
(2017) 02 BOM CK 0086

In the Bombay High Court

Case No : Company Petition No. 570 of 2016 with Company Applications Nos. 455, 570 of 2016

IDFC Bank Limited

APPELLANT

Vs

M/s. Ruchi Soya Industries Limited

RESPONDENT

Date of Decision : 14-02-2017

Acts Referred:

Companies Act, 1956 — Section 433(e), Section 434, Section 539

Citation : (2017) 2 AIRBomR 514 : (2017) 201 CompCas 114

Hon'ble Judges : R.D. Dhanuka, J.

Bench : Single Bench

Advocate : Mr. Ravi Kadam, Senior Counsel with Mr. Pratik Sakseria, Mr. Akash Menon, Ms. Salonee Kulkarni and Ms. Suchita Jaiswal i/b Mr. Ameya Gokhale, Advocates, for the Petitioner; Mr. Mustafa Doctor, Senior Counsel with Mr. Naushad Engineer, Mr. Hasmit Trivedi and Mr. Lalan Gupta i/b Dhruve Liladhar & Co, for the Respondent; Mr. Sharan Jagtiani with Mr. Chandavale, Ms. Ayodhya Patki and Mr. Nilesh Bhutekar, Advocates, for the Applicant in Company Application No. 470 of 2016/Intervenor

Final Decision : Disposed Off

Judgement

R.D. Dhanuka, J.—By this Company Petition (570 of 2016), the petitioner prays that the respondent be wound up by and under the directions, supervision and control of this Court under the provisions of the Companies Act, 1956 and seeks appointment of the Official Liquidator. The Company Application No.455 of 2016 is filed by the petitioner inter-alia praying for various interim reliefs against the respondent. The Company Application No.470 of 2016 is filed by the IDBI Bank Limited seeking its impleadment as a party respondent in Company Petition No.570 of 2016 and in the Company Application No.455 of 2016.

2. On 25th January, 2016, the petitioner sanctioned various facilities / financial assistance in favour of the respondent not exceeding an aggregate amount of Rs.200.00 crores. On 28th January, 2016, the petitioner and the respondent executed Master Facility Agreement. It was provided in the said agreement that

the petitioner had sanctioned secured over all limits of Rs.200.00 crores consisting of Fund based limits of Rs.25.00 crores and Non-fund based limits of Rs.200.00 crores. On 28th January, 2016, the respondent executed an Unattested Deed of Hypothecation in favour of the petitioner thereby hypothecating only those Current Assets and Receivables created out of the financial assistance provided by the petitioner under any of the facilities contemplated under the said Master Facility Agreement.

3. on 8th February, 2016, the petitioner disbursed a sum of Rs.20.00 crores under the said Master Facility Agreement. The petitioner issued various letters of credit in accordance with the limits under the said agreement.

4. Vide a letter dated 7th May, 2016, the petitioner reminded the respondent that an amount of Rs.20.00 crores under the short term loan facility was to be repaid by the respondent on or before 7th May, 2016, which the respondent had failed and neglected to repay and discharge its obligations under the said agreement. The petitioner called upon the respondent to make payment of the said amount within a period of two days and threatened to take such steps as may be necessary for enforcing its rights in the event of the default of the respondent.

5. On 10th May, 2016, the letter of credit for US \$ 3,814,803.80 became due and payable by the respondent to the petitioner. Vide a letter dated 10th May, 2016, the petitioner informed the respondent that in addition to over due short term facility of Rs.20.00 crores, letter of credit issued for US \$ 3,814,803.80 had also matured on 10th May, 2016 which the respondent had failed and neglected to repay to the petitioner. The petitioner called upon the respondent to make the said payment immediately and threatened to take necessary steps for enforcing its rights against the respondent.

6. On 12th May, 2016, the petitioner sent a reminder regarding outstanding amounts payable under the said agreement by the respondent to the petitioner. By the said letter, the respondent was called upon to immediately make payment aggregating to an amount of Rs.45,73,46,664.35 and to provide cash collateral of Rs.145.00 crores for the letters of credit due to mature subsequently. It is the case of the petitioner that on 13th May, 2016, the letter of credit for US \$ 3,395,000 became due and payable by the respondent to the petitioner. The petitioner vide its letter dated 13th May, 2016 sent a reminder to the respondent regarding outstanding payments and called upon the respondent to pay the said amount.

7. It is the case of the petitioner that on 16th May, 2016, a letter of credit for US \$ 1,426,000 became due and payable by the respondent to the petitioner. By a letter dated 16th May, 2016, the petitioner sent another reminder to the respondent for the outstanding amount.

8. On 16th May, 2016, the respondent replied for the first time to the notices issued by the petitioner and attempted to foist its inability to pay on business compulsions and market volatility. It is the case of the petitioner that by the said

letter, the respondent however, did not deny its liability to pay to the petitioner.

9. On 18th May, 2016, the petitioner replied to the said letter dated 16th May, 2016 and placed on record that since the respondent had committed default in repayment, an "Event of Default" as contemplated in clause 12 of the Master Facility Agreement had occurred in view of the continuous defaults alleged to have been committed by the respondent and thus the petitioner was constrained to cancel all unutilized limits under the said agreement. The petitioner called upon the respondent to clear all outstanding liability and to furnish cash collateral for the balance letters of credit. There was no response to the said letter from the respondent.

10. On 19th May, 2016, the petitioner issued a statutory notice for winding up under section 433 and 434 of the Companies Act, 1956 to the respondent.

11. It is the case of the petitioner that on 20th May, 2016, the letter of credit for US \$ 2,634,863.51 became due and payable by the respondent to the petitioner. On 20th May, 2016, the petitioner vide its letter sent a reminder to the respondent regarding outstanding amount payable under the said agreement and called upon the respondent to repay the said amount along with interest.

12. It is the case of the petitioner that on 23rd May, 2016, letter of credit for US \$ 33,11,938.18 became due and payable by the respondent to the petitioner. On 23rd May, 2016, the petitioner sent a reminder to the respondent regarding the alleged outstanding amount payable under the said agreement.

13. It is the case of the petitioner that the respondent made an announcement on 21st May, 2016 through Bombay Stock Exchange that the respondent would be convening a meeting on 30th May, 2016 recommending dividend for the year ending 31st March, 2016. The petitioner vide its letter dated 25th May, 2016, reminded the respondent that the respondent could not declare or pay any dividend under the terms and conditions of the said agreement and any breach of the terms of the said agreement would constrain the petitioner to initiate suitable legal action. It is the case of the petitioner that on 26th May, 2016, letter of credit for US \$ 2,683,155.62 became due and payable by the respondent to the petitioner. The petitioner vide letter dated 26th May, 2016 sent a reminder to the respondent to pay various alleged outstanding amounts.

14. On 31st May, 2016, the respondent replied to the said statutory notice and reiterated what was stated by it in their earlier reply. It was alleged in the said reply that the respondent had not defaulted but there was some delay in making payments for the reasons beyond its control. It was also alleged that an additional interest charged by the petitioner was not payable by the respondent which required reconciliation. It was mentioned that once the figures were reconciled, the respondent will immediately provide the petitioner with revised repayment schedule. The respondent also requested the petitioner to resolve the issue amicably.

15. On 3rd June, 2016, the petitioner replied to the letter dated 31st May, 2016 and reiterated its claim. It is case of the petitioner that on 6th June, 2016, letter of credit for US \$ 5,459,936.12 became due and payable by the respondent to the petitioner. The petitioner vide its letter dated 6th June, 2016 sent a reminder to the respondent for payment of the alleged outstanding dues. On 28th June, 2016, letter of credit for US \$ 2,742,957.80 became due and payable by the respondent to the petitioner. On 28th June, 2016, the petitioner sent a reminder to the respondent for payment of the alleged outstanding dues.

16. On 8th July, 2016, the petitioner filed a company petition inter-alia praying for winding up of the respondent company. The petitioner also filed a separate company application inter-alia praying for the appointment of the Official Liquidator. The petitioner also filed an additional affidavit before this Court placing certain additional information on record. The respondent has filed a detailed affidavit in reply. The petitioner has filed rejoinder to the affidavit filed by the respondent.

17. Mr. Kadam, learned senior counsel appearing for the petitioner invited my attention to the various documents annexed to the company petition, including the correspondence exchanged between the parties and also to the averments made in the Company Application No.445 of 2016 and more particularly in paragraph 7. He submits that the respondent has sold its stake to another company i.e. Ruchi Kagome Foods India Private Limited. Reliance is also placed on press release dated 22nd May, 2016 in support of the submission that the respondent had proposed to take steps to hive off its business to a third party i.e. Adani Wilmar Limited.

18. Learned senior counsel placed reliance on the order passed by the Security Exchange Board of India (SEBI) making various observations about alleged dubious plan of the respondent and fraud alleged to have been committed by the respondent. He also placed reliance on the letter dated 30th March, 2016 addressed by the respondent to the Bombay Stock Exchange and National Stock Exchange pointing out the out come of the meetings of the Board of Directors of the respondent. He submits that the loss suffered by the respondent during the financial year 2015-2016 itself according to the said letter is about Rs.811.70 crores. He also placed reliance on the audited report of the respondent.

19. It is submitted that since the respondent is heavily indebted and has suffered tremendous financial loss and is in process of hiving off its business to a third party, the respondent company is deemed to be unable to pay its debts and thus this company petition deserves to be admitted and the Official Liquidator shall be appointed as the Provisional Liquidator.

20. Learned senior counsel for the petitioner invited my attention to the allegations made by the respondent in its affidavit in its reply. He submits that various circulars relied upon by the respondent which were issued by the Reserve Bank of India and referred to and relied upon by the respondent in the affidavit

in reply has no binding effect and thus no reliance thereon can be placed by the respondent against the petitioner. My attention is invited to those five circulars, which have been relied upon by the respondent in its affidavit in reply. Insofar as circular dated 26th February, 2014 i.e. "Frame Work for Revitalising Distressed Assets in the Economy - Guidelines on Joint Lender's Forum (JLF) and Corrective Action Plans (CAP)" is concerned, it is submitted that there is no dispute that the Joint Lender's Forum (JLF) has to be formed under the said circular if the outstanding liability of a borrower towards the banks is above Rs.1000 million and when the account has turned into NPA.

21. The emphasis is led on clause 2.6 of the said circular. It is submitted that since the petitioner and the respondent have admittedly not signed any Joint Lender's Forum (JLF) agreement and also Inter Creditor Agreement (ICA) and Debtor Creditor Agreement (DCA), the provisions made in the said circular are not binding upon the petitioner. He submits that the respondent is not declared as wilful defaulter in view of the order passed by this Court in the company petition in favour of the respondent. He submits that none of the options available under the said circular, including (i) Corrective Action Plan, (ii) Restructuring and (iii) Recovery, are binding on the petitioner including the decisions, if any, taken by the said Joint Lender's Forum. He submits that the petitioner is entitled to pursue the remedy available to it in law including winding up of the respondent company on the ground that the respondent is unable to pay its debts.

22. Learned senior counsel for the petitioner also led emphasis on clauses 3.2 to 3.4 of the said circular and would submit that if the lenders would have proceeded with restructuring of the account, such decision would have been binding on the lenders only if minimum of 75% of the creditors by value and 60% of the creditors by number in the said Joint Lender's Forum would have signed Inter Creditors Agreement and not otherwise. He submits that admittedly no such Inter Creditors Agreement was signed by the petitioner and thus the decisions, if any, even if taken by 75% of the creditors by value and 60% of the creditors by number in the JLF would not be binding upon the petitioner. He submits that under clauses 3.3 and 3.4 of the said circular, no such agreement was arrived at between the JLF and the respondent within the time prescribed therein.

23. Reliance is also placed on clauses 7.1 and 7.2 of the said circular. It is submitted that the rights vested in the lender for recovery of amounts due under the loan agreement and other facilities executed between the parties and to file the proceedings for recovery of the said amounts or for seeking winding up of the borrower company cannot be taken away or superseded by the decisions even if taken by 75% of the creditors by value and 60% of the creditors by number in the Joint Lender's Forum if the lenders have not signed Inter Creditor Agreement and Debtor Creditor's Agreement. He submits that under clause 7.2 of the said circular, penalty can be imposed for committing any default by a

member of the JLF only if the lender was a signatory to such Inter Creditor Agreement and Debtor Creditor Agreement.

24. Learned senior counsel appearing for the petitioner also placed reliance on the Master Circular dated 1st July 2014 and more particularly on clauses 21.1, 21.3, 21.6, 22, 26.1 and 26.2. It is submitted that these provisions of the circular dated 1st July, 2014 are in pari materia with the circular dated 26th February, 2014.

25. Learned senior counsel for the petitioner also invited my attention to the circular dated 24th September, 2015 and would submit that clause 5.2 of the said circular would apply only to those lenders, who were signatories to the said Inter Creditor Agreement and Debtor Creditor Agreement and not otherwise. He submits that the lender has to first agree to sign the agreement and to enter in the said JLF and the said Inter Creditors Agreement and Debtor Creditor's Agreement to make decisions of the said JLF binding upon the lender. He submits that the petitioner in this case totally remained outside the said JLF. It is submitted that since the petitioner was not a part of the said JLF, there was no question of the petitioner exercising any option, including an option of exit. He submits that clauses 5 and 6 of the said circular have to be read together.

26. It is submitted that no lender can be forced by the Reserve Bank of India to waive its right to recover the amounts due to the lender from the borrower or can be directed to provide any further facilities to the borrower. The emphasis is also led on clause 6.2(ii) of the said circular in support of the submission that the said penal provision also could be attracted only in case of violation of the decisions taken by the JLF provided the lenders would have been the signatories to the said two agreement and those lenders would have changed their stand later or would have refused to implement the package.

27. Mr. Kadam, learned senior counsel for the petitioner placed reliance on various submissions made in the additional affidavit dated 31st August, 2016 and submits that 8 out of 11 Crushing plant of the respondent are already closed. He submits that the mark to market loss of the respondent is about Rs.522.00 crores. The total debts of the respondent company are more than Rs.9451.80 crores. The respondent has admitted its outstanding liability to the petitioner at least to the extent of Rs.192.30 crores and has admitted its debts of Rs.9451.80 crores.

28. Learned senior counsel for the petitioner invited my attention to the minutes of the meeting dated 28th July, 2016 of the said JLF, which was attended by the representative of the petitioner. He submits that even if the petitioner has made any suggestion in any of the JLF meeting or had attended the said meeting, the decisions taken, if any, in such meetings of the said JLF were not binding upon the petitioner in view of the petitioner not having signed the Inter Creditor's Agreement or Debtor Creditor's Agreement, no decision taken by the said JLF could be made applicable to the petitioner. He also invited my attention to the

minutes of the meeting of the said JLF held on 7th September, 2016. He submits that the JLF had suggested the SDR schemes with a view to wipe up debt of the respondent and to offer equity in the respondent company which is not accepted by the petitioner.

29. It is submitted that reconstructing the respondent company proposed in the said JLF meeting and the steps of rectification have totally failed. He also placed reliance on the minutes of the meeting dated 23rd September, 2016 in support of his submission that even those minutes would indicate that reconstructing and rectification has failed. He submits that in the said meeting, the petitioner had made its position clear that the petitioner has already filed winding up petition against the respondent and seeks to pursue the same.

30. It is submitted by the learned senior counsel for the petitioner that since the respondent has admitted its liability towards the petitioner, the petitioner is entitled to prosecute this proceedings for winding up against the respondent. He submits that it is not the case of the respondent that the scheme of SDR is binding upon the petitioner. He submits that in any event the SDR now suggested by the JLF allegedly is even otherwise not part of the circulars issued by the Reserve Bank of India. He submits that there is thus no waiver on the part of the petitioner not to initiate any legal proceedings for recovery of its dues or for winding up of the respondent. He submits that there is no statutory bar against the petitioner from prosecuting winding up proceedings against the respondent.

31. It is submitted by the learned senior counsel that even under the circular dated 1st July, 2014 and more particularly clause 22.1(c), it is clearly provided that if first two options provided at (a) and (b) of clause 19.1 are not feasible, due legal process may be resorted to. He submits that as on today admittedly no reconstructing process of the respondent is formulated and finalized. Learned counsel distinguished the judgment of the Court in case of Tata Capital Financial Services Limited v. Infraprojects Limited, (2015) SCC Online Bom. 3597. My attention is also invited on paragraphs 15, 16, 19 and 20 of the said judgment. He also placed reliance on the judgment of this Court in case of BNY Corporate Trustee Services Ltd. v. Wockhardt Limited, (2014) 187 Company Cases 301 (Bom.) and the judgment of the Supreme Court in case of IBA Health (India) Private Limited v. Drive Systems SDN Board, (2010) 10 SCC 553. He submits that even if SDR scheme as canvassed by the said JLF is pending, the company petition for winding up can still be admitted since the conditions of winding up of the company are satisfied.

32. Mr. Kadam, learned senior counsel for the petitioner placed reliance on the judgment of this Court in the case of BNY Corporate Trustee Services Ltd. v. Wockhardt Ltd., (2014) 187 Comp Cas 301 (Bom) and in particular paragraph on page 339 in support of his submission that the petitioner cannot be forced to join the SDR scheme. The law does not postulates any such compulsion on the petitioner. He submits that the respondent-company cannot compel the petitioner to join SDR scheme and since the petitioner has not agreed to join SDR scheme,

the present petition for winding up of the respondent is maintainable. He submits that in this case the claims of the petitioner are admitted by the respondent and the conditions of winding up of the respondent-company are satisfied.

33. Learned senior counsel distinguishes the judgment of this Court in the case of Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. & Ors. (supra) on the ground that the facts before this Court in the said judgment were totally different. He submits that admittedly no such SDR scheme was finalised in this case as on today. Learned senior counsel placed reliance on the judgment in the matter of Advent Corporation Pvt. Ltd., reported in (1969) 39 Comp Cas 463 and in particular paragraphs 10 and 11 in support of his submission that the other creditors are not entitled to be heard by this Court in this company petition at the admission stage. He submits that the creditors and the shareholders can be heard by this Court only after the company petition is admitted and at the final hearing stage. He submits that the said judgment of this Court in the matter of Advent Corporation Pvt. Ltd. was not brought to the notice of this Court in the case of Bharat Petroleum Corporation Limited v. National Organic Chemical Industries Ltd. & Anr., 2004 (2) Mh.L.J. 114 and thus the said judgment of this Court is per-in-curium and not binding on this Court.

34. Mr. Doctor, learned senior counsel for the respondent, on the other hand, invited my attention to various averments made in the affidavit-in-reply filed by the respondent dated 23rd September 2016 and would submit that this company petition is not at all maintainable. He submits that the Reserve Bank of India has formulated a new scheme of reporting and resolving distress in accounts. As per the said scheme, where the amount over Rs.100 crore is found due and payable by a borrower to the lenders and if the account was not serviced for 60 days, it has to be classified as Special Mention Account-2 and in that event, it is mandatory that a Joint Lenders Forum (JLF) is formed comprising of all the lenders.

35. It is submitted that such JLF has to exercise one of the options prescribed under the Circular dated 26th February 2014 and various other Circulars i.e. dated 1st July 2014, 24th September 2015 and 25th February 2016 and 13th June 2016. He submits that once the corrective action plan is accepted by 75% of the lenders in value and 50% in number, such decision is binding on all the lenders including the petitioner. It is submitted that if any lender including the petitioner does not wish to be a part of such a scheme, it is bound to sell its exposure to another lender. He submits that it is not open to the dissenting lender to continue with its existing exposure and simultaneously not agree for rectification or restructuring as part of the corrective action plan. He submits that various circulars referred to and relied upon by the respondent in the affidavit-in-reply which are also referred to by the petitioner are binding on all the banks including the petitioner.

36. Learned senior counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of Canara Bank v. P.R.N. Upadhyaya and Ors.,

(1998) 6 SCC 526 and in particular paragraph 11 thereof in support of his submission that the circulars issued by the Reserve Bank of India under Section 21 or 35 of the Banking Regulation Act, 1949 are statutory in nature and are required to be complied with by the banks. Mr. Kadam, learned senior counsel for the petitioner at this stage states that there is no dispute that the circulars issued by the Reserve Bank of India under Section 21 or 35 of the Banking Regulation Act, 1949 are statutory in nature and are binding on all the banks.

37. In so far as the submission of the learned senior counsel for the petitioner that unless the lender is signatory to the Inter Creditor Agreement (ICA) and the Debtor Creditor Agreement (DCA), the decision taken in JLF is not binding upon the petitioner is concerned, the learned senior counsel for the respondent led emphasis on clauses 2.3, 2.6, 2.7, 3, 6.3 and 7.1 to 7.3 of the Circular dated 26th February 2014. He submits that under the said circular and more particularly under clause 2.3 thereof, since the account of the respondent was reported under the category as Special Mention Account-2, all the lenders including the petitioner were mandatorily required to form a Committee to be called JLF. He submits that under clause 2.6 of the said circular, it is mandatory for all the lenders to formulate and sign an Agreement i.e. JLF Agreement.

38. It is submitted that the Indian Banks' Association thereafter, prepares a Master JLF agreement and operational guidelines for JLF which has to be adopted by all the lenders. Upon such formation of JLF, subsequent corrective actions are required to be taken mandatorily as provided in clause 3 - Corrective Action Plan by JLF of the said circular namely clause 3.1- (a) Rectification, (b) Restructuring and (c) Recovery. He submits that under clause 3.2 of the said circular, if the decision is agreed upon by a minimum of 75% of creditors by value and 60% of creditors by number in the JLF, the same would be considered as the basis for proceeding with the restructuring of the account and such decision agreed upon by the aforesaid number of creditors, it would be binding on all the lenders. He submits that once the decision is taken by a minimum of 75% of creditors by value and 60% of creditors by number in the JLF, all the lenders have to sign the Inter Creditor Agreement and also the Debtor Creditor Agreement as contemplated under clause 3.1(b) which has to be read with clause 3.2 of the said circular.

39. It is submitted by the learned senior counsel that in the event of any of the lenders who had agreed to the restructuring decision by the JLF but changes their stance later on or delays/refuses to implement the package, such lender will be subject to accelerate provisioning requirement on their exposure to the borrower if the account of the borrower is classified as Non-Performing Assets (NPA). He submits that under clauses 7.1 to 7.4 of the said circular, the punitive action is provided against such lenders who change their stance and refuses to implement the package or causes delay. He submits that since the said provision contemplates for punitive action, it presupposes that other provisions provided therein are binding and are mandatory in nature. He submits that the said

provision would be binding even upon the lenders who are not members of consortium.

40. Learned senior counsel for the respondent placed reliance on clauses 5.2 and 6.2 of the Circular dated 24th September 2015 which provides for an Exit option to the lenders in certain circumstances. He submits that clause 6.2 of the said circular relied upon by the petitioner would not assist the case of the petitioner in support of its case that unless the petitioner would be signatory to the Inter Creditor Agreement and the Debtor Creditor Agreement, there was no question of exercising any option of exit from the JLF. He submits that such Inter Creditor Agreement and Debtor Creditor Agreement have to be entered into after the decision of restructuring of the account of the borrower is decided by the JLF. He submits that the scheme framed and the decision taken by the JLF have to be made workable. The majority of the creditors have decided to form a scheme and to take steps towards restructuring of the account of the respondent and the petitioner being one of the lenders, cannot be allowed to scuttle such scheme and be permitted to pursue the winding up proceedings against the respondent.

41. Learned senior counsel invited my attention to some of the minutes of meetings of the JLF in support of his submission that the petitioner has all throughout participated in the said meetings by the JLF and have made various suggestions for taking steps for restructuring of the account of the respondent.

42. In his alternate submission, the learned senior counsel for the respondent invited my attention to the averments made in the affidavit-in-reply to demonstrate that the respondent alone processes 15% of the processing capacity of India's edible oil requirements. The respondent provides nutritious and value oriented foods to over 15 crore Indian consumers through a network built over last 30 years. The respondent has 21 manufacturing units across India and plays a significant role in the Indian farm economics. He submits that the respondent is responsible for the lives of around 7-8 million farmers covering 11-12 million hectares of land in 4 major States of the country. The respondent has exclusive access to 55000 hectares of land planted with palm plantations under the Oil Palm Plantation Programme sponsored by Government of India in several States which provides employment to a large number of farmers and also supports the self sufficiency programme for edible oils.

43. It is submitted that the respondent is a public listed company having more than 25000 shareholders and has received several awards and accolades. The respondent was ranked No.1 firm as per total income in financial year 2015 in the food produce sector by Dun and Bradstreet. The respondent has been featured in the list of World's top 250 Consumer Produce Companies prepared by Deloitte. The respondent has remitted an aggregate amount of Rs.14,89,00,000/- towards its direct tax liability for the Financial Year 2014-2015 and has paid an aggregate amount of Rs.7,32,59,95,204/- as and by way of indirect tax liability for the Financial Year 2015- 2016. The gross value of the fixed assets of the respondent is Rs.4,019.97 crore as on 31st March 2016. He

submits that the respondent-company employs 8325 persons and has paid all its employees their wages. The total wages paid in the Financial Year 2015-2016 aggregates to Rs.2,11,37,00,000/-.

44. It is submitted by the learned senior counsel for the respondent that in so far as the order passed by the Security Exchange Board of India which has been relied upon by the learned senior counsel for the petitioner is concerned, the said order was passed ex-parte. He submits that by the said order, a show cause notice was issued to the respondent with an opportunity to file an objection which objection has already been filed by the respondent. He submits that in any event, the said order passed by the Security Exchange Board of India is only a prima-facie order and is not relevant for the purpose of deciding this petition.

45. Learned senior counsel for the respondent placed reliance on the minutes of meeting dated 26th August 2016 held by the Consortium and would submit that the said consortium comprising of the said 21 bankers have already passed a resolution unanimously to oppose the said winding up petition and have authorised IDBI bank as a leader of consortium to file an intervention application before this Court on behalf of the consortium lenders for their working capital limits and term loan limits. He submits that only the petitioner who is not a consortium member has chosen to file the present winding up petition though had attended all the meetings of the said JLF. He submits that since 21 bankers who are consortium members and are the major secured creditors have unanimously decided to oppose the said winding up petition, this Court has to consider wishes of the creditors while considering the petition for winding up under the provisions of the Companies Act, 1956. He submits that even if the company petition which is filed by the petitioner so as to exert pressure on the respondent-company is admitted, it will have serious effect on the process of restructuring decided by the said JLF. He submits that various steps are taken by the said JLF pursuant to various meetings held which were attended by the petitioner also and the same is at an advance stage.

46. Learned senior counsel for the respondent placed reliance on the judgment of the Gujarat High Court in the case of Tata Iron and Steel Co. v. Micro Forge (India) Ltd., (2001) 104 Comp Cas 533 and in particular paragraphs 14 and 16 to 19 in support of his submission that the winding up order shall not be made on a petition of the creditors, if it would not benefit him or the creditors of the company in general. He submits that since the respondent-company has not become defunct or has not closed its business or is not commercially insolvent, no order of winding up of the company can be passed. He submits that in all matters relating to the winding up of a company, the court may have regard to the wishes of the creditors and contributories.

47. Learned senior counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of M/s. Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd., 1971 (3) SCC 632 and in particular paragraph 22 thereof and would submit that if there is opposition to the making of the winding

up order by the creditors, the Court will consider their wishes and may decline to make the winding up order. He also placed reliance on the judgment of this Court in the case of Bharat Petroleum Corporation Limited (supra) and in particular paragraphs 2 to 6 and would submit that since an order of admission seriously affects the market position of a company, the wishes of the workers, creditors and the contributories has to be considered by this Court even at the admission stage of the winding up petition. He submits that this Court has after adverting to the judgments of the Supreme Court in the cases of M/s. Madhusudan Gordhandas & Co. (supra) and Bipla Chemical Industries v. Shree Keshariya Investment Ltd., (1977) 47 Company Cases 211 and other judgments has held that the right of the creditors to appear and be heard in all matters relating to the winding up of a company is recognised by law.

48. Learned senior counsel for the respondent also placed reliance on the judgment of the Gujarat High Court in the matter of Rishi Enterprises, (1992) 73 Comp Cas 271 and in particular paragraphs 1 to 6 in support of the submission that the wishes of the workers and creditors have to be considered and the Court may decline to make a winding up order.

49. Learned senior counsel for the respondent placed reliance on the judgment of this Court in the case of Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. & Ors. (supra) and in particular paragraphs 13 to 17 in support of the submission that winding up is a matter of discretion for the Company Court and such discretion has to be exercised judicially. The said judgment is also relied upon in support of the submission that since the CDR package is under consideration, no order of admission of winding up petition can be passed by this Court against the respondent. He submits that in view of overall economic slow down of the industries at large in India including the respondent, this Court shall exercise discretion in favour of the respondent and shall refuse to pass an order of winding up of the respondent-company. He submits that approach of the Court in this situation shall be for revival of such company and not to pass a drastic order of winding up of a company which would destroy the chances of revival if any of the company in future. He submits that it is the government policy to bring the lenders together to make an attempt to revive the company and to try and preserve the inherent value of its assets.

50. In so far as the submission of the learned senior counsel for the petitioner that the respondent has sold some of the assets worth Rs.63 crore is concerned, it is submitted by the learned senior counsel for the respondent that the sale proceeds of those assets are utilised for various purposes set out in the affidavit-in-reply and such sale was not a fraudulent sale. He submits that the respondent-company is now turn profitable. He submits that the leader of such consortium banks i.e. IDBI bank limited has already filed a separate company application inter-alia praying for intervention for opposing the present company petition filed by the petitioner. He submits that in view of opposition of the company petition by those 21 secured creditors opposing admission of the company petition, this

Court shall not pass any order admitting this company petition. He submits that discretionary powers of this Court thus shall be exercised in favour of the respondent and not in favour of the petitioner.

51. Mr. Jagtiani, learned counsel for the intervenor in Company Application (L) No.517 of 2016 submits that the applicant has been appointed as a leader of consortium of 21 banks who have passed a resolution to oppose the company petition filed by the petitioner. He submits that those 21 members of the said consortium are also parties to the said JLF. He submits that total debts of the respondent towards those 21 members of the consortium is about Rs.8593 crore. The principal amount of the petitioner is however only to the extent of Rs.70 crore. He submits that the alleged liability of the petitioner recoverable from the respondent company is hardly 2% of the total debts of the other lenders and is at 1% of the debts of the total creditors.

52. In so far as the circulars issued by the Reserve Bank of India from time to time which are relied upon by the respondent is concerned, it is submitted by the learned counsel that those resolutions have statutory force and are binding on all banks including the petitioner. He submits that the petitioner has participated in the meetings held by the said JLF from time to time and could not have filed this company petition. He submits that since 21 secured creditors are opposing the admission of this company petition and other reliefs as prayed, the wishes of these 21 creditors have to be considered by this Court before admitting the company petition or before passing any interim order. Learned counsel also sought reliance on various judgments referred to and relied upon by Mr. Doctor, learned senior counsel for the respondent in support of the aforesaid submission. It is submitted by the learned senior counsel that the judgment of this Court in the case of Bharat Petroleum Corporation Limited (supra) is not per-incurium as canvassed by the learned senior counsel for the petitioner.

53. Learned counsel placed reliance on the judgment of the Supreme Court in the case of National Textile Workers' Union v. P.R. Ramkrishnan & Ors., 1983 SCC (1) 228 and submits that the workers and the creditors have a locus-standi to appear and be heard both before the petition is admitted and an order for advertisement is made as also after the admission and advertisement of the petition until an order is made for winding up the company. He submits that relying upon the said judgment of the Supreme Court, this Court in the said judgment in the case of Bharat Petroleum Corporation Limited (supra) has held that having due regard to the provisions of Section 557(1) of the Companies Act, 1956, the principle which has been laid down by the Supreme Court in the case of the workers must necessarily apply in the case of the creditors.

54. It is submitted that the judgment of this Court in the matter of Advent Corporation Pvt. Ltd. (supra) is impliedly overruled in view of the judgment of the Supreme Court in the case of National Textile Workers' Union (supra). He submits that the consequences of admission of a company petition for winding up is very serious and thus the wishes of the workers, creditors and contributories if

they oppose the admission of a company petition itself, the same cannot be overlooked but have to be considered by the Company Court. He submits that Section 557 of the Companies Act, 1956 is not noticed in the judgment in the matter of Advent Corporation Pvt. Ltd. (supra).

55. It is submitted by the learned counsel for the Intervenor that the Draft Techno Economic Viability Report has been already circulated amongst the members of the JLF. An Audit Draft Report is expected by end of January 2017. He submits that further meeting of the said JLF for taking further course of action for restructuring and revival of the respondent-company would be taken by the said JLF after such audit report is placed for its consideration.

56. In so far as the submission of the learned senior counsel for the petitioner that since the petitioner had not signed any Inter Creditor Agreement and Debtor Creditor Agreement and thus were not bound by the decision, if any, taken by the JLF is concerned, the learned counsel for the intervenor placed reliance on clauses 7.1, 7.3 and 9.2 of the said circular dated 26th February 2014 and would submit that those accelerated provision would apply if any default is committed after execution of Inter Creditor Agreement and Debtor Creditor Agreement. He submits that clause 7.3 specifically provides for the consequences for non-compliance of the obligations prior to such execution of Inter Creditor Agreement and Debtor Creditor Agreement. He submits that since the said circular provides for punitive action for committing breaches of obligations of the parties, it presupposes that the compliance of the obligations under those circulars are not optional but mandatory.

57. It is submitted by the learned counsel for the Intervenor that out of 21 members of consortium who are also the members of the said JLF, 18 members have already signed the JLF Master Agreement. He submits that stage of execution of Inter Creditor Agreement and Debtor Creditor Agreement has not reached so far. He submits that a detailed restructuring plan would be decided after receipt of the audit report as contemplated in the meeting of the said

58. The learned counsel for the Intervenor also tenders a copy of the proforma prepared by the Indian Banks' Association to show various provisions to be incorporated in the agreements to be entered into by the members of the JLF while restructuring the respondent or initiating the recovery action. He submits that the said JLF Master's Agreements have sanctity and force of law till the Inter Creditor Agreement and Debtor Creditor Agreement are signed. Such Inter Creditor Agreement would provide details of restructuring. He submits that the decision of 75% of creditors by value and 60% of creditors by number in the JLF applies and binds all the lenders even in respect of any recovery action proposed to be taken or to oppose any action by any other lender outside. He submits that Inter Creditor Agreement and Debtor Creditor Agreement on one hand and the said JLF sub-serve two different purposes and are executed at two different stages. He submits that stage of execution of Inter Creditor Agreement and Debtor Creditor Agreement has not reached till date whereas, the execution of

the said JLF Master's Agreement has already been completed by 18 banks out of 21 banks. It is submitted that admission of the company petition would hamper the process of restructuring of the respondent-company and thus the Intervenor thus be permitted to intervene in these proceedings and to oppose the admission of winding up of this company petition and grant of any interim relief as prayed by the petitioner.

59. Mr. Kadam, learned senior counsel for the petitioner in rejoinder heavily placed reliance of the judgment of this Court in case of BNY Corporate Trustee Services Ltd. (supra) and also on the judgment of this court in case of Advent Corporation Pvt. Ltd. (supra). It is submitted that the judgment of this court in case of Bharat Petroleum Corporation Limited (supra) is per-in-curium. He also placed reliance on some of the paragraphs of the judgment of this court in case of Tata Capital Financial Services Ltd. (supra). He submits that admittedly all the creditors of the respondent are not before this court. All the creditors whether unsecured or secured can oppose or support this winding up petition only if this petition is admitted and if the petition is advertised in accordance with the Company (Courts) Rules. He submits that the minutes of the meeting of the JLF also clearly indicates that different suggestions were given by the different creditors and there is total uncertainty whether any of the suggestions given by those lenders present in those JLF meetings were implementable or not.

60. It is submitted that the circular dated 26th February, 2014 issued by the RBI does not override the contractual rights of the petitioner with the respondent. He submits that the said circular does not provide that the said circular would be binding on the petitioner and the right of the petitioner being one of the creditor would be suspended or would not be enforced if a JLF is formed.

61. Learned senior counsel for the petitioner once again led emphasis on clause 3(1)(b) of the circular and would submit that even the said provision clearly indicates that the lenders are given an option to sign the Inter Creditor Agreement or Debtor Creditor Agreement. He submits that even the said provision provides that the stand-still clause may be stipulated in the Debtor Creditor Agreement. He submits that the said clause 3(1) (b) has to be read with clause 3.2 of the said circular. He submits that the petitioner thus being not bound to execute the Inter Creditor Agreement, no decision even if taken by the said JLF would be binding upon the petitioner and thus the petitioner is at liberty to pursue its legal remedy by adopting the legal proceedings against the respondent including the winding up petition. He submits that in this case the record clearly indicates that the deemed insolvency of the respondent clearly exists.

62. It is submitted by the learned senior counsel that since the intervenor is not entitled to be heard in this company petition at this stage, the objection raised by the intervenor cannot be considered by this court. He submits that there is no scheme formulated by JLF under implementation as on today. He submits that there is no definite proposal given by the lenders in the said JLF which can be

implemented so as to restructure the respondent company.

63. Learned senior counsel for the petitioner distinguished the judgment of Gujarat High Court in case of Tata Iron and Steel Co. (supra). He submits that the company court cannot judge at this stage whether admission of the winding up petition is for the benefit of the petitioner or not. He also distinguished the judgment of Gujarat High Court in case of Rishi Enterprises (supra).

64. Learned senior counsel for the petitioner submits that the respondent has already suffered substantial speculation loss and have taken various steps prejudicial to the interest of large number of creditors including the petitioner by making an attempt to dispose of the valuable assets such as trade mark etc. He submits that though various steps were to be taken by the respondent pursuant to the decisions taken in the meeting held by the said JLF, the respondent has not complied with any of those suggestion given/decision taken in the said JLF meeting. He submits that since July 2016, the discussion in the JLF meeting is going on without any substantial progress. He submits that the petitioner cannot be compelled to join SDR schemes propounded by the said JLF. He submits that though it is mandatory to attend the meetings of JLF, it is at the discretion of the petitioner whether to join SDR schemes or not. He submits that the petitioner also attended the meeting of JLF too and made various suggestions to revive the respondent company but it is not in the interest of the petitioner to wait and watch for a longer period for the outcome of the implementation of the various conflicting suggestions given by the lenders in the JLF.

65. Mr. Doctor, learned senior counsel for the respondent submits that the debt of the petitioner is only to the extent of 1% of the total debts of the creditors and 2% of the debts of the total creditors of the other banks and financial institutions who are supporting the respondent. He submits that in these circumstances, this court shall exercise the discretionary power in this winding up petition in favour of the respondent and not the petitioner.

Reasons And Conclusions :

66. I will first decide the issue as to whether the IDBI Bank Limited, a Consortium Leader representing the consortium of 21 banks who have lent and advanced huge amounts to the respondent company can be allowed to intervene in this company petition at the stage of admission of the company petition or can be allowed to intervene only after the company petition is admitted and notice is issued for final hearing of the company petition. The IDBI Bank Limited has filed Company Application No.470 of 2016 inter-alia praying for its impleadment as a party or in the alternate has prayed for intervention in this company petition. The petitioner has opposed the company application filed by the applicant i.e. IDBI Bank Limited on various grounds.

67. Mr. Kadam, learned senior counsel appearing for the petitioner has opposed the application for intervention on the ground that the applicant even if is allowed to intervene in the winding up petition, the applicant cannot be allowed

to intervene at the admission stage. He submits that no notice of admission is issued by this Court in this petition till date. He submits that only after the notice is issued by this Court after admitting the petition, all the creditors can appear before the Court in the company petition and can oppose or support the final order of winding up of the respondent company and not at this stage.

68. Learned senior counsel for the petitioner placed reliance on the judgment in the matter of Advent Corporation Private Limited (supra) and would submit that this Court in the said judgment has categorically held that the Court can pass a winding up order in the interest of shareholders and in the interest of creditors, no such enquiry however can possibly be made by the Court at the preliminary stage of admission of the petition when all that the Court has to ascertain is whether it appears to the Court that there is a prima-facie case and whether it requires further enquiry and investigation. It is held that at the admission stage the Court has to consider contentions of a preliminary nature that the petition is not maintainable, or that the petition constitutes an abuse of the process of the Court insofar as it is based on a disputed debt, or if it is a creditor's petition, that the petitioner has failed to make out that he is a creditor.

69. It is the submission of the learned senior counsel for the petitioner that the judgment of this Court in the matter of Advent Corporation Private Limited (supra) was not brought to the notice of this Court in case of Bharat Petroleum Corporation Limited (supra) decided by a learned single Judge of this Court and thus the judgment of this Court in case of Bharat Petroleum Corporation Limited (supra) is per-in-curium.

70. The Supreme Court in case of M/s. Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Private Limited, (supra) had considered the issue whether the creditors of the company can be allowed to oppose the petition for winding up at the admission stage or not. The Supreme Court in the said judgment held that if there is opposition to the making of the winding up order by the creditors, the Court will consider their wishes and may decline to make winding up order. Under section 557 of the Companies Act, 1956 in all matters relating to the winding up of the company the Court may ascertain the wishes of the creditors. It is held that winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally.

71. In case of National Textile Workers' Union & Ors. v. P.R. Ramakrishnan, (supra) the Supreme Court laid down principle that the workers are entitled to appear at the admission stage of winding up petition either to support or oppose it and so long as no winding up order is made by the Court. It is held by the Supreme Court in the said judgment that the workers have a locus to appear and be heard in the winding up petition both before the winding up petition is admitted and an order for advertisement is made and after the admission and advertisement of the petition until an order is made for winding up of the Company.

72. This Court in case of Bharat Petroleum Corporation Limited (supra) has adverted to the judgment of the Supreme Court in case of National Textile Workers' Union & Ors. (supra) and M/s. Madhusudan Gordhandas & Co. (supra) and has held that the circumstance that there is no rule which envisages that the creditors may be heard to oppose the admission of a petition does not interpose any bar to the Company Court even at the stage of admission in view of the clear mandate of section 557 that in all matters relating to the winding up of a company, the Court will have regard to the wishes of creditors and contributories. This Court has construed section 557(1) of the Companies Act, 1956 and has held that there is no reason why the mandate of section 557(1) should not be applied even to the stage of admission of the company. It is held that the interest of the creditors has to be considered by the Court even at the stage of admission.

73. This Court in the said judgment was considering a company application filed by the State Bank of India which bank was Leader of the Consortium Banks and had advanced large amounts to the respondent company therein towards working capital facilities. The Consortium Banks had granted its in-principal approval for the acceptance of restructuring package by other members of Consortium. This Court allowed the said Consortium Leader to intervene in the said winding up petition at the admission stage. In my view, the judgment of the Supreme Court in case of National Textile Workers' Union & Ors. (supra), in case of M/s. Madhusudan Gordhandas & Co. (supra) and the judgment of this Court in case of Bharat Petroleum Corporation Limited (supra) squarely apply to the facts of this case. I am respectfully bound by the said judgments.

74. In my view, the judgment of this Court in the matter of Advent Corporation Private Limited (supra) is impliedly over-ruled by the Supreme Court in case of National Textile Workers' Union & Ors. (supra) and in case of M/s. Madhusudan Gordhandas & Co. (supra), which are delivered subsequently. I am thus not inclined to accept the submission of the learned senior counsel for the petitioner that the judgment of this Court in case of Bharat Petroleum Corporation Limited (supra) is per-incurium on the ground that the judgment of this Court in the matter of Advent Corporation Private Limited (supra) was not brought to the notice of this Court when the judgment in Bharat Petroleum Corporation Limited (supra) was delivered by this Court in the year 2004.

75. This Court in case of Tata Capital Financial Services Limited (supra) has adverted to the judgment of this Court and has held that broadly all aspects concerning advisability of a winding up order in the face of various circumstances, including a CDR package under implementation between a company and its secured or other lenders, is a matter which very much forms part of the consideration of the Company Court in a winding up petition not only at the stage of final disposal, but also, depending on facts of an individual case, at the time of admission of a winding up petition. It is held that restructuring package in respect of a debt of a respondent company being under active

implementation and reflecting materially on the viability of the company as also the effect of a winding up order, or even an order of admission of a winding up petition, on the implementation of such package and its effects qua the company and all the other stakeholders, are matters that may well be considered by the Company Court in a winding up petition, both at the stage of admission as well as final hearing. The judgment of this Court in case of Tata Capital Financial Services Limited (*supra*) applies to the facts of this Court. I am respectfully bound by the said judgment.

76. I am not inclined to accept the submission of the learned senior counsel for the petitioner that the interest of other creditors would not be affected if the company petition is admitted and if they are allowed to be heard only after the admission of the petition and after advertising of the petition is ordered by this Court. In my view, once the company petition is admitted and if the petition is advertised even if there are any chances of revival of the respondent company, such chances of revival would be remote. The advertisement of the petition in the newspapers and gazette may affect the reputation and business of the respondent company. It will have serious bearing on the financial conditions and goodwill of the respondent company. There will be panic amongst large number of creditors, shareholders and contributories upon noticing the advertisement of the petition of such company. A company which may have temporary set back will not be able to revive if the petition is admitted and the petition is advertised.

77. On the contrary, if the creditors, workers and contributories oppose the company petition or support winding up of the respondent company are allowed to intervene, the Court can take a balance view after considering the wishes of major creditors, workers and contributories before even admitting such petition. I am thus not inclined to accept the submission of the learned senior counsel for the petitioner that no prejudice would be caused to the respondent company or other set of creditors if they are not allowed to intervene at the admission stage of the company petition and they can be allowed to be heard or intervened after the petition is admitted and advertised. In my view, there is serious consequence of admission of the company petition and thus the Court has to apply its mind and consider the wishes of major creditors, workers and contributories if they intervene in the proceedings before passing an order of admission against the respondent company.

78. This Court in case of *Hy-Line International v. C & M Hy-Line Farms Private Limited*, 2004 (3) Mh.L.J. 922 has followed the judgment of this Court in case of *Bharat Petroleum Corporation Limited* (*supra*) and has held that the secured creditors can be heard at the stage of admission of company petition and can be permitted to intervene. The said judgment applies to the facts of this case. I am respectfully bound by the said judgment.

79. Insofar as the facts of this case are concerned, it is not in dispute that the applicant - IDBI Bank Limited is a leader of Consortium of 21 banks and is authorised to represent them before this Court. Such Consortium has also

participated in the JLF meetings and have already taken a decision to oppose the company petition filed by the petitioner. The Consortium and other members of the said JLF have also taken various decisions in the meetings towards restructuring the respondent company. The total debts of the members of the said Consortium recoverable from the respondent company are much larger than the claim of the petitioner. A perusal of the company application filed by the intervenor indicates that the working capital consortium and term loan dues of the term lenders outstanding is Rs.8593.00 crore and Rs.945.00 crore respectively. It is thus clear that insofar as the petitioner is concerned, the alleged liability of the petitioner recoverable from the respondent company is hardly 2% of the total debts of the other lenders and is at 1% of the debts of the total creditors. In my view, the intervenors are thus entitled to oppose this petition and are entitled to be heard at the admission stage of this petition. Any order of admission of this petition will seriously hamper the interest of large number of lenders which are participating in the process of restructuring of the respondent company. I am thus inclined to allow the intervention application filed by the IDBI Bank Limited and permit them to intervene in the present proceedings at the admission stage.

80. I shall now decide as to whether various circulars issued by the Reserve Bank of India which are relied upon by the respondent are statutory in nature and are binding on the banks, including the petitioner and are whether required to be complied with by the petitioner or not before initiating this proceeding.

81. A perusal of the circular (guidelines) dated 26th February, 2014 issued by the Reserve Bank of India on Joint Lenders" Forum (JLF) and Corrective Action Plan (CAP) indicates that the said guidelines are issued by the Reserve Bank of India on formation of a Joint Lenders" Forum and adoption of Corrective Action Plan (CAP) for operationalizing Framework of Revitalising Distressed Assets in the Economy. The said circular provides that the said guidelines would be applicable for lending under consortium and multiple banking arrangements except instructions in paragraphs 2.1, 7.1, 8 and 9, which would be applicable in all cases of lending and should be read with the latest master circular on "Income Recognition, Asset, Classification and Provisioning Pertaining to Advances" and any other instructions issued in that regard from time to time.

82. In paragraph 2.1, the loan accounts are classified in three categories. Clause 2.3 provides that as soon as the account is reported by any of the lenders to Central Repository of Information on Large Credits (CRILC) as SMA-2 category, they should mandatorily form a committee to be called Joint Lenders" Forum (JLF) if the aggregate exposure of lenders in that account is Rs.1000 millions and above. It is thus clear that in the said event, formation of JLF is mandatory. It is not in dispute that the account of the respondent was classified as SMA-2. It is also not in dispute that the claim of the respondent and several other creditors is more than Rs.1000 millions and the amount had not been serviced for more than 60 days.

83. Clause 2.6 of the said circular provides that all the lenders should formulate and sign an agreement which may be called as JLF agreement incorporating the broad rules for the functioning of the said JLF. The Indian Banks Association has to prepare master JLF agreement and operational guidelines for JLF which could be adopted by all the lenders. The said JLF has to explore the possibility of the borrower setting right the irregularities / weaknesses in the account.

84. Clause 2.7 of the said circular provides that while JLF formation and subsequent corrective actions will be mandatory in accounts having aggregate exposure of Rs.1000 million and above, in other cases also the lenders will have to monitor the asset quality closely and take corrective action for effective resolution as deemed appropriate.

85. Clause 3 of the said circular provides for corrective action plan. JLF may explore various options to resolve the stress in account. Various options are given under the said clause as and by way of corrective action plan such as (a) rectification, (b) restructuring and (c) recovery. Under clause (a), a specific commitment from the borrower is contemplated to regularize the account so that the account comes out of SMA status or does not slip into NPA category. Clause (b) of the clause 3.1 provides that such action of restructuring, the lenders in the JLF may sign Inter Creditor Agreement and also required the borrower to sign the Debtor Creditor Agreement which would provide legal basis for any restructuring process, rectification and restructuring. Clause (c) provides that once the first two options i.e. rectification and restructuring are seen as not feasible, due recovery process may be resorted to. The JLF may decide the best recovery process to be followed among various legal and other recovery options available with a view to optimizing efforts and results.

86. Clause 3.2 of the said circular provides that besides agreed upon by a minimum of 75% of the creditors by value and 60% of the creditors by number in the JLF would be considered as the basis for proceedings with restructuring of the account, and will be binding on all the lenders under the terms inter creditor agreement. It further provides that if the JLF decides to proceed with recovery, the minimum criteria for binding decision, if any, under any relevant laws / acts would be applicable. Clause 3.4 of the said circular clearly provides that if JLF decides on options of rectification or restructuring, but the account fails to perform as per the agreed terms under option (a) or (b) i.e. rectification or restructuring, JLF should initiate recovery under option 3.1(c) i.e. recovery.

87. Clause 7 of the said circular provides for punitive action by subjecting defaulter banks as set out therein to accelerated provisioning for those accounts and / or other supervisory actions as deemed appropriate by the Reserve Bank of India. Clause 7.2 of the said circular provides that any of the lenders who have agreed to the restructuring decision under CAP by JLF and is a signatory to ICA and DCA, but changes their stance later on, or delays / refuses to implement the package. will also be subjected to accelerated provisioning requirement as indicated in paragraph 7.1.

88. Clause 5 of the said circular dated 24th September, 2015 clearly provides for exit option available to the lender. Dissenting lender who is not willing to participate in rectification or restructuring of an account has an option to exit their exposure completely by selling their exposure or to new or existing lender within the prescribed time line for implication of the agreed CAP.

89. A perusal of the circular / guideline dated 26th February, 2014 issued under sections 21 and 35 of the Banking Regulation Act, 1949 is mandatory in nature. The Supreme Court in case of Canara Bank (supra) has held that the circulars issued by the Reserve Bank of India under section 21 and 35 of the Banking Regulation Act, are statutory in nature and are required to be complied with by the banks is not in any doubt. It is not in dispute that the petitioner bank is also bound by the statutory circulars issued by the Reserve Bank of India under the said provision. It is an admitted position that even according to the petitioner, the petitioner was bound to form Joint Lenders' Forum along with other lenders in view of the classification of the account of the respondent under SMA-2. It is also not in dispute that the petitioner had attended most of the meetings held by the JLF and had made various suggestions towards the corrective action plan in respect of the respondent.

90. In my view, Mr. Kadam, learned senior counsel for the petitioner is not correct in his submission that unless the petitioner would have signed the Inter Creditor agreement or Debtor Creditor Agreement, such circulars were not binding on the petitioner. In my view, the entire text of the circulars are binding and not any part thereof as canvassed by the learned senior counsel for the petitioner. In my view, since the formation of JLF was mandatory, all corrective action plans were required to be explored by the said JLF such as rectification or restructuring etc. It is not in dispute that percentage of the creditors by value and percentage of creditors by number in JLF as required under clause 3.2 have been participating in the said JLF, including the petitioner. Several suggestions have been given by the members of the said JLF, including the petitioner towards corrective action plan in respect of the respondent.

91. On correct interpretation of clause 3.1(b) read with clauses 3.2 and 3.4 of the said circular dated 26th February, 2014, in my view the stage of signing such Inter Creditor Agreement or Debtor Creditor Agreement, as the case may be would have arisen only after the steps of restructuring were taken by the said JLF. A plain reading of clause 3.1(b) indicates that if possibility of restructuring of account of the borrower was considered, the commitment from the promoters for extending their personal guarantees along with declaration that they would not undertake any transaction, that they would not alienate assets without the permission of the JLF and simultaneously any deviation from the commitment by borrowers affecting the security/recoverability of the loans would be treated as a valid factor for initiating recovery process for any such action to be sustainable, the lenders could sign an Inter Creditor Agreement and also could require the borrower to sign the Debtor Creditor Agreement which would provide the legal

basis for any restructuring process.

92. In my view, the stage of execution of the said Inter Creditor Agreement or Debtor Creditor Agreement as the case may be, has not arisen till date. I am thus not inclined to accept the submission of the learned senior counsel for the petitioner that since the petitioner had not signed the said ICA or debtor Creditor Agreement, decision taken by the JLF would not be binding upon the petitioner.

93. A perusal of the said circular also indicates that the said circular further provides that if any lender including the petitioner does not wish to be a part of such a scheme, it is bound to sell its exposure to another lender. In my view, the learned senior counsel for the respondent is right in his submission that under the said circular, it is not open to the dissenting lender to continue with its existing exposure and simultaneously not agree for rectification or restructuring as part of the corrective action plan.

94. A perusal of the record indicates that under clause 2.3 of the said circular, the account of the respondent was reported under the category as Special Mention Account-2. The said JLF was already formed by the lenders under the said circular. The petitioner had already participated in the said meetings from time to time and issued various suggestions. Clause 7.4 of the said circular also provides for punitive action against such lenders who change their stance and refuses to implement the package or causes delay which itself indicates that the said circular is binding upon the petitioner.

95. A perusal of the circular dated 24th September 2015 issued by the Reserve Bank of India clearly indicates that the said circular was issued in continuity of the circular dated 21st October 2014. In paragraph 5.2 of the said circular dated 24th September 2015, it is clarified that it had been brought to the notice of the Reserve Bank of India that sometimes disagreement arises among lenders on deciding the CAP on rectification or restructuring, resulting in delay in initiating timely corrective action. It is provided in the said circular that it had been decided that dissenting lenders, who do not want to participate in the rectification or restructuring of the account as CAP which may or may not invoke additional financing, will have an option to exit their exposure completely by selling their exposure to a new or existing lenders within the prescribed timeline for implementation of the agreed CAP.

96. It is provided that the exiting lenders will not have the option to continue with their existing exposure and simultaneously not agreeing for rectification or restructuring as CAP. The new lender to whom the exiting lender sells its stake may not be required to commit any additional finance, if the agreed CAP involves additional finance. It is further provided in such cases that if the new lender chooses not to participate in additional finance, the share of the additional finance pertaining to the exiting lender will be met by the existing lenders on a pro-rata basis. The said circular also provides that for various penal provisions.

97. In so far as the reliance placed on clause 6.2 of the said circular by the

learned senior counsel for the petitioner in support of the submission that the said provision also indicates that unless and until the lenders are signatories to the Inter Creditor Agreement and the Debtor Creditor Agreement, the decision taken by the JLF for restructuring or for any other steps against the company is not binding is concerned, in my view, the said provision cannot be read in isolation. The Court has to consider and interpret all the provisions of the circular so as to give true and correct meaning thereof and has to interpret the circulars harmoniously.

98. In so far as the submission of the learned senior counsel for the petitioner that by the Reserve Bank of India's circular, the remedy of the petitioner to file appropriate proceedings for recovery of its dues against the borrower cannot be taken away or the petitioner cannot be forced to reduce its amount of its recovery from such borrower is concerned, it is not disputed by the petitioner that the circular issued by the Reserve Bank of India are statutory in nature and are binding on the banking companies including the petitioner. A perusal of the above referred circular clearly indicates that none of the circulars compel the banking companies to reduce its claim or not to initiate their proceedings against the borrower.

99. A perusal of the circular dated 26th February 2014 and subsequent circulars referred to aforesaid which are in continuity with the said circular indicates that all the banks which are governed by the said circular have to form JLF, all the lenders will have to monitor the asset quality closely and take corrective action for effective resolution as provided in the said circular. The three corrective action plans are specifically provided in the said circular i.e. Rectification, Restructuring and Recovery. In so far as the action of recovery is concerned, the said action can be initiated as may be decided by the JLF which may be best recovery process, however, only if the first two options i.e. Rectification and Restructuring of the borrower are not feasible.

100. It is thus clear that the petitioner which is also a banking company and forming part of the said JLF can also adopt the appropriate legal steps as and by way of recovery process that may be decided by the said JLF only after corrective action plan i.e. Rectification and Restructuring are not found feasible. In my view, the petitioner thus independently cannot adopt any recovery process being part of the said JLF unless the process of rectification and restructuring are found not feasible and the JLF decides thereafter the best recovery process to be followed, among the various legal and other recovery options available, with a view to optimizing the efforts and results. In my view, the process of rectification and restructuring on one hand and the process of recovery by one of the members of the said JLF on the other hand cannot be permitted simultaneously and at the same time. In my view, the petitioner will have to wait till such appropriate decision for adopting the recovery process in terms of clause 3.1 (c) of the said circular dated 26th February 2014 is taken by the said JLF. The petitioner independently cannot adopt any proceedings during the on going process of

rectification and restructuring being proceeded with or being under consideration by the said JLF.

101. If the petitioner is allowed to proceed with the recovery process by adopting this winding up petition at the stage when the process of rectification and restructuring is being decided by the said JLF, the entire process of corrective action plan i.e. by rectification and restructuring would be adversely affected. It is not in dispute that about 98% of the total numbers of creditors have resolved to oppose this winding up petition. The petitioner having about 2% debts of the total debts of the other lenders and at 1% of the debts of the total creditors thus cannot be allowed to proceed with winding up petition against the respondent.

102. Supreme Court in the case of *Sudhir Shantilal Mehta v. Central Bureau of Investigation*, (2009) 8 SCC 1 has held that having regard to the fact that the Reserve Bank of India exercises control over the banking companies, the said circular issued by the Reserve Bank of India was binding on the banking companies. A similar view has been also taken by the Supreme Court in the case of *Sardar Associates and Ors. v. Punjab and Sind Bank and Ors.*, (2009) 8 SCC 257. The Supreme Court has adverted to its judgment in the case of *Central Bank of India v. Ravindra*, (2002) 1 SCC 367 in which it was held by the Supreme Court that the power conferred by Sections 21 and 35-A of the Banking Regulation Act, 1949 is coupled with duty to act. The Reserve Bank of India is the prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of the public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally.

103. It is held that the Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is held that the Reserve Bank of India has been issuing directions/circulars from time to time which, inter alia, deal with the rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It is held that its circulars shall bind those who fall within the net of such directives. It is held by the Supreme Court in the said judgment that a bare perusal of Section 21(3) of the Banking Regulation Act, 1949 clearly mandates that every banking company shall be bound to comply with the directions given to it in terms thereof. Section 35-A of the 1949 Act empowers the Reserve Bank of India to issue directions inter-alia in the interest of banking policy. It is thus clear that the circulars/directives issued by the Reserve Bank of India from time to time for implementation of those directives by various banking companies are statutory in nature and are binding on all the banking companies including the petitioner.

104. In so far as the judgment of this Court in the case of *BNY Corporate Trustee Services Ltd. v. Wockhardt Ltd.* (supra) relied on by Mr. Kadam, learned senior counsel for the petitioner is concerned, this Court while considering the CDR scheme has held that there is no absolute right in a creditor and he cannot insist

on a winding up order being passed but the Court cannot refuse to entertain a petition merely because CDR scheme for settlement of its debts is proposed by the company. It is held by this Court in the said judgment that when a scheme is proposed and the creditors will have to wait for settlement of their dues, by itself, cannot be a ground to refuse the admission of winding up petition. Something more will have to be set out and proved in that behalf. In my view, the said judgment would not assist the case of the petitioner. The CDR scheme was not binding on the creditors whereas, the circulars/directives issued by the Reserve Bank of India under the provisions of the Banking Regulation Act, 1949 read with the Reserve Bank of India Act, 1934 are statutory in nature and are binding.

105. In this case, it is not in dispute that the JLF has already been formed pursuant to the circular dated 26th February 2014 issued by the Reserve Bank of India. The petitioner itself has participated in various meetings held by the said JLF and the said JLF who has taken various decisions from time to time. The auditor report of the respondent is being submitted as decided in the meetings held by the said JLF. The judgment of this Court in the case of BNY Corporate Trustee Services Ltd. v. Wockhardt Ltd. (supra) is thus clearly distinguishable in the facts of this case.

106. This Court in the case of Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. & Ors. (supra) has distinguished the judgment of this Court in the case of BNY Corporate Trustee Services Ltd. v. Wockhardt Ltd. (supra) in view of the further steps taken by the creditors to revive the borrower-company. This Court has dismissed the company petition for winding up against the borrower-company. In my view, the judgment of this Court in the case of Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. & Ors. (supra) would assist the case of the respondent. I am respectfully bound by the said judgment.

107. I shall now decide as to whether the petitioner has made out a case for winding up of the respondent-company. Supreme Court in the case of M/s. Madhusudan Gordhandas & Co. (supra) has held that if there is opposition to the making of the winding up order by the creditors, the Court will consider their wishes and may decline to make the winding up order. Under Section 557 of the Companies Act, 1956 in all matters relating to the winding up of the company, the Court may ascertain the wishes of the creditors. It is held that the wishes of the shareholders are also considered though the Court may attach greater weight to the views of the creditors. It is further clarified that the wishes of the creditors will however be tested by the Court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is held that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The judgment of the Supreme Court in the case of M/s. Madhusudan Gordhandas & Co. (supra) has been consistently followed by this Court and several other High Courts. This

Court in the case of Bharat Petroleum Corporation Limited (supra) has adverted to the said judgment of the Supreme Court in the case of M/s. Madhusudan Gordhandas & Co. (supra).

108. This Court in the case of Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. & Ors. (supra) has held that it was true that there was no defence to the debts of the petitioner and there was a clear case of deemed inability to pay it on the part of the company, but that does not mean that the Company Court is obligated to admit a winding up petition. It is held that advisability of a winding up order is not a matter to be considered by the Company Court. It is held that if there is opposition to the making of the winding up order by the creditors, the Court will consider their wishes and may decline to make the winding up order.

109. Gujarat High Court in the case of Tata Iron and Steel Co. (supra) has laid down various guidelines which are to be kept in mind before reaching a decision for winding up petition or for passing an order of winding up. It is held that merely because any one of the circumstances enumerated in section 433 of the Companies Act exists, the court is not bound to order winding up of the company. Nobody can aspire to wind up the company as a matter of course. The court has wide power and discretion. It is held that inability to pay debts is required to be judged from various sets of facts and circumstances. It is held that inability to pay debts in all cases, ipso facto, could not be construed as an appropriate case for winding up.

110. It is held that even if the debt is proved and even if the inability to pay the debt is also shown, it is not a launching pad, in all cases, for a successful winding up order. Inability may arise for a variety of reasons and the court is obliged to consider whether the inability is the outcome of any deliberate or designed action or mere temporary shock and effect of economy and market. It is held that in a given case, it may happen that a party may become unable to pay its debts for a while, but that by itself is not a criterion for exercise of the power to wind up, ipso facto.

111. It is held by the Gujarat High Court in the said judgment that even dividend declared by the company regularly and having profit in the light of the profit and loss account, though temporarily, there may be inability to pay the debt or in the case of any eventuality, the company is unable to make the payment of dues, that by itself could not be construed as a ground to wind it up. It is held that winding up of a company, as such, is nothing but a commercial death or insolvency and, therefore, the company court is obliged to take into consideration not only the temporary inability, or disability to make the payment of debts, but the entire status and position of the company in the market. It is held that a winding up order shall not be made on a creditor's petition, if it would not benefit him or the company's creditors in general. It is held that it is also necessary to consider whether the respondent-company has become defunct or has closed its business, for quite some time, whether it is commercially

insolvent. For the purpose of finding commercial insolvency, a mere look into the financial data is relevant to examine about its soundness. It is held that a winding up petition is not a legitimate means of seeking to enforce the payment of a debt which is disputed by the company, bona fide and ought not to be aimed at pressurising the company to pay the money.

112. It is the case of the respondent that the respondent alone processes 15% of the processing capacity of India's edible oil requirements. It is the case of the respondent that the respondent provides nutritious and value oriented foods to over 15 crore Indian consumers through a network built over last 30 years and the respondent has 21 manufacturing units across India. The respondent is responsible for the lives of around 7-8 million farmers. The respondent has exclusive access to 55000 hectares of land planted with palm plantations under the Oil Palm Plantation Programme sponsored by Government of India in several States. The respondent is a public listed company having more than 25000 shareholders.

113. It is the case of the respondent that the respondent was ranked No.1 firm as per total income in financial year 2015 in the food produce sector by Dun and Bradstreet. The respondent has been featured in the list of World's top 250 Consumer Produce Companies prepared by Deloitte. The respondent has also remitted an aggregate amount of Rs.14,89,00,000/- towards its direct tax liability for the Financial Year 2014-2015 and has paid an aggregate amount of Rs.7,32,59,95,204/- as and by way of indirect tax liability for the Financial Year 2015-2016. It is the case of the respondent that the gross value of the fixed assets of the respondent is Rs.4,019.97 crore as on 31st March 2016. It is the case of the respondent that it employs 8325 persons and has paid all its employees their wages. The total wages paid in the Financial Year 2015-2016 aggregates to Rs.2,11,37,00,000/-. The respondent also claims to have paid dividend till last year. The petitioner has not seriously disputed the aforesaid details asserted by the respondent.

114. In these circumstances, when 98% of the creditors in value of the total debts of the respondent have agreed to oppose this petition for winding up and have been participating in the JLF's meetings to take steps for rectification and restructuring of the respondent and some decisions taken by the said JLF are under implementation, in my view, the petition at the instance of the petitioner who claims about 1% of the total debts of the respondent cannot be entertained. In my view, an order of winding up in favour of the petitioner would not benefit the petitioner or the creditors of the respondent generally. Even if there are any chances of revival of the respondent-company which are attempted by the creditors of more than 98% in value, any adverse order passed in this petition at this stage would hamper the chances of revival of the respondent. This Court has to consider the wishes of large number of the creditors who are seriously opposing the winding up of the respondent as against the desire of the petitioner who is claiming about 1% of the total debts of the respondent and seeks to

pursue this winding up petition. If 98% of the creditors in value have decided to oppose a winding up petition and have agreed to take steps to revive the respondent-company by taking corrective action plan, the petitioner who is one of the miniscule creditor of the respondent cannot be allowed to coerce the respondent for its winding up. I am in agreement with the views expressed by the Gujarat High Court in the case of Tata Iron and Steel Co. (supra).

115. Powers of the Company Court under Section 539 of the Companies Act, 1956 are discretionary and have to be exercised cautiously and judiciously. In the facts of this case, I am satisfied that the respondent-company which has a temporary set back and is making a sincere attempt of its revival with the assistance of large number of the creditors, it would not be desirable and in the interest of all the creditors including the petitioner to pass any order of winding up against the respondent-company at this stage.

116. I therefore pass the following order :-

i). Company Application No.470 of 2016 filed by the Intervenor is allowed in terms of prayer clause (a).

ii). Company Petition No.570 of 2016 is dismissed. In view of the dismissal of Company Petition No.570 of 2016, Company Application No.455 of 2016 does not survive and is accordingly disposed off.

iii). It is, however, made clear that the observations made by this Court in this order are made for the purpose of deciding this company petition for winding up. If the petitioner proposes to file any proceedings for recovery of its legitimate dues, in accordance with the decision, if any, of the Joint Lender Forum, the said proceedings to be decided on its own merits without being influenced by the observations made by this Court in this order.

iv). There shall be no order as to costs.

117. On the oral application of the learned counsel for the petitioner, ad-interim protection granted by this Court on 6th October, 2016 in Company Petition No.570 of 2016 to continue for a period of four weeks from today. If any appeal is filed against this order, the papers and proceedings of the appeal along with notice shall be served upon the respondent and also upon the intervenor.