Act invites a liberal interpretation in so far as it relates to the giving of a notice. The Supreme Court in relation to a notice under Section 138 of the Negotiable Instruments Act applied the principle in Maxwell's Interpretation of Statutes that provisions relating to giving a notice often received a liberal interpretation. In my view this principle is equally applicable and ought to be applied in respect of a question regarding the delivery of a notice issued under Section 434(1)(a) of the Companies Act. Indeed such an interpretation would cause no prejudice to the company either. If in a given case the concerned officers of a company genuinely do not have the benefit of reading the notice for any reason whatever the same would furnish a valid ground for contending in the petition that may be filed that no presumption should be drawn against the company merely by

virtue of the company not having replied to the said notice. On the other hand a view to the contrary would not only cause great prejudice to the creditors of a company but would in fact have the effect of rendering the provisions of sections 433 and 434 of the Companies Act otiose."

16. Mr. Ganda emphatically denied that under the Agreement-cum- Pledge, the petitioner could have only sold the shares pledged by the respondent debtor.

17. Having heard the parties and having perused the papers, this Court finds that statutory winding up notice had been issued by the petitioner to both the principal debtor as well as to the respondent guarantor at their respective registered office and administrative office. In fact, the statutory notices sent to the respondent by registered A.D. at its registered office had been returned back unserved with the remarks "no such firm at such address". In the opinion of this Court, the petitioner had discharged the duty cast on it under the Act by sending the winding up notice at the respondent‟s last known registered office. The respondent‟s argument that the respondent should have been served at its registered address even when none was present on behalf of the respondent cannot be accepted by this Court as that would amount to asking a party to do an impossible act!

18. In the case of Nuchem Ltd. (supra) relied upon by the respondent, there was a change of address of the registered office of the company. In the present case, the notice was dispatched by the petitioner not only to the administrative office of the respondent but also to its last known registered office. Consequently, the judgment in Nuchem Ltd. (supra) is inapplicable to the facts of the present case.

19. Section 126 of the Indian Contract Act, 1872, defines the contract of guarantee, surety, principal debtor and creditor. The said Section reads as under:-

"126. Contract of guarantee', 'surety', 'principal debtor' and 'creditor'–A „contract of guarantee‟ is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the „surety‟, the person in respect of whose default the guarantee is given is called the „principal debtor‟, and the person to whom the guarantee is given is called the „creditor‟. A guarantee may be either oral or written."

20. On a holistic reading of the Agreement-cum-Pledge, this Court is of the opinion that the respondent was a guarantor as in consideration of the loan advanced by the petitioner to a third person namely the principal debtor, the respondent had pledged shares owned by it in the event of default of repayment of loan. Moreover, in the opinion of this Court, the Agreement-cum-Pledge constituted a composite Tripartite Agreement amongst the Lender, Principal Debtor and Guarantor. In this regard, relevant clauses 4, 12 and 17 of the Agreement-cum-Pledge are reproduced hereinbelow :-

"4. In consideration of the said bill discounting facility, the original Securities mentioned in the Schedule attached to this Agreement, are hereby pledged in favour of the LENDER as an exclusive charge to the LENDER towards repayment of the principal etc. due to the LENDER under the bill discounting facility. Any change in the securities hereby pledged may

be effected by the execution of supplementary schedule(s).

xxx xxx xxx

12. The said pledged securities and the promissory note would be a continuing security to the LENDER for all monies which are due from the BORROWER.

xxx xxx xxx

17.The provisions of this agreement, in particulars provisions of Clause 4, 11 and 12 shall, to the extent applicable, apply to the BORROWER and / or the GUARANTOR, as the case may be."

21. The Board Resolution dated 04th September, 1996 passed by the respondent company also proves beyond doubt that the respondent was a guarantor. The relevant portion of the said resolution is reproduced hereinbelow:-

"RESOLVED that the consent of the Board is hereby accorded for giving guarantee to M/s. CRA Global Securities Limited, New Delhi for the amount of Rs.52,55,500/- (Rupees Fifty two lacs Fifty five thousand five hundred only) being granted by way of Bill Discounting facility to M/s. Lunar Diamonds Limited by them."

"RESOLVED FURTHER that Mr. S.L. Maloo, Director of the Company be and is hereby authorised to pledge and following shares of Sunrise Securities Limited held by the company as collateral security with M/s. CRA Global Securities Limited:

Share Certificate No.	Distn. No.	No of Shares
13173	2214701-2652700	438000

"RESOLVED FURTHER that Mr. SL. Maloo, Director be and is hereby authorised to sign, execute deed and other necessary documents in this connection."

(emphasis supplied)

22. The judgment of the Bombay High Court in Ramchandra B.Loyalka (supra) is clearly distinguishable. In the said case as the main broker had entered into a settlement agreement directly with the client without involving the sub-contractor who was the guarantor, the Court held that the guarantor stood discharged. Since in the present case there was no settlement/compromise entered into by the petitioner, the said judgment offers no assistance to the respondent.

23. The respondent‟s submission that under the Agreement-cum- Pledge, the petitioner had only one security, namely, the pledged shares is contrary to facts and untenable in law. In fact, if that were so, this Court is of the view that the respondent would not have assumed the role of a guarantor and would not have described itself as a guarantor in the Agreement-cum-Pledge. In the opinion of this Court, the argument advanced by the learned counsel for the respondent-guarantor is contrary to the written document executed

between the parties.

24. This Court is further of the opinion that Agreement-cum-Pledge did not limit the liability of the respondent-guarantor. In fact, the respondent‟s liability by virtue of Section 128 of the Indian Contract Act, 1872 has to be co-extensive with that of the principal debtor. Section 128 of the Indian Contract Act, 1872 is reproduced hereinbelow:-

“128,. Surety‟s liability–The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract.”

25. Further, Sections 172 to 176 of the Indian Contract Act, 1872 defines the relationship amongst the Pledge, Pawnor and Pawnee and the rights of the Pawnee when the Pawnor commits a default. This Court is of the view that in the event of default in re-payment of the loan by the principal debtor, the petitioner under the Agreement-cum-Pledge was entitled to either sell the pledged shares or to sue the respondent-guarantor for recovery of amount due and payable under the loan agreement. Also in law, in the event there was any balance amount due and payable after the sale of the pledged shares, petitioner in law would be entitled to file recovery proceedings for the balance amount against the guarantor. Section 176 of the Indian Contract Act, 1872 reads as under:-

“176. Pawnee‟s right where pawnor makes default.–If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.”

26. The Bombay High Court in State Bank of India vs. Smt. Neela Ashok Naik & Anr. AIR 2000 Bombay 151 has held as under:-

“12. We may notice that in the present appeal there are no disputes on facts. The contentions are purely legal. Now we would consider the first contention regarding applicability of section 176 of the Contract Act. Section 176 provides for pawnee’s right where pawnor makes default. It inter alia stipulates that on pawnor making default in payment of the debt, at the stipulated time, in respect of which the goods are pledged, the pawnee may bring a suit against the pawnor on the debt and retain the goods pledged as a collateral security; or he may sell the goods pledged, on giving the pawnor reasonable notice of the sale and if the sale proceeds are deficient the pawnor would be liable to pay the balance and if more, the surplus amount shall be paid to the pawnor. The contention of Mr. Nadkarni is that the only effect of aforenoticed Clause 6 is that the Bank can dispose of the security without giving any notice to the respondents. It is only a waiver of the stipulation of right of the respondents to a reasonable notice before the Bank decides to appropriate the security. Learned Counsel relies upon a decision of the Delhi High Court in Bank of Maharashtra v. M/s Racmann Auto (P) Ltd., AIR 1991 Delhi 278. In the said

decision, the question which came up for considerations was whether there was any legal duty cast on the plaintiff Bank to take early steps for disposing of the pledged goods. Construing Section 176, it was held that the very wording of the section makes it clear that it is the discretion of the pawnee to sell the goods in case the pawnor makes default but if the pawnee does not exercise that discretion no blame can be put on the pawnee and pawnee has the right to bring a suit for recovery of the debt and retain the goods pledged as collateral security. Doubt was also expressed whether a defendant as pawnor could force the pawnee to dispose of the pledged goods without defendant clearing the debt. However, on the facts of the present case, we need not go into this latter aspect on which doubt has been expressed. It has been categorically held in the cited decision that it is the discretion of the plaintiff Bank to have filed the suit for recovery of the debt and retain the pledged goods as collateral security or in the alternative it could resort to selling the pledged goods after giving reasonable notice of sale to the defendants. In that case the plaintiff Bank had in its wisdom exercised the first option of filing the suit and retaining the collateral security.

13. We are in respectful agreement with the legal proposition propounded in the aforesaid decision and thus there would be no question of judicious or arbitrary exercise of discretion by the Bank as to the time of appropriation of the amount from the collateral security given to it in the form of FDRs."

27. The Supreme Court in State Bank of India vs. Indexport Registered and others, [1992] 75 Comp Cas 1 (SC) has held as under:

"14. In Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 it is observed thus:

Co-extensive–Surety's liability is co-extensive with that of the principal debtor…

xxx xxx xxxx

17. In The Hukumchand Insurance Co. Ltd. v. The Bank of Baroda and Ors.: AIR 1977 Kant 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-a-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed:

The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously.

18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default."

28. In view of the aforesaid conclusions, it is apparent that the defence set up by the

respondent is a sham and moonshine. Consequently, this Court is of the opinion that respondent company is unable to pay its debts. Accordingly, present petition is admitted and respondent company is directed to be wound up. The Official Liquidator attached to this Court is appointed as Provisional Liquidator of the respondent company and is directed to forthwith take over the assets and records of the respondent company. For this purpose, Provisional Liquidator would be entitled to obtain police aid and the local police is directed to render all assistance to the Provisional Liquidator.

29. In the meantime, respondent-company, its Directors, officers, employers, authorised representatives are restrained from selling, transferring, alienating, encumbering and parting with the possession of any movable and immovable assets and funds of the respondent company. They are also restrained from withdrawing any money from the accounts of the respondent company.

30. The Directors of the respondent company are directed to forthwith hand over all the records of the respondent company to the Provisional Liquidator including its books of account. The Directors of respondent company are also directed to provide the statement of affairs and file their statements under Rule 130 within a period of twenty one days as provided for in the Act.

31. Citations are directed to be published in the newspapers, namely, “The Statesman (English edition) and “Veer Arjun“ (Hindi edition) as well as in „Delhi Gazette“. The petitioner is directed to deposit a sum of Rs. 50,000/- with the Official Liquidator to meet the expenses for publication within a period of two weeks.

32. The Official liquidator is directed to file a fresh status report before the next date of hearing.

List on 08th October, 2012.

MANMOHAN, J.

MAY 28, 2012