

(2014) 07 DEL CK 0201

In the Delhi High Court

Case No : I.A. Nos. 1438, 2867, 5754, 6157 and 11895/2014 in
CS(OS)217/2014

Yes Bank Limited

APPELLANT

Vs

A2Z Maintenance and Engineering Services Ltd.

RESPONDENT

Date of Decision : 30-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151
Companies Act, 1956 — Section 113(1), 391, 433(e), 434(1)(a)

Citation : (2014) 07 DEL CK 0201

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Sandeep Sethi, Sr. Advocate and Shiv Sapra, Advocate for the Appellant; A.S. Chandhiok, Sr. Adv., Atul Kumar, Arun Gaur, Mallika Ahluwalia, Ritesh Kumar, Mayank Bamniyal, Robin David, Chitranshal Sinha, Abhinav Thareja and S.N. Relan, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Singh, J.—The plaintiff is a company incorporated under the Companies Act, 1956 and a Bank company under the Banking Regulation Act, 1949 who has filed the present suit for declaration, permanent and mandatory injunction against four defendants seeking various reliefs mentioned in the prayer clause. The defendant No. 1 i.e. the A2Z Maintenance and Engineering Services Ltd. a public limited company incorporated under the Companies Act, 1956 and is engaged in inter alia the power transmission and distribution sector.

2. The defendant No. 2, Mr. Amit Mittal, is a promoter of defendant No. 1 and holds 35% of shareholding by way of 2,59,62,743 equity shares of Rs. 10/- in the defendant No. 1 company.

3. The defendant No. 3, ICICI Bank is a company incorporated under the Companies Act, 1956 and a bank company under the Banking Regulation Act,

1949 and is the pro-forma defendant.

4. The defendant No. 4, 3i Infotech Trusteeship Services Limited is also a pro-forma defendant.

5. The brief facts are that the Working Capital Consortium agreement which is called EPC Consortium Agreement had 16 lender banks including the plaintiff and defendant No. 1 as parties to the said agreement. Joint deed of hypothecation was also executed. Both are dated 17th March, 2011. The contribution of the plaintiff was Rs. 40 crore. The total facility sanctioned to the defendant No. 1 was Rs. 2014 crore. These 16 banks have a charge over all assets of defendant No. 1.

6. Apart from the said consortium as the defendant No. 1 was desirous of setting up 3 (three) biogases-cum-bio mass based power co-generation plants, namely, a. The Fazilka Project, b. The Morinda Project, c. The Nakodar Project in the State of Punjab, India (hereinafter referred to as the "Said Project"), a Rupees Term Loan agreement was executed amongst defendant No. 1, the plaintiff, the defendant No. 3, defendant No. 4 and the persons set forth in schedule & shy; I (as the rupee lenders) in order to fund part of the said project seeking financial assistance to the tune of approximately Rs. 178,00,00,000/- (Rupees One Hundred Seventy Eight Crores Only). The defendant No. 1 was admittedly the "Borrower". The defendant No. 4 in its capacity was as the security trustee (hereinafter referred to as the "Security Trustee").

7. By virtue of the said agreement, it was agreed to and, inter alia, as under:

(a). That the Term Lenders shall provide defendant No. 1 with a rupee term loan of an amount not exceeding Rs. 178,00,00,000/- (Rupees One Hundred Seventy Eight Crores Only hereinafter referred to as the "Total Loan") (Clause 2.1.1 of the said agreement). Out of the Total Loan, the plaintiff provided a term loan of Rs. 90,00,00,000/- (Rupees Ninety Crores Only- hereinafter referred to as the " Said Loan") (Schedule 3 of the Said Agreement).

(b). That the defendant No. 1 shall apply the said loan towards funding of the said project. (Clauses 2.4 and 13.2.2 of the said agreement).

(c). That the defendant No. 1 shall execute, inter alia, a Deed of Hypothecation in favour of the Security Trustee and for the benefit of the Term Lenders creating a first charge over inter alia the Said Assets of the said project. (Clause 15.1 of the said agreement).

(d). That the plaintiff, would be entitled to recall the said loan and enforce the security created in favour of or for the benefit of the plaintiff in the event of, inter alia, a default on the part of the defendant No. 1. (Clause 16.2 of the said agreement).

8. In terms of the Said agreement, the defendant No. 1 executed a Deed of Hypothecation dated 27th May 2011 (hereinafter referred to as the "Deed of Hypothecation") with the Security Trustee defendant No. 4 which was for the

benefit of, inter alia, the plaintiff. By way of the Deed of Hypothecation, defendant No. 1 created a First Charge over inter alia the said assets in favour of the Security Trustee. The details of the said assets are mentioned in the plaint.

9. In addition in terms of the said agreement and the Deed of Hypothecation, the defendant No. 1 agreed and undertook that it shall not create any further charge, lien or encumbrance affecting the said assets or any part thereof without, inter alia, the plaintiffs prior written consent nor shall the defendant No. 1 do anything qua the said assets which would prejudice the charge created in favour of Security Trustee acting for the benefit of, inter alia, the plaintiff. (Clause 14.9 of the said agreement read with Clause 17 of the Deed of Hypothecation). In terms of the said agreement and the Deed of Hypothecation, it has been stipulated that in the event of any default, the plaintiff shall be entitled to recall the said loan as funded by the plaintiff and take charge and/or possession of seize, recover, receive and remove the said assets and/or sell the said assets. (Clause 6.1 (ii) of the Deed of Hypothecation). The said agreement provides that the courts and tribunals at Delhi shall have jurisdiction to try any matters arising out of or in connection therewith. (Clause 20.14 of the said agreement).

10. It is not denied by any of the parties that a new consortium dated 27th May, 2011 was entered in between the plaintiff and ICICI Bank, the defendant No. 3, in which Rs. 178 crore was lent for these power projects and a first charge was created over the same (said power projects in Punjab), which are not the subject matter of charge under the EPC consortium agreement dated 17th March, 2011. Under this new consortium, Rs. 90 crores were lent by the plaintiff and Rs. 88 crores were lent by ICICI Bank.

11. The plaintiff submits that apart from the financial assistance provided by the Term Lenders, there are other banks/bodies/institutions (known as the "Working Capital Consortium") from which the defendant No. 1 has also availed financial assistance/working capital facilities for the day to day operations of the defendant No. 1 but not for the said project. In this regard, the defendant No. 1 has executed a Working Capital Consortium Agreement dated 17th March, 2011 with the Working Capital Consortium (hereinafter referred to as the "Working Capital Consortium Agreement/WCCA"). In terms of the Working Capital Consortium Agreement, it was provided that the defendant No. 1 is required to create a first charge on inter alia the fixed and current assets of the company other than the fixed assets exclusively financed by other lenders. (Article II of the Working Capital Consortium Agreement).

12. The defendant No. 1 also executed a joint deed of hypothecation dated 17th March, 2011 (hereinafter referred to as the "Working Capital Deed of Hypothecation/WCDOH") with the Working Capital Consortium whereby a first charge was created by the defendant No. 1 in favour of the Working Capital Consortium qua fixed and current assets of the company, except fixed assets exclusively financed by other lenders. (Clause 2 read with Schedule II of the WCDOH).

13. The plaintiff has referred the requisite deeds filed by the plaintiff available at page 60-212 of the Part III/document file. A mere reading of Schedule II to the WCDOH reveals that the intention of the parties, at the time of entering into/ executing the WCDOH was to exclude fixed movable assets exclusively financed by other lenders, both present and future, from the scope of the WCDOH. These include the said assets and it is on this basis that the said agreement and the deed of hypothecation came to be executed and that the plaintiff was granted the first charge qua the said assets along with the defendant No. 3/Pro-Forma defendant. It is an admitted position that the WCDOH did not create a charge of any ranking qua the said assets. Therefore, it is alleged by the plaintiff that the intention of the defendant No. 1 as well as the Working Capital Consortium was to exclude the said assets of the project from the purview of the Working Capital Consortium Agreement and the Working Capital Deed of Hypothecation since the said assets were exclusively financed by the Term Lenders for the Project. A first charge qua the said assets was created by the defendant No. 1 in favour of the Term Lenders (which includes the plaintiff).

14. An Escrow Account Agreement dated 27th May, 2011 (hereinafter referred to as the "Escrow Agreement") also executed, inter alia, by and between the defendant No. 1 and the plaintiff whereby it was agreed as under:

a. the defendant No.1. shall deposit all the receivables, insurance proceeds, etc. to be received by the defendant No. 1 company from the said project into the escrow account maintained with the plaintiff,

b. the said receivables were to be deposited with the plaintiff for repayment of the monies sanctioned by the plaintiff under the said agreement together with interests, costs, charges and expenses thereto and all other costs, charges, etc, arising out of the financing documents under the said agreement,

c. no person other than the plaintiff and the defendant No. 3/Pro Forma defendant shall have a right to the amounts deposited in the escrow account.

15. The grievance of the plaintiff in the present case is that it has recently come to the knowledge of the plaintiff that the proposed CDR Package has been approved in the Corporate Debt Restructuring Executive Committee meeting dated 24th December, 2013 (of the CDR member banks) with a cut-off date of 1st January, 2014. Thereafter, the defendant No. 1 vide letter dated 2nd January, 2014 provided the plaintiff with a copy of the final CDR Package. The said approval CDR Package stipulates, inter alia, the restructuring of the term loans qua the said project.

The CDR Package further stipulates that a second charge on the power plant assets (being part of the said assets) be created in favour of the Working Capital Consortium and a first charge on the power plant assets be created in favour of all lenders providing incremental funding for the said project. The CDR Package further stipulates that one of the terms approved in the CDR Scheme provides that the defendant No. 2 shall pledge its entire shareholding in favour of the

other lenders. The plaintiff therefore apprehends that the defendant No. 2 may pledge the said shares, which would be in breach of the said Non Disposal Undertaking and shall cause wrongful loss and irreparable harm to the rights/interests of the plaintiff and it apprehends that a draft of the Master Restructuring Agreement (hereinafter referred to as the "Alleged MRA") has been circulated and that the Alleged MRA was likely to be executed by 25th January, 2014.

Further, the CDR Package also stipulates that all cash flows of the defendant No. 1 including that of the Project and EPC business shall be routed through a single trust and retention account (hereinafter referred to as the "TRA Account"). It is alleged by the plaintiff that this action of pooling in all cash flows by virtue of the CDR Package is in direct breach of the escrow agreement executed by the defendant No. 1 with, inter alia, the plaintiff. It is submitted that the cash flows of the project, which are charged/secured for the facilities given by the plaintiff, cannot be pooled in a single TRA Account without the consent of the plaintiff, being a Term Lender to the said project. In view of such situation as observed by the plaintiff, the present suit has been filed.

16. The suit as well as interim application was listed before Court on 24th January, 2014. The summons/notice were issued to the defendants for 13th February, 2014. In the interim application being IA No. 1438/2014 (Order 39 Rule 1 and 2) the following, inter alia, interim orders were passed. Para 5 and 6 of the said order are re-produced hereunder :

5. I am satisfied that so far as defendant No. 2 is concerned, the plaintiff has been able to make out a prima facie case that the said defendant cannot create any charge, hypothecation or pledge 35 per cent shares for which he has stood guarantee for repayment of the loan advanced by the plaintiff bank. The plaintiff has got prima facie good case. Balance of convenience is in their favour and they will suffer irreparable loss in case defendant No. 2 is not prevented from creating such a charge or his shares. Accordingly, defendant No. 2 is restrained from creating any charge, pledge or hypothecation of his shares which is stated to be 35 per cent in the defendant No. 1 company.

6. So far as other ad interim prayers of the plaintiff are concerned, the learned senior counsel, during the course of arguments, has pointed out that the CDR agreement which was to be signed by defendant No. 1 with the other banks from whom the restructuring of the finance was being got done was to be signed originally on 25.1.2014, however, it has now been postponed to be signed on 31.1.2014. The cause of action is stated to have arisen in favour of the plaintiff way back on 23.12.2013 and thereafter voluminous correspondence between the plaintiff and the defendant have been exchanged which clearly show that the second charge has already been created by the defendant and that is why they are seeking declaration. Since the agreement for restructuring is yet to be signed by the defendant, therefore, the agreement, if not already signed shall not be signed till next date of hearing.

17. Upon service, the defendant No. 1 and 2 have filed an application under Order 39 Rule 4 CPC being IA No. 2867/2014 for vacation of ex-parte order. The said application alongwith IA No. 1438/2014 (O 39 R 1 & 2) were considered by the Court on 20th March, 2014 when the orders were passed by modifying the order dated 24th January, 2014 permitting the defendants and other financial institutions to sign the CDR agreement between the parties other than the plaintiff as the defendant No. 1 and 3 conceded that so far as signing of the agreement is concerned that may be permitted in view of the fact that time is the essence and 31st March, 2014 is the last date and the various financial institutions are involved in signing of the said agreement. It has also been stated that this agreement will not be given effect to without the permission of the court.

The said order was passed without prejudice to the interest of the plaintiff and it shall not be given any effect to without the permission of the court. Further, it shall be subject to the decision in the suit itself. This arrangement is permitted without expressing any opinion on the merits of the case of either side.

18. After passing the order dated 20th March, 2014 IA No. 5754/2014 was filed by defendant No. 3 praying that a clarification be issued by the Court that the CRD agreement shall be effective until reversed by the Court. Another application being IA No. 6157/2014 has been filed by State Bank of Patiala under Order 1 Rule 10 CPC for impleadment who claimed being leader of the working capital consortium. In the meanwhile, the defendant No. 1 filed the application, being I.A. No. 11895/2014, on 2nd July, 2014 for modification of order dated 20th March, 2014. The following prayer is sought in the abovementioned application :

(a) Modify/clarify order dated 20.3.2014 and necessary permission be granted to the applicant as well as all CDR/lenders be allowed to implement and act upon the CDR agreements so executed between the parties after the passing of order dated 20.03.2014 in the interest of justice.

19. The application filed by the defendant No. 1 is listed before this Court for hearing when the other pending applications are also listed. Parties have made their submissions in the said application. They have also filed short written submissions.

20. It is stated in the application filed by the defendant Nos.1 and 2 that after passing of order dated 20th March, 2014, the defendant No. 1 along with the other CDR lenders had executed CDR agreements including the Master Restructuring Agreement (MRA) on 27th March, 2014. As per the CDR Scheme, the defendant No. 1 is required to infuse the promoter quota of contribution of Rs. 34 Crores (Approx.) within 120 days of CDR execution. Subsequent to execution of the CDR agreements, defendant No. 2 the promoter (Mr. Amit Mittal) in the Minutes of CDR lenders Meeting and Joint lenders Meeting held on 8th May, 2014 had conveyed that he is finding it extremely difficult to raise capital/loan for promoter contribution from the external sources due to court case filed by Yes Bank and further requested for granting some additional time

for the same. The meeting dated 8th May, 2014 was duly attended by all concern including the plaintiff. Since CDR cell had only granted the time till 15th June, 2014 for infusing entire promoters quota hence under compelling circumstances the promoter made the arrangements by taking third party expensive loans for depositing the entire promoter quota by 14th June, 2014 in the Pre-TRA Account held with State Bank of Patiala and duly complied with the requirement of CDR with its intention to put everything on stake for the revival of the company.

21. Simultaneously the consortium CDR lenders were also supposed to open the B.Gs and L.Cs of the defendant No. 1 and to act upon other requisite things as per the CDR agreements, which are "sine qua non" for the survival of the company and for fulfilling the very object for which the whole lengthy and cumbersome process of CDR was initiated in order to revive the company and to secure the public money of the lender CDR member banks and to achieve the very object of initiating the CDR. But now the CDR members are not complying with the terms of CDR agreement on account of embargo created by the Court in the order dated 20th March, 2014, whereby the court has specifically directed to take prior permission before further acting on the CDR agreement and in this situation even after getting through the CDR the benefits of the same cannot be given effect to the ailing company which is at the verge of collapsing on account of the above legal impediment, as a result the very purpose of modifying the earlier order dated 24th January, 2014 and further execution of CDR agreements have not brought out any relief to the already ailing applicant company and the very purpose of CDR has been defeated on account of above restriction.

22. It is alleged in the application that as per the CDR process, the CDR lenders are also required to provide other financial relief as per the MRA and CDR scheme and to complete other formalities as per the terms of the above agreements for successful implementation of the CDR scheme and to provide necessary succor to the company for bailing out from the present financial crisis, in the absence of any clarity by the Court in the ongoing litigation and the impasse so created by the mandate of the last order.

23. It is also stated in the application that the defendant No. 1 has recently obtained a prestigious work order of worth appx. Rs. 2500 crores under the tender floated by BSNL for construction of Exclusive Optical NLD Backbone and optical Access Route for defense network all over India on back to back basis from ITI Ltd. (PSU Govt. of India organization). This project itself will be a lifeline and important and sole milestone for the revival of the defendant No. 1's company. If the above B.Gs and LCs are not released in the given time frame then all chances of revival of company as well as the sensitive and work of national importance related to Ministry of Defense will suffer adversely.

24. It is argued by Mr. A.S. Chandhiok, learned Senior counsel appearing on behalf of defendants No. 1 and 2 that mainly the plaintiff is relying upon an undertaking. A perusal of this undertaking as well as the averment in the plaint would show that this is the only undertaking defendant No. 2 has given in favour

of defendant No. 4 as trustee of the plaintiff and defendant No. 3 wherein it is mentioned that defendant No. 2 shall not dilute the percentage (35%) of its shareholding in defendant No. 1 Company and his clients have made the statement before this Court that till further orders of this Court, the defendant No. 2 shall not dilute the percentage (35%) of his shareholding in defendant No. 1.

25. It is argued that the restructuring, viz., CDR, is not voluntary as contended by the Plaintiff. The framework and guidelines as laid down by the Reserve Bank of India are binding on the plaintiff. Defendants have placed on record the earlier guidelines dated 30th January, 2014 and the new guidelines dated 26th February, 2014 which would show that the restructuring can be done provided 75% of the banks agree and if that agreement takes place, then it is binding on the remaining 25% as well. The Clause reads as under :

2.3.2 The decisions agreed upon by a minimum of 75% of creditors of value and 60% of creditors by number in the JLF would be considered as the basis of for proceeding with restructuring and will be binding on all lenders under the terms of ICA.

It is also argued by Mr. Chandhiok, learned Senior Counsel that 16 banks have agreed to restructuring and signed the MRA, which also includes the ICICI Bank, the defendant No. 3 considering the position that ICICI Bank's interest have been duly protected & secures in the CDR agreement which has been made on an equitable basis for all the lenders and is not prejudicial to the rights of any of the lenders involved. ICICI bank is an equal partner on pari passu basis with the plaintiff in the second term loan consortium. Mr. Chandhiok submits that in any event the interests of the plaintiff have been protected by providing a repayment schedule for the loan extended under agreement dated 27th May, 2011.

Learned Senior Counsel has referred the application filed by the defendant No. 3 and rather in the interest of the plaintiff to agree for the same. ICICI Bank, by its I.A. No. 5754/2014 also requested this Court to clarify that the consortium agreement may be made operative. By the consortium agreement, no terms of the charge of the plaintiff is being changed. The first charge on the power projects assets at Fazilka, Morinda and Nakodar in Punjab is not being violated nor is defendant No. 2 diluting its percentage of shareholding in defendant No. 1.

It is submitted on behalf of defendant No. 1 and 2 that the said consortium agreement also takes into account the repayment of amount payable to the plaintiff under the second consortium agreement of 27th May, 2011. Therefore, an additional funding of Rs. 43 Crores is required for completion of the projects on which the plaintiff claims first charge. Any additional funding by the lenders adds value to the security available with Yes Bank Ltd. Value of security as against loan of Rs. 90 Crores is still much higher than envisaged at the time of sanction of the loan. Hence, overall there is no dilution in the security of Yes Bank. The present value of the power projects is more than Rs. 429 crore now

and once they become operative or additional funding comes in, their value will definitely increase. The debt of the plaintiff is adequately secured and since the repayment of its loans are already included in the CDR, interest of the plaintiff is fully safeguarded.

In its application being I.A. No. 11895/2014, the defendant No. 1 has prayed for that CDR/MRA be allowed to be implemented and made operative for Defendant No. 1 as a new project has been awarded to it by BSNL, amounting to approx. Rs. 2500 crores for which it needs inter-alia bank guarantee and letters of credit facilities. Admittedly, the total facility which Defendant No. 1 can avail under the original EPC agreement, as stated above, is Rs. 2014 crores. Defendant No. 1 has availed limits to the extent of about Rs. 1700 crore leaving a balance of over Rs. 300 crore which can be utilized by the Company from other banks if the CDR is allowed to be implemented and made operative. Further, of Rs. 1700 Crores, Yes Bank's exposure is only 5-6% while other lenders are having exposure of 94% - 95%.

It is also submitted that in the EPC Consortium agreement, the plaintiff is a party and had agreed to allow the defendant to avail credit facility to the extent of Rs. 2014 crore and therefore, today cannot object to grant of this facility. The CDR only restructures the debt and inter-alia provides additional funding Rs. 43 crores for completion of the Power Projects. Once these projects are completed, they will generate funds, over which the plaintiff along with ICICI Bank and the CDR Member banks will get benefit.

26. It is argued that as per the latest guidelines issued by RBI vide notification/guidelines dated 1st January, 2014 the RBI has already issued framework dated 30th January, 2014 on recognition of financial distress, prompt steps for resolution and fair recovery for lenders. The preamble of the framework clearly articulates that "not only do financially distressed assets produce less than economically possible; they also deteriorate quickly in value. Therefore, there is a need to ensure that the banking system recognizes financial distress early, takes prompt steps to resolve it". In view of the above guidelines issued by the RBI, CDR is also applicable on non CDR members otherwise the whole process and scheme of rehabilitation of companies will be thwart because of non cooperating attitude of the minor stake holder in the whole process. The decision of majority lenders will be bound on minority stake holders in corporate democracy is an underline rule to be followed in letter and spirit.

27. On the issue of balance of convenience and injury, it is submitted that if the payment is not released immediately, in that event the defendant No. 1 and the employees will suffer irreparable loss and injury and moreover, defendant No. 1 will also become liable for non compliance of statutory compliance, rules and regulations. If defendant No. 1 survives then everything will sail through including the interest of the plaintiff and other minor stakeholder lenders and other lenders, hence any impediment by way of judicial order or otherwise for the rehabilitation of defendant No. 1 will mark the very purpose and intent for

which the CDR process was undertaken by the RBI for financial sick companies. The other banks who are parties to the MRA willing to give BG/LC as per the CDR agreement are in fact feeling restrained in view of the order dated 20th March, 2014 stating that the order dated 20th March, 2014 is preventing from issuance of the same by them. Therefore, it is necessary that if the order dated 20th March, 2014 is further modified and necessary permission to all concern CDR members is granted for further act upon the CDR agreement.

28. Mr. Sandeep Sethi, learned Senior counsel appearing on behalf of the plaintiff has made various submissions. The relevant submissions are outlined as under:-

(a) The conduct of the defendant No. 1 is not bonafide rather it is malafide. Its main motive is to bypass the provisions of the said agreement, the Deed of Hypothecation and proceeding in a whimsical and unilateral fashion with no regard to the rights and interests of the plaintiff. The plaintiff has tried to resolve the issues amicably with the defendant No. 1. However knowingly the plaintiff held a first charge qua the said assets the defendant No. 1 has deliberately sought to file for the alleged charge qua the said assets in favour of third parties. By virtue of the said agreement read with the Deed of Hypothecation, the defendant No. 1 was prohibited from creating any charge, interest, encumbrance, etc qua the said assets in favour of any other persons/entity without the prior written consent of inter alia, the plaintiff.

(b) In case the second charge is created qua the said assets, the defendant No. 1 not only violated the terms and conditions of the said agreement read with the Deed of Hypothecation but also committed, inter alia, a breach of trust for which the plaintiff reserves its right to take appropriate action available to the plaintiff under law.

(c) He says that it is clearly mentioned in the plaint that the modus operandi adopted by the defendant No. 1 seems to indicate that the defendant No. 1 has sought to complete the corporate debt restructuring by resorting to measures which run contrary to the terms and conditions of the said agreement read with the Deed of Hypothecation. This is evident from the terms of the Working Capital Consortium Agreement read with the Deed of Hypothecation executed thereunder by the defendant No. 1 with the working capital lenders, no charge was created in favour of the working capital lenders qua fixed movable assets exclusively financed by other lenders (namely the said assets financed by the plaintiff herein).

(d) It is submitted by Mr.Sethi, learned Senior counsel appearing on behalf of plaintiff, that in fact the defendant No. 1 was going through financial liquidity crunch and was desirous of restructuring or re-schedulement and/or reduction in then interest rates of the debts/borrowings availed by the defendant No. 1 under the aegis of a capital debt restructuring mechanism, which is a voluntary non-statutory system based on Debtor-Creditor Agreement (DCA) and Inter-Creditor Agreement (ICA) signed between the contracting parties. The plaintiff is not a

member to the CDR mechanism and has not acceded to any of the requests of the defendant No. 1. The defendant No. 1 was desirous of raising additional financial facilities inter alia for the said project by way of a Corporate Debt Restructuring Package (hereinafter referred to as the "CDR Package").

In this regard, several discussions took place between, inter alia the plaintiff and the defendant No. 1. On one such meeting dated 20th November, 2013, it was categorically stated by the plaintiff that the term lenders may consider providing a second charge qua the said assets for such incremental funding to be provided by the CDR Lenders. However, this would be subject to, inter alia, an up front, unconditional and satisfactory no approval of the second charge holders that would be required by the Term Lenders at any point.

(e) He submits that the defendant No. 1 simultaneously worked towards the proposed CDR Package and the plaintiff, on becoming aware of the same, made several representations to the defendant No. 1 as well as the Capital Debt Restructuring Cell regarding the proposed CDR Package.

(f) It is submitted that the plaintiff on or about 17th December, 2013 received information that the defendant No. 1 had filed for an additional charge qua the said assets of the said project in favour of certain other lenders, without the prior written consent of the plaintiff, which was required to be taken in terms of the financing/security documents of the said project. The alleged charge was created by virtue of submission of Form 8 accompanied by an intimation dated 22nd November, 2012 issued by the plaintiff, which has been assumed by the defendant No. 1 to be an 'NOC' of the plaintiff. However, this said intimation dated 22nd November, 2012 by the plaintiff was only in respect of the current assets of the said project and not in respect of the said assets, over which a second charge was sought to be created by the defendant No. 1. This fact is clear from a perusal of the intimation of the plaintiff dated 22nd November, 2012. The current assets of the said project would mean and include, inter alia, stocking trade, raw materials, etc. which are different/separate from the fixed movable assets (said assets) of the said project for which even as of today the plaintiffs may not have any objection if second charge is created as these are not in preview of the part of the loan form agreement dated 27th May, 2011.

(g) The plaintiff in order to amicably resolve the above difference, held a meeting on 20th December, 2013 between the parties along with State Bank of Patiala (the lead bank of the Working Capital Consortium). During this meeting the plaintiff raised its grievances regarding the illegal second charge created by the defendant No. 1. However, rather than addressing the issues raised, the defendant No. 1 was obstinate that the proposed CDR Package had already been approved by majority and that "nothing could be done now at that stage".

(h) The objection of the plaintiff is that any sale/hive-off/enforcement of those assets/business transfer arrangement under SARFAESI/any other applicable law and the assets/business can be sold/hived-off/enforced under SARFAESI/any

other applicable law, as per the process and valuation as decided and mutually agreed by the first charge holders, i.e., the term lenders. Hence, it is clear that the defendant No. 1 was to provide the term lenders (including the plaintiff herein) with the said NOC from the proposed second charge holders prior to creation of such second charge. The said NOC was never provided to the plaintiff. As such, there has been no consent by the plaintiff qua any proposed second charge, till date.

29. The plaintiff submits that although the defendant No. 1 is required to obtain the prior written consent of the plaintiff qua fresh/further funding (including for the issuance of bank guarantee and letter"s of credits from banks, as required for the BSNL project in question), it has not so far approached the plaintiff for such consent however, his client may not have any objection if further funding facility is provided under the EPC Consortium agreement dated 17th March, 2011.

30. It is strongly argued by Mr. Sethi, learned Senior counsel, that the defendant Nos.1 and 2 cannot absolved from the contractual obligations qua the plaintiff raising the issue of CDR mechanism to which the plaintiff is not a party.

31. Mr. Sethi says that there is no force in the submission of defendant No. 1 that it has received a contract from BSNL in respect of which the defendant No. 1 is required to submit a bank guarantee/letter of credit within 14 days from the date of the contract i.e. 14 days from 30th June, 2014. The application under reply was filed the very next day, i.e., on 1st July, 2014. It is evident that the defendant No. 1 was in discussions/negotiations qua the BSNL project much prior to the execution of the same. The defendant No. 1 would have been aware of the requirements of the requisite bank guarantee/letter of credit prior in time and the defendant Nos.1 and 2 could make the arrangement privately with other financial institutions for which no one would have any objection.

32. He submits that a perusal of the documents filed by the defendant No. 1 would reveal that while some CDR members have agreed to provide incremental funding to the defendant No. 1 (by way of issuance of bank guarantees/letters of credit for the BSNL project), the same is subject to the CDR package and the MRA becoming effective. One of the conditions in the MRA is creation of a charge on the said assets. Another condition in the MRA, is pooling the receivables of the defendant No. 1 (including the receivables from the said project) into a common TRA. A third condition is creation of a pledge by the defendant No. 2 of the shares held by him in defendant No. 1. It may be noted that each of these conditions is in direct violation of the contractual rights of the plaintiff and hence, in the event the MRA is made effective, it would thwart all contractual rights of the plaintiffs. His argument is that in view thereof the defendant No. 1 cannot be permitted to create any such charge on the said assets. Despite of above, the defendants No. 1 and 2 want to proceed with a CDR package and violate the contractual rights of the plaintiff.

33. It is argued by Mr. Sethi that the purpose of the plaintiff to keep the said

assets and the receivables from the said projects outside the purview of the CDR package has all throughout been in the knowledge of the defendant No. 1 and despite the benefit of such knowledge of the defendant No. 1, by including the said assets and receivables from the said projects in the CDR package, defendant No. 1 has acted in a manner whereby the contractual rights of the plaintiff are sought to be violated. The defendant No. 1 cannot now take advantage of its own wrong. The defendant No. 1 has not taken any step to exclude those provisions from MRA, which affect the contractual rights of the plaintiff. Let me deal with the legal submissions of the parties before deciding the matter on merit.

34. Mr. A.S. Chandhiok, learned Senior counsel, appearing on behalf of the defendants No. 1 and 2 during the course of hearing referred the following decisions and guidelines dated 26th February, 2014 issued by the Reserve Bank of India.

In the first decision in the case of Administrator of the Specified Undertaking of the Unit Trust of India and Another Vs. Garware Polyester Ltd., , Mr. Chandhiok has referred para 38 which reads as under:

38. In view of the our findings aforementioned, we are of the opinion that the Appellants herein having failed to establish that they could hold the entire scheme to ransom so as to stall the proceedings as a result whereof the majority of debenture holders would be deprived, the purpose or object motivating the Appellants to advance such a huge amount to the Respondent against issue of debentures is a matter of little or of no concern to the Respondent - company or other debenture holders. A special or a new right cannot be found in favour of the Appellants in the agreement when it creates none. The scheme applies equally to all debenture holders and as such the Appellants cannot be treated as a separate class. Once the Respondent-Company prima facie showed that the scheme is fair and reasonable and also that the requisite majority of the debenture holders recorded their decision in its favour, the court in absence of any unforeseen unjustness or unreasonableness therein ought not to reject the same.

In order to understand the finding arrived by the Supreme Court in para 38, it is imperative to refer paras 3, 4, 26 and 37 of the said judgment which read as under:

3. On or about 19.6.1997, a Common Subscription Agreement was entered into by and between the Respondent and the debenture holders; the relevant clauses whereof are as under :

1.1. Wherever used in this Agreement, unless the context otherwise requires the following terms shall have the following meanings :

a) *** **

b) *** **

c) "Debenture holders" means LIC, UTI, GIC, NIC, NIA, OIC and UTI or the holders of the Debentures for the time being deriving their title to the Debentures.

2. Company's Request For Financial Assistance.

The Company has approached the Debenture holders for financial assistance to the company for long term capital requirements and the Debenture holders have agreed to advance financial assistance in the form of subscription to 18.5%, 21,00,000 non-convertible. Privately placed debentures of Rs. 100/- each to the extent mentioned below :

2.2 Debenture Shall Rank Pari Passu : The Company shall ensure that the Debentures shall rank pari passu inter se to all intents and purposes without any preference or priority of one over the other.

3.3 Right To Review The Rate Of Interest : The Company agrees and undertakes that the Debenture holder(s) shall have a right to review the rate of interest as mentioned herein. The Company shall pay interest on the Debentures at the rate that may be stipulated by the debenture holder(s) as a result of such review. The company also agrees and undertakes to obtain all necessary consents from the concerned authorities in accordance with the then prevailing rules and regulations and to sign all deeds and documents that may be required in this regard and to endorse the revised interest rates on the Debenture Certificates as and when communicated by the Debenture holder(s).

3.7 Repayment : The Company agrees and undertakes to redeem the debentures to all the debenture holders in three equal yearly installments from the end of 4th year from the date of allotment and ending in the 6th year from allotment.

The debenture holders may at the request of the company in suitable circumstances and also in the absolute discretion of the Debenture holders, subject to the statutory guidelines as may be applicable for the purpose, revise/postpone the redemption of the debentures or any part thereof outstanding for the time being or any installment of redemption of the said debentures or any part thereof upon such terms and conditions as may be decided. If for any reason the amount of the Debentures finally subscribed for by the debenture holders is less than the amount of the debentures agreed to be subscribed the installment(s) of redemption will be reduced proportionately but will however be payable on the due date as specified.

3.9 Debenture Certificate : The Company shall issue debenture certificate/s to the debenture holder/s after making necessary compliance to the provisions of section 113(1) of the Companies Act, 1956 read with the Companies (Issues of share Certificate) Rules, 1960.

7.5 Negative Covenants : Unless the debenture holders/trustees shall otherwise agree, the Company shall not : a) DIVIDEND Declare and/or pay any dividend to any of its shareholders, whether equity or preference, during any financial year

unless the company has paid to the debenture holders the installments of principal, if any interest commitment charges, costs charges and other moneys payable under this agreement upto and during that year or has made provisions satisfactory to the debenture holders for making such payment. b) CHARGES Create or permit any charges or lien on any assets of the Company except as provided in Article-IV, hereof. For the purpose of this clause, the term "Lien" shall include mortgages, pledges, shares, privileges and priorities of any kind and the term "assets" shall include revenues and property of any kind. c) AMENDMENT OF MEMORANDUM AND ARTICLES OF ASSOCIATION Amend its Memorandum and Articles of Association or alter its capital structure except as specified herein. d) MERGER, CONSOLIDATION ETC. Undertake or permit any merger, consolidation, re-organization, scheme of arrangements or compromise with its creditors or share holders or effect any scheme of amalgamation or reconstruction, e) INVESTMENT BY THE COMPANY Make any investment by way of deposits, loans, share capital etc. in any manner. f) REVALUATION OF ASSETS Revalue its assets. g) TRADING ACTIVITY Carry on any general trading activity other than the sale of its own product."

4. In terms of the Common Subscription Agreement on or about 17.9.1997, a Debenture Trust Deed was created, the relevant clauses whereof are as under :

45. Modifications To These Presents : The Trustees shall concur with the Company in making any modifications in these presents which in the opinion of the Trustees shall be expedient to make. Provided that once a modification has been approved by consent in writing of the holder(s) of the Debentures representing not less than three fourths in value of the Debentures for the time being outstanding or by a special resolution duly passed at a meeting of the Debenture holders convened in accordance with the provisions set out in Fifth Schedule hereunder written, the Trustees shall give effect to the same by executing necessary Deed(s) supplemental to these presents." xxx xxx xxx "The Third Schedule above referred to Financial Covenants and Conditions

1. Debentures To Rank Pari Passu The debentures shall rank pari passu inter se without any preference or priority of one over the other or others of them.

10. Variation Of Debenture Holders" Rights The rights, privileges and conditions attached to the Debentures may be varied, modified or abrogated in accordance with the Articles of Association of the Company and the Act and with the consent of the holders of the debentures by a Special Resolution passed at the meeting of the Debenture holders, provided that nothing in such resolution shall be operative against the Company where such resolution modifies or varies the terms and conditions governing the Debenture if the same are not acceptable to the Company." "The Fourth Schedule Above Referred to Form of Debenture Certificate xxx xxx xxx The Fifth Schedule Above Referred to Provisions for the Meeting of the Debenture holders 22. A meeting of the Debenture holders shall, inter alia, have the following powers exercisable in the manner hereinafter specified in Clause 23 hereof : xxx xxx xxx (ii) Power to sanction any

compromise or arrangement proposed to be made between the Company and the Debenture holdeRs. (iv) Power to assent to any scheme for reconstruction or amalgamation of or by the Company whether by sale or transfer of assets under any power in the Company's Memorandum of Association or otherwise under the Act or provisions of any law.

26. This Court in this case is not called upon to interpret the nature of a document or the covenants entered into by and between the parties. The agreement specifies the rights and privileges of the parties thereto and in particular the rights and privileges of the debenture holder either collectively or individually."

37. In J.K. (Bombay) (P) Ltd. (supra), it was held : "The Court could not have completed, as contended by the appellants, their rights which were still incomplete or order the company to execute a debenture trust deed or the second mortgage, and thus set up the appellants and the other Sch. "B" creditors as secured creditors against the rest of the unsecured creditors. Such an order could not be passed as it would be contrary to and in breach of the right of distribution *pari passu* of the joint body of unsecured creditors. (See *Andhra Bank Vs. Official Liquidator and Another*,)

35. It is apparent that the said judgment has no application to the facts in the present case. In that a common subscription agreement had been entered into by and between the respondent and the debenture-holders. In terms of agreement a debenture trust deed was created, the relevant clause 45 says that once a modification has been approved by consent in writing of the holder(s) of the debentures representing not less than three-fourth in the value of the debentures, the trustees shall give effect to the same by executing necessary deed(s) supplementary. In para 36 of the judgment, the Supreme Court did not agree that clause 7.5 puts a total embargo in the part of the company or other creditors to file a compromise u/s 391 of the Companies Act without obtaining the consent of all debenture-holders.

Under these circumstances in para 38, it has been rightly opined that the party i.e. appellants in that case could hold the entire scheme to ransom so as to stall the proceedings as a result whereof the majority of the debenture-holders would be deprived.

36. But the facts in the present case are totally different as in an independent Rupees loan agreement dated 27th May, 2011, the plaintiff provided a term loan of Rs. 90,00,00,000/- (Rupees Ninety Crores only) to the defendant. The other lender was defendant No. 3. The defendant No. 1 has executed various documents including a deed of hypothecation in favour of Security Trustee and for the benefit of term lenders creating first charge over the said assets of the said project and defendant No. 1 undertook that it shall not create any further charge, lien or encumbrance affecting the said assets or any part thereof without *inter alia* the prior written consent which was not obtained by the defendant No.

1 despite of having full knowledge of various documents executed. Even defendant No. 1 also executed a joint deed of hypothecation dated 17th March, 2011 with the working capital consortium where the first charge was created later on by the defendant No. 1 in subsequent independent loan agreement dated 27th May, 2011. In the present case, only two lenders are involved. The plaintiff has more stakes in the loan agreement than the defendant No. 3. The condition of minimum 75% creditors by value and 60% of creditors by number does not help the case of the defendant No. 1 in view of facts of the present case.

The said decision does not help the case of the defendant No. 1 and 2 in any manner. The similar is the position of another case referred by learned Senior counsel for defendants No. 1 and 2 in the case of BPTP Ltd. vs. CPI India Ltd. and Others of the Division Bench passed in FAO (OS) 507/2012 on 9th October, 2013. The facts in that case were different than in the case.

37. The other decision referred by Mr.Chandhiok in the case of Moser Bear India Ltd. vs. Citi Bank N.A.London Branch decided by the Division Bench of this Court on 20th December, 2012 has no application in the facts of the present case as in that case the respondent was admittedly an unsecured creditor, however, in the present case, the position is just opposite.

38. With regard to guidelines dated 26th February, 2014 issued by Reserve Bank of India, as well as the supporting decision in the case of Sardar Associates and Others Vs. Punjab and Sind Bank and Others, , wherein the guidelines para 4, it has been mentioned with regard to restructuring process that where even creditors who are not part of CDR system can join by signing transaction to transaction based agreement and in case the decision agreed upon by a minimum 75% creditors by value and 60% of creditor by number in the JLF would be considered as the basis of proceedings with the restructuring of the account and will be binding on all lenders under the terms of ICA. The case of the plaintiff is that such agreement as mentioned in guidelines para 3.2 and 4 has been signed by the plaintiff who does not want to agree upon to join any other creditors and terms of the ICA are not binding as there was no agreement as such.

It is apparent that clause 4 of the guidelines provides an option that where even creditors who are not part of CDR system can join by signing transaction to transaction based agreement. Clause 3.1 of guidelines decides restructuring of the account as CAP and indicative in nature that the same is an independent of the CRD mechanism. There are reversed guidelines on Corporate Debt Restructuring (CDR) Mechanism which are referred by the plaintiff. Para 4.3 of the same reads as under :

4.3 Restructuring by JLF

4.3.1 If the JLF decides to restructure an account independent of the CDR mechanism, the JLF should carry out the detailed Techno-Economic Viability (TEV) study, and if found viable, finalise the restructuring package within 30 days

from the date of signing off the final CAP as mentioned in paragraph 3.3 above.

4.3.2 For accounts with AE of less than Rs. 5000 million, the above-mentioned restructuring package should be approved by the JLF and conveyed by the lenders to the borrower within the next 15 days for implementation.

4.3.3 For accounts with AE of Rs. 5000 million and above, the above-mentioned TEV study and restructuring package will have to be subjected to an evaluation by an Independent Evaluation Committee (IEC)³ of experts fulfilling certain eligibility conditions. The IEC will look into the viability aspects after ensuring that the terms of restructuring are fair to the lenders. The IEC will be required to give their recommendation in these cases to the JLF within a period of 30 days. Thereafter, considering the views of IEC if the JLF decides to go ahead with the restructuring, the restructuring package including all terms and conditions as mutually agreed upon between the lenders and borrower, would have to be approved by all the lenders and communicated to the borrower within next 15 days for implementation.

4.3.4 Asset Classification benefit as applicable under the extant guidelines will accrue to such restructured accounts as if they were restructured under CDR mechanism. For this purpose, the asset classification of the account as on the date of formation of JLF will be taken into account.

4.3.5 The above-mentioned time limits are maximum permitted time periods and the JLF should try to arrive at a restructuring package as soon as possible in cases of simple restructuring.

4.3.6 Restructuring cases will be taken up by the JLF only in respect of assets reported as Standard, SMA or Sub-Standard by one or more lenders of the JLF. While generally no account classified as doubtful should be considered by the JLF for restructuring, in cases where a small portion of debt is doubtful i.e. the account is standard/sub-standard in the books of at least 90% of creditors (by value), the account may then be considered under JLF for restructuring.

4.3.7 Wilful defaulters will normally not be eligible for restructuring. However, the JLF may review the reasons for classification of the borrower as a wilful defaulter and satisfy itself that the borrower is in a position to rectify the wilful default. The decision to restructure such cases should however also have the approvals of the board/s of individual bank/s within the JLF who have classified the borrower as wilful defaulter.

4.3.8 The viability of the account should be determined by the JLF based on acceptable viability benchmarks determined by them. Illustratively, the parameters may include the Debt Equity Ratio, Debt Service Coverage Ratio, Liquidity/Current Ratio and the amount of provision required in lieu of the diminution in the fair value of the restructured advance, etc. Further, the JLF may consider the benchmarks for the viability parameters adopted by the CDR mechanism (as mentioned in Appendix to the circular No. DBOD.BP.BC.No.

99/21.04.132/2012-13 dated May 30, 2013 on 'Review of Prudential Guidelines on Restructuring of Advances by Banks and Financial Institutions') and adopt the same with suitable adjustments taking into account the fact that different sectors of the economy have different performance indicators.

39. In the case of BNY Corporate Trustee Services Ltd. vs. Wockhardt Limited; which is referred by Mr. Sethi, learned Senior counsel passed in Company Petition No. 971/2009 the same aspect as involved in the present case has been discussed in detail.

In that case also the petitioner company inter alia stated that it is seeking help in financial restructuring of debts and interests from various lenders in India through CDR mechanism. However, no certificate as requested by the petitioner was provided. Therefore, the petitioner reiterated its request by another email dated 16th April, 2009 to the respondent. The respondent company addressed a letter dated 23rd April, 2009 inter alia informing that an application has been made by ICICI as the lead institution on behalf of the company to the CDR cell for a possible restructuring of company's loans and confirming that it shall revert to the petitioner with a submission of particulars with regard to the matters specified in clause 9.8 of the Trust Deed.

40. In paras 34 and 47, the arguments advanced by the parties in similar situation are discussed. The same read as under:

"34) Mr. Kapadia has been supported by Mr. Swanand Ganoo who appears for the applicants/intervenors in Company Application No. 37 of 2011. He submits that the President of the Wockhardt Employees Union, who has filed the affidavit in support of this application, has pointed out that the petitioner should not be allowed to disrupt the functioning of the respondent company for good reason viz., under the CDR package, CDR lenders/banks have consented to restructure the facilities and the petitioner would be recognised as a secured creditor viz-a-viz the respondent and the company would start repaying the amount due from July 15, 2010. He submits that the livelihood of the workers depends upon the company. The company has a large network, net sales of the company have grown up considerably. The company is a viable entity and is facing temporary financial crunch due to adverse market conditions. If petition is admitted, there is likelihood that the workers may lose their only source of livelihood as their jobs would be at risk. Therefore, this Court by following the principle laid down in the decision of the Supreme Court (National Textiles Workers Union and Ors. Vs. P.R.Ramakrishna 1983 (1) SCC 28, should not admit this winding up petition. Workers' rights have been recognised in this decision, according to Mr. Ganoo and, therefore, even their wishes must be respected and taken into consideration."

47) However, the petitioner persisted with the request of calling upon the company to comply with clause 9.8 of the Trust Deed and the petitioner received a reply dated 23rd April 2009 from the respondent stating that the company has

approached CDR cell with a view to take advantage of the initiative of RBI to assist creditworthy companies to tide over temporary liquidity crunch for a possible restructuring of its loans. The company replied that it would keep the petitioners notified with regard to compliance with clause 9.8 of the Trust Deed. Since the company did not revert back, even after time being allowed, the petitioner addressed a letter dated 6th May 2009 with the following:-

.. In view of the aforementioned and in accordance with our powers set out in clause 9.3 and 9.4 of the Trust Deed, we hereby urgently request you in your capacity as Issuer of the Bonds to produce a certificate of compliance and no event of default or potential event of default within five calendar days hereof. "Note that the certificate should make reference to the Trust Deed and the notes and should be issued in compliance with the terms of the Trust Deed." "Please provide the said certificate as a matter of urgency and in any event, no later than 5 pm (London time) on 11th May 2009." "Should you have any queries, please contact Zaira Jehangir on +44 207 964 4981." "The Trustee hereby reserves all of its rights and the rights of the Bondholders under the Trust Deed, the conditions, any other documents relating to the Bonds and at law.

In paras 60 and 61 i.e. final conclusion of the judgment, the Court has held as under:

60) As far as the maintainability of the petition is concerned, once the objection raised in that behalf is found to be of no substance, then, the other contentions need not detain me. The petitioner cannot be forced to join the CDR scheme. The law does not postulates any such compulsion on the petitioner. Once section 433(e) and section 434(1)(a) of the Companies Act, 1956 is applicable, then, the section does not confer a right on a debtor but only gives him an opportunity to discharge the debt in one or other of the ways mentioned therein. The debtor could secure or compound for a debt only where the circumstances under which the demand is made permit such a discharge. It is not the respondent's case that CDR is a discharge. It seeks the petitioner's approval to agree to postponement of payment to a future date. However, once the petitioner does not agree to any such course in law, it cannot be said that a winding up petition should not be presented by it. 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. 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 this case, there may be participation of some bond holders in the scheme and they may choose to wait for settlement of their dues but by that itself and without anything more, this Court cannot in the garb of refusing to entertain the winding up petition, issue any directive or require the petitioners to wait in queue for settlement of their dues, if the petitioner does not choose to do so. Moreover, it is not the case of respondent that the petitioner has

accepted the CDR scheme or has participated in the same. Merely because the company finds that it is feasible and some other creditors may have agreed with that view, does not mean that the petitioner can be directed to join the said scheme or the petition at its instance can be dismissed straightaway. The argument on feasibility of the scheme also need not be gone into nor the objection that the scheme is being implemented by giving preference to some creditors and such preference is fraudulent in nature requires any answer. Once a view is taken that the petition cannot be dismissed merely because the scheme is proposed and is being implemented, then, all other contentions are of assistance to the Company and they need not detain me.

61) The other objection raised to the maintainability of the petition is that some of the creditors have found the scheme feasible and have pumped in funds. This is also cannot be a ground not to admit the petition because there is no dispute about the liability, there is no denial thereof and there is nothing which would indicate that the respondent has a bonafide defence. The only defence seriously pursued is on the maintainability of this petition. That defence has no substance. There is no denial of the liability or any dispute raised in that behalf. In fact, the liability to pay the amount is admitted throughout. The company calls upon the petitioner to enter into a package or scheme of compromise allegedly to secure the debt. That package or scheme (CDR) has been rejected by the petitioner and it proceeds to institute this petition. Once it rejects the proposal and the conduct of the petitioner in trying to protect the interest of bond holders cannot be termed as blameworthy or questionable, then, it must be held that the alternatives or options suggested to secure the debt in this case do not constitute a substantial defence. The claim is huge and the petitioner has filed the petition as a trustee. Therefore, it would not be proper to hold in this case that the power to admit this petition cannot be exercised at the instance of the petitioner. Similarly, the conduct of some of the bond holders also is no ground to refuse entertainment of the petition at the instance of petitioner.

41. The plaintiff in the present case does not want to become a party to the CDR mechanism.

42. It is not denied by defendant No. 1 that the defendant No. 1 prior to the CDR package in question entered into a binding contractual relationship with the plaintiff and are governed by the terms of inter alia, the following instruments in this regard :

- i. Rupee Term Loan Agreement dated 27th May, 2011.
- ii. Deed of Hypothecation dated 27th May, 2011.
- iii. Non disposal undertaking dated 27th May, 2011.
- iv. Escrow Account Agreement dated 27th May, 2011.

43. By virtue of the said documents, the plaintiff has the following contractual rights:-

a) a charge that has been created in favour of the plaintiff in respect of the movable fixed assets of the said Project (hereinafter called the "Said Assets"). No other/further charge to be created in respect of the said assets without the prior consent of the plaintiff.

b) The defendant No. 2 shall not dispose off, including by way of a pledge, his shareholding in the defendant No. 1-Company without the prior consent of the plaintiff.

c) All the receivables from the said projects to be deposited into an escrow account opened with, and maintained by the plaintiff/defendant No. 3.

d) The defendant No. 1 shall not obtain any incremental funding whatsoever without the prior written consent of the plaintiff/respondent.

44. It is rightly argued by Mr. Sethi that the BSNL contract requires the defendant No. 1 to undertake further indebtedness, which cannot be done without the prior consent of the plaintiff. The plaintiff has no objection if the defendant No. 1 can procure bank guarantees for the BSNL project from other lenders outside the CDR Package.

In the event CDR Members are required to provide incremental funding for the BSNL project, the same is subject to the CDR Package and the MRA becoming effective. One of the conditions in the MRA is creation of a charge on the said assets. Another condition in the MRA is pooling the receivables of defendant No. 1 (including the receivables from the said project) into a common TRA (Trust Retention Account). Third condition is the creation of a pledge by the defendant No. 2 of the shares held by him in defendant No. 1. Each of these conditions is in direct violation of the contractual rights of the plaintiff/respondent. The plaintiff does not have any intent in opposing the CDR Package so long as its contractual rights are not breached.

45. The entire case of the plaintiff is to protect its contractual rights vis-a-vis the CDR Package has all throughout been in the knowledge of the defendant No. 1 and the CDR Lenders. Despite the benefit of such knowledge, the defendant No. 1 and the CDR Lenders agreed to the CDR Package in its present form, which breaches the contractual rights of the plaintiff. The defendant No. 1 cannot now take advantage of its own wrong. The CDR Lenders were aware of the breach of the contractual rights of the plaintiff before executing the MRA. The defendants and the CDR Lenders should modify the CDR Package to ensure that the contractual rights of the plaintiff are not breached and under the garb of "further clarification", the defendant No. 1 has actually sought a review of the said order passed by the Court. The defendants have all throughout maintained that they be permitted to execute the MRA in question that they shall not give effect to the MRA. Now the defendant is changing its stance and seeks giving effect to the MRA resulting in the very sanctity of the said order being defeated.

46. There is no force in the submissions of defendant No. 1 that the funding is

being availed under the Working Capital Facility Agreement of 2011. The bank guarantees/letters of credit may be issued pursuant to the terms of the MRA. This is the only reason why the defendant No. 1 is seeking to make the MRA effective. If the bank guarantees/letters of credit were supposed to be issued under the WCCA, then there is anyway no requirement to give effect to the MRA.

47. It cannot be disputed that Corporate Debt Restructuring (which is what the defendants have proposed by virtue of the MRA) is a voluntary mechanism as per the CDR guidelines. Being a voluntary mechanism, no lender can be forced to approve the same. By resorting to such conduct, the defendants are in fact resorting to oppression of minorities by alleging "interests of majorities", which the defendants cannot be permitted to do. It is the case of the defendants that the investments and stakes of the plaintiff are minuscule in comparison to the other investors/creditors and as such, the plaintiff herein ought to give in to the MRA. Such an assertion renders the sanctity of contracts meaningless and is in itself illegal. In any event, the RBI guidelines referred to in the application under reply clearly states "so, it would be beneficial if lenders appreciate the concerns of fellow lenders and arrive at a mutually agreed option within a view to preserving the economic value of assets". In keeping up with the sanctity of the said guidelines, the defendants ought to appreciate the concerns of the plaintiff that the rights of the plaintiff are sought to be violated/breached for no fault of the plaintiff which clearly, is not in the scheme of the defendants. Be that as it may, the plaintiff is entitled to safeguard its contractual interests.

48. As mentioned earlier, the Corporate Debt Restructuring mechanism is a voluntary mechanism as per the CDR Guidelines and no lender can be forced to approve the same. The JLF Guidelines are not applicable to the instant factual scenario since the MRA is already executed under the CDR mechanism. The JLF Guidelines cannot be applied retrospectively to this CDR mechanism.

49. In the present case, the plaintiff does not have any intent in opposing the CDR package so long as its contractual rights as mentioned in the suit and hereinabove are not breached. The plaintiff merely seeks the protection of its contractual rights which have arisen by virtue of various agreements executed between the parties for the said project. The plaintiff has no intention to stall the CDR package. The plaintiff maintained its objection to the violation of its contractual rights.

50. Mr. Sethi has rightly argued that plaintiff does not oppose the CDR package as long as its own contractual rights which are governed by the various contracts executed between the plaintiff and the defendants No. 1 and 2 as listed above remain protected and are not breached.

51. No doubt in the present case, the defendant No. 1 has obtained a contract from BSNL. The defendant No. 1 seeks the permission of this Court to give effect to the CDR package/MRA on the ground that, in view of the directions of this Court, the defendant No. 1 is unable to act upon this contract with BSNL. The

said BSNL contract is a stand alone contract and is in no manner connected with the said projects. Further indebtedness cannot be done without the prior consent of the plaintiff. The fresh indebtedness is an attempt to violate the contractual rights of the plaintiffs which were created by virtue of independent agreement and the following contractual rights of the plaintiff including without limitation :

- a. A charge that has been created in favour of the plaintiff/respondent in respect of the movable fixed assets of the said project as defined in the instant suit (hereinafter referred to as the "said assets");
- b. No other/further charge to be created in respect of the said assets without the prior consent of the plaintiff/respondent (as provided in the said agreement and the said deed of hypothecation);
- c. The defendant No. 2 shall not dispose off, including by way of a pledge, his shareholding in the defendant No. 1 company without the prior consent of the plaintiff/respondent;
- d. All the receivables from the said projects to be deposited into an escrow account opened with and maintained by the plaintiff/respondent/defendant No. 3 (as provided in the escrow agreement);
- e. The defendant No. 1 shall not obtain any incremental funding whatsoever without the prior written consent of the plaintiff/respondent.

52. It is apparent from the conduct of defendant Nos.1 and 2 that they are trying to curtail the contractual rights of the plaintiff which have come in favour of the plaintiff by way of independent rights under term loan agreement dated 27th May, 2011. They are trying to absolve themselves from the legal bindings of the said documents executed by defendant No. 1. One fails to understand why the defendants and the CDR lenders cannot agree on the CDR package which does not impinge upon the rights of the plaintiff under previously executed contracts. Rather than applying for a modification of the order dated 20th March, 2014, the defendant No. 1 should be applying to the CDR lenders for a modification in the MRA terms. The conduct of the defendants No. 1 & 2 is not bonafide.

53. The plaintiff has also made it clear that if any facility of further loan is provided to the defendant Nos.1 and 2 under the EPC Consortium agreement dated 17th March, 2011 in which plaintiff is one of the parties. But in the present case, it is submitted that the defendant No. 1 is making a false impression that the defendant No. 1 is bona fide in its approach and that the CDR package in question is in view of the larger interests of the defendant No. 1 company.

54. It is totally immaterial if defendant No. 3 is taking a different stand which is just opposite to the stand of plaintiff. It is rightly argued by Mr.Sethi and it appears to the Court that the defendant No. 3 (ICICI Bank) has given consent to the CDR Package because they are a part of the CDR Mechanism in question and as the defendant No. 3 has a higher exposure in the working capital facility as opposed to the term loan facility. Therefore, the defendant No. 3 has joined the

CDR scheme even if ICICI Bank has consented and other banks who are not a party to the Rupees Term Loan agreement dated 17th May, 2011, there is no obligation on the plaintiff to consent as well.

55. From the entire gamut of the case, this Court is of the view that the lenders having exclusive charge on a specific asset cannot be forced to share their charge on the security. The said assets are to keep outside the ambit of the proposed CDR package. The said assets of the project shall continue to be charged exclusively to the term lenders of the said project and security on the said assets of the project shall not be shared with other lenders of the defendant No. 1. The defendants No. 1 & 2 in the present case want to proceed with a CDR package by violating the contractual rights of the plaintiff.

56. The plaintiff in the present case admittedly sought modifications in the proposed CDR Package as the plaintiff and the defendant No. 3/pro-forma defendant had extended financial assistance for purposes of funding the said project and that as a security, a first charge was created in favour of the Security Trustee exclusively for the benefit of inter alia the plaintiff and the defendant No. 3/pro-forma defendant herein qua the said assets of the said project.

57. Therefore, the prayer made in the application, being I.A. No. 11895/2014 u/s 151 CPC for modification and I.A. No. 2867/2014 under Order XXXIX Rule 4 CPC for vacation of ex-parte order, cannot be allowed as there is no merit in the said applications. The same are dismissed. however, it is clarified that if defendants No. 1 and 2 shall keep the said assets of the project outside the ambit of the proposed CDR package, they may continue with the said scheme but they cannot force the plaintiff to share their charge on the security. In view of the aforesaid reason, similar is the position of I.A. No. 5754/2014 filed by defendant No. 3. The prayer made in the applications cannot be granted. The said application filed by defendant No. 3 is accordingly dismissed. Another application being I.A. No. 6157/2014 filed by State Bank of Patiala under Order 1 Rule 10 CPC is also infructuous and the same is dismissed.

58. In the light of abovementioned findings arrived, the prayer made in I.A. No. 1438/2014 (O 39 R 1 & 2 CPC) is allowed. The orders already passed on 24th January, 2014 and modified order dated 12th March, 2014 be also read along with the prayer clause.

59. All the above mentioned applications are accordingly disposed of.

CS(OS) 217/2014

60. List the matter for completion of pleadings and admission/denial of documents before the Joint Registrar on 14th November, 2014.

61. Copy of the order be given dasti to all the parties under the signatures of the Court Master.