

Before Hon'ble N. K. Sodhi, J.

M/S GOODWILL INDIA LTD.,—Petitioner.

versus

M/S P.S.B. PAPER MILLS PVT. LTD.—Respondent.

Company Petition No. 60 of 1993.

5th July, 1995.

*Companies Act, 1956—Ss. 433, 434—Winding up on account of inability to pay debt—Lease money claimed—Respondent raising objection that transaction was a loan transaction and hit by Usurious Loans Act and Punjab Relief of Indebtedness Act—No such contention raised before issuance of statutory notice—Such defence cannot be said to be bona fide—Company liable to be wound up.*

*Held, that the company had defaulted in the payment of lease rentals and had, therefore, become liable to pay interest at the agreed rate 2½ per cent per mensem which is being claimed by the petitioner as additional lease charges. At no stage prior to the filing of the written statement did the company dispute its liability to pay the amount as claimed by the petitioner in terms of the lease agreement. It is for the first time that the plea was raised in this Court that the lease agreement was in fact a loan transaction.*

(Para 8)

*Further held, that it can safely be presumed that the pleas sought to be raised by the Company are only an after-thought and a convenient way to wriggle out of its liability to pay the amount under the lease agreement. It appears that the company had no funds to pay the amount due to the petitioner and the present pleas have been taken in the written statement only with a view to hide its inability to pay. The defence raised by the Company cannot, therefore, be said to be bona fide and for this reason as well I hold that the Company is unable to pay its debts.*

(Para 8)

*Companies Act, 1956—Agreement—Whether loan agreement or lease document must be read as a whole—Courts to determine real intention of parties—Courts have power to go behind document to determine its nature and intent.*

*Held, that in order to examine the nature of an agreement it must be seen as a whole and its substance has to be looked at. The parties cannot insert words to defeat the real intention of entering into the transaction and it is only by examining the whole of the*

agreement that the substance can be ascertained. The Court is not merely to look at the document but it must discover what the real intention of the parties was. In *Sundaram Finance Ltd. v. The State of Kerala and another*, A.I.R. 1966 S.C. 1178, their Lordships of the Supreme Court observed that the true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the Court has the power to go behind the document and to determine the nature of the transaction whatever may be the form of the documents.

(Para 6)

S. K. Mehra, Sr. Advocate with Mamta Mehra and Jaishree Thakur, Advocate, for the Petitioner.

T. K. Gamju, Advocate with P. S. Saini, Advocate, for Respondent.

#### JUDGMENT

N. K. Sodhi, J.

(1) Whether the lease agreement dated 6th February, 1988 executed between the petitioner and M/s P.S.B. Paper Mills Private Limited, Faridabad, the respondent herein (for short, the Company) is in effect and in substance a loan transaction, is the primary question that arises for determination in this petition filed under Sections 433, 434, and 439 of the Companies Act, 1956 (hereinafter called the Act) for the winding up for the company on the ground that it is unable to pay its debts.

(2) Facts giving rise to this petition may first be noticed. The petitioner is a leasing and hire purchase Company incorporated under the provisions of the Act with its registered office at New Delhi. It is carrying on its business in terms of the objects mentioned in its Memorandum of Association and it has amongst others an object of giving on lease all kinds of plant and machinery, motor vehicles, marine engines, marine boats, travelers, launching ships, vessels, barges, earthmoving equipment, open cast mining equipment, compressors, drilling machines, industrial gas cylinders and any other equipment that the Company may think fit. The Company approached the petitioner with a proposal to buy the equipment/machinery described as M.G. Framing with loading arrangement and other accessories required for the said equipment from M/s Hindon Engineering Private Limited, Saharanpur and M/s Pat Fab Engineers Private Limited, Ahmedabad who are the manufacturers and suppliers of the said machinery and accessories

and leasing out the same to it. A proposal form for this purpose was duly filled up and signed by the Company through its Directors and the same was submitted to the petitioner along with the personal statement of the guarantors. On the request of the Company, the petitioner purchased the aforesaid equipment/machinery and accessories as per the requirement and specifications supplied by the Company from the aforesaid manufacturers and suppliers. Photo copies of the invoices are annexures P5/1 to P5/4 with the petition. A look at these invoices makes it clear that the goods were purchased by the petitioner. The total value of the machinery and its accessories as mentioned in the invoices comes to Rs. 10,64,250 and it is common ground between the parties that the price was paid by the petitioner and that the equipment was transported and delivered to the Company through M/s New Janta Transport Company-transporters. Before taking delivery of the equipment, the Company verified the said equipment and after satisfying itself that the same was according to its specifications, executed a lease agreement (Annexure P6 with the petition) on 6th February, 1983 on the terms and conditions mentioned therein. This agreement was signed by the petitioner through its Managing Director as lessor and by the Company through its Directors Sarvshri Anil Bajaj and Ravi Bajaj as lessee. Shri Shyam Sunder Periwal and Shri Ashok K. Bajaj, Directors of the Company also signed the agreement as guarantors for the due performance of its terms and conditions. According to the terms of this agreement, the equipment purchased by the petitioner was leased out to the Company for a period of 5 years and the total lease charges of Rs. 16,39,000 were to be paid by the Company in 20 quarterly instalments of Rs. 81,950 each commencing from 15th February, 1988. The Company was required to keep the equipment at all times in its possession and control at Faridabad and it could not be removed therefrom without the prior consent of the petitioner. The Company acknowledged in the lease agreement that it held the equipment as a mere bailee of the petitioner and that it shall not have any proprietary right or title or interest in the equipment in any point thereof. It was also acknowledged by the Company that the essential function of the petitioner was to purchase the equipment selected by the Company from the suppliers designated by the Company. The Company undertook to pay regularly and punctually without any deduction or abatement the lease charges during the continuance of the agreement regardless of whether the equipment was under repairs or otherwise not working. The petitioner did not make any representation as to warranty with respect to the merchantability, condition, quality,

durability or performance of the equipment. The Company undertook to indemnify the petitioner at all times against loss, destruction or damage to the equipment by fire, accident or any other cause whatsoever. It was agreed between the parties that the Company shall not transfer, assign or otherwise dispose of its rights and obligations under the agreement. The petitioner on the other hand was at liberty to assign or otherwise deal with its rights or interest in the equipment covered under the agreement. It was further agreed that the petitioner would not sell, transfer, hypothecate, pledge or otherwise create any encumbrances or lien on the equipment whether under repairs or otherwise. Clause 22 of the agreement then provides that on the expiry of the term of the lease, it may be renewed for a further period on the terms and conditions to be mutually agreed to between the parties on notice for renewal to be addressed by the Company to the petitioner six months prior to the expiration of the lease and to be accepted by the petitioner within three months from its receipt. It was clearly understood that the petitioner would have the absolute right not to renew the arrangement even after the receipt of notice for renewal. Clauses (a), (b) and (c) of clause 22 read as under :—

- (a) Upon determination of the Lease hereby granted by efflux of time unless the renewal or extension or as the same is agreed to, the LESSEE will at its own cost forthwith delivery or cause to be delivered the Equipment to the LESSOR at such place as may be intimated by the LESSOR to the LESSEE. After such delivery, the LESSOR shall, as the absolute owner of Equipment be at liberty to dispose of the same in such manner as it may deem fit including by private sale, and the price obtained on such sale shall not be questioned or challenged by the LESSEE.
- (b) If the price obtained on such a sale be less than the residual value specified in clause 21 hereof, then the LESSOR may by notice in writing request the LESSEE to pay the difference of the amount to the LESSOR within 14 days of the date of such notice together with all other sums owing to the LESSOR under or by virtue of this Agreement. Upon the LESSEE's default in making payment within such period of 14 days as aforesaid such sums shall forthwith become due and recoverable by action.

(c) The sale price shall be the price obtained upon a sale after deduction therefrom of all costs and expenses incidental to such sale.

(3) The agreement further provides that on the occurrence of any of the events mentioned in clause 23 including failure to pay the lease charges on the dates and in the manner stipulated in the agreement, it shall be open to the petitioner to recover and retake the possession of the equipment and also recover from the Company by way of liquidated damages the arrears of the lease charges together with interest thereon. Clause 25 of the agreement contains the default clause. It provides that if the Company makes any default in the payment of lease charges or any other sums due and payable by the Company, it shall pay to the petitioner interest at the rate of 2½ per cent per mensem on the amount due for the time being on the arrears from the date on which such amount became due until the date of actual payment thereof. This is, however, without prejudice to the petitioner's rights and remedies otherwise provided for in the agreement. There are some other clauses in the agreement as well but we are not concerned with them in the present case. It will be seen that the lease period expired on 15th February, 1993 and the equipment which was always in the ownership of the petitioner was to revert back to it and the Company under no circumstances had the option to buy the equipment even after payment of the agreed lease charges.

(4) The case of the petitioner is that the Company made defaults in the schedule of payments of lease rentals and paid only a sum of Rs. 6,55,600 as lease charges and another sum of Rs. 75,000 towards interest in the form of additional lease charges as per the terms and conditions of the agreement. It is alleged that thereafter the Company failed and neglected to make the payments and a sum of Rs. 9,83,400 was due from it up to 15th November, 1992 as lease charges and another sum of Rs. 5,85,045 as additional lease charges as on 15th March, 1993. It is further alleged that the Company issued two cheques dated 30th January, 1992 and 20th February, 1992 for a sum of Rs. 60,000 each towards the payment of the amounts due from it but the said cheques were returned unpaid by the bankers with the remarks "exceeds arrangement". The Company is then stated to have taken the plea that the aforesaid cheques were issued on the understanding that the petitioner would contact the Company before encashing them. This plea of the Company, according to the petitioner, is false and that the Company was only trying to hide its inability to pay. The Company then

issued another cheque dated 20th March, 1992 for Rs. 60,000 and the same was also dishonoured. The petitioner then served a registered notice in March, 1992 on the Company informing it about the non-payment of lease rentals under the lease agreement dated 6th February, 1988 and the fact that the cheques issued by it had been dishonoured was also brought to its notice. A copy of this notice was also issued to the Directors of the Company two of whom had stood guarantee for the due performance of the lease agreement. The Company was told to make the payment of the amount due from it but it failed to do so, as according to the petitioner, it had become commercially insolvent. A statutory notice under section 434 of the Act was also issued and in spite of that the amount due was not paid. It may be mentioned that when the Company was informed that the cheques issued by it had been dishonoured, it informed the petitioner that it would be issuing demand drafts in lieu thereof. On 23rd June, 1989, the Company wrote a letter to the petitioner acknowledging the letter written by the petitioner to it and requested for a complete statement of accounts and also the details of the amounts sanctioned, the amount of lease rental, its due date and the rate of compensation charges payable for non-payment of lease rentals on due dates. A request was also made to send a photo copy of the insurance policy for which the petitioner had remitted a sum of Rs. 5,775 to the insurance company on behalf of the Company. It was mentioned by the Company in its letter that these details were being asked with a view to facilitate to make quick and timely payments to the petitioner. Shri Ashok Bajaj, Director of the Company also sent a reply to the petitioner stating therein that even though he continued to be a guarantor on behalf of the Company, he was no longer looking after the business and requested that in future the letters be addressed to the Company at its Faridabad address for necessary action. He, however, sent the letter received from the petitioner to the Company with a request that immediate action be taken to make the payment. In spite of all this, the Company did not make the payment which the petitioner claims was due to it under the lease agreement. Hence, the present petition.

(4) In the reply filed on behalf of the Company, some preliminary objections have been taken in regard to the maintainability of the petition. It is pleaded that the petitioner has sought to impose upon the Company an illegal, unconscionable and unlawful claim. It is further stated that the petitioner is a finance company which *inter alia* grants loans for the purchase of machinery and that the

transaction between the parties namely, lease agreement was in substance and in reality a loan agreement for all intents and purposes and that the petitioner provided a loan to the Company for the purchase of the equipment covered by the so called lease agreement. It is also averred that the petitioner obtained signatures of the Directors of the Company on printed documents purporting to be a lease agreement. According to the Company, the agreement contained various blanks which were not filled in at the time when the document was signed and later on the figures were typed out in the blank spaces. It is also alleged that the petitioner is not a manufacturer or a supplier of the equipment covered by the agreement and, therefore, the agreement was a loan agreement hit by the provisions of the Usurious Loans Act, 1918. The Company also alleged that in view of the provisions of section 5 of the Punjab Relief of Indebtedness Act, 1934, an amendment has been made to section 3 of the Usurious Loans Act according to which interest over and above 12 per cent per annum in the case of unsecured loans is highly excessive and the Company is, therefore, relieved of all its liability over and above the interest at the rate of 12 per cent per annum. The Company has filed a suit in the District Court at Delhi which is pending. According to the Company, only a sum of Rs. 80,850 is due to the petitioner which it is willing to pay.

(5) Before proceeding further, it may be mentioned that the management of the Company was in the hands of Shri Anil Bajaj and Shri Ravi Bajaj and their relations/associates when the lease agreement (annexure P6 with the petition) was executed on 6th February, 1988 and the same was signed by Shri Anil Bajaj and Shri Ravi Bajaj on behalf of the Company. Thereafter, the Bajaj group divested itself of their interest in the Company and transferred the same in favour of Shri R. J. Ganguli and his relations/associates. By the time the present petition was filed, Shri R. J. Ganguli and his group had taken over the management of the Company and it is they who have filed the written statement. Execution of the agreement by Shri Anil Bajaj and Shri Ravi Bajaj on behalf of the Company in February, 1988 has not been disputed before me at the time of arguments.

(6) Now I will deal with the question whether the lease agreement was in substance a loan agreement as contended by the Company. If it is not, the question of it being hit by the provisions of the Usurious Loans Act as amended by the Punjab Relief of Indebtedness Act would not arise. It is well settled that in order to examine the nature of an agreement it must be seen as a whole and

its substance has to be looked at. The parties cannot insert words to defeat the real intention of entering into the transaction and it is only by examining the whole of the agreement that the substance can be ascertained. The Court is not merely to look at the document but it must discover what the real intention of the parties was. In *Sundaram Finance Ltd. v. The State of Kerala and another* (1), their Lordships of the Supreme Court observed that the true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the Court has the power to go behind the document and to determine the nature of the transaction whatever may be the form of the documents. Some of the observations of their Lordships may be quoted hereunder :—

“An owner of the goods who purports absolutely to convey or acknowledge to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped from proving that the real bargain was a loan on the security of the goods. *If there is a bona fide and completed sale of goods, evidenced by documents, anterior to and independent of a subsequent and distinct hiring to the vendor, the transaction may not be regarded as a loan transaction, even though the reason for which it was entered into was to raise money.* If the real transaction is a loan of money secured by a right of seizure of the goods, the property ostensibly passed under the documents embodying the transaction, but subject to the terms of the hiring agreement, which become part of the buyer's title, and confer a licence to seize. When a person desiring to purchase goods and not having sufficient money on hand borrows and pays it over to the vendor, the transaction between the customer and the lender will unquestionably be a loan transaction.” (Emphasis supplied.)

A loan agreement is normally one under which a loanee is required to repay the same to the lender according to the stipulations and in the manner contained in the agreement alongwith interest agreed upon between them. If the loanee purchases any goods/articles with that money, he remains the owner thereof though the goods may be pledged or hypothecated as a security for the repayment of

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(1) A.I.R. 1966 S.C. 1178.

the loan. The lender may even have the right to seize the goods but that is only with a view to ensure repayment of the loan. In a loan agreement, the lender never becomes the owner of the goods purchased by the loanee.

(7) In the present case, the petitioner is a leasing and hire purchase company. It is not a finance company as is clear from the objects mentioned in its Memorandum of Association. The Company approached the petitioner with a proposal to purchase the equipment from the suppliers and gave the specifications of the equipment in the proposal itself. The petitioner purchased the equipment and paid the price to the manufacturers. The equipment was supplied to the Company and before taking its delivery the Company satisfied itself that the equipment was in accordance with the specifications mentioned in the proposal form. The invoices issued by the manufacturers were in the name of the petitioner. A *bona fide* and complete sale took place and after purchasing the equipment the same was leased out to the Company on the terms and conditions mentioned in the lease agreement. This was an independent and a subsequent transaction between the parties. At no stage, did the Company become the owner of the goods and even on the payment of the entire lease charges and on the expiry of the lease period, the equipment would have reverted back to the petitioner. The Company never had the option to purchase the equipment. Keeping in view the detailed terms of the lease agreement as referred to in the earlier part of the judgment, the intention of the parties, in my opinion, is manifestly clear that the equipment was meant to be leased out to the Company and not that the Company was borrowing a loan from the petitioner as alleged. Two independent transactions took place—(1) purchase of equipment by the petitioner from the manufacturers and (2) subsequent lease of the same by the petitioner to the Company—and even though these transactions were entered into for the reason that the Company may not have had funds to buy the equipment, the subsequent lease transaction cannot in the circumstances be described as a loan. Since the subsequent transaction was a lease agreement, it is, therefore, not hit by the provisions of the Usurious Loans Act as amended by the Punjab Relief of Indebtedness Act. The contention advanced on behalf of the Company has, therefore, no merit.

(8) There is yet another aspect of the matter. The Company, as already observed, had defaulted in the payment of lease rentals and had, therefore, become liable to pay interest at the agreed rate of  $2\frac{1}{2}$  per cent per mensem which is being claimed by the petitioner as additional lease charges. At no stage prior to the filing of the

written statement did the Company dispute its liability to pay the amount as claimed by the petitioner in terms of the lease agreement. It is for the first time that the plea was raised in this Court that the lease agreement was in fact a loan transaction. No doubt, the Company has instituted a suit in the District Court at Delhi claiming that the lease agreement is in fact a loan agreement but that too had been filed only after the Company had been served with a statutory notice under section 434 of the Act. It can safely be presumed that the pleas sought to be raised by the Company are only an after-thought and a convenient way to wriggle out of its liability to pay the amount under the lease agreement. It appears that the Company had no funds to pay the amount due to the petitioner and the present pleas have been taken in the written statement only with a view to hide its inability to pay. The defence raised by the Company cannot therefore, be said to be *bona fide* and for this reason as well I hold that the Company is unable to pay its debts. The amount worked out and claimed by the petitioner under the agreement has not been disputed by the Company except on the ground that the interest claimed was excessive and, therefore, hit by the provisions of the Usurious Loans Act as referred to above. The amount due is admittedly more than Rs. 500 which the Company has on receipt of a notice neglected to pay or secure or compound the same to the satisfaction of the petitioner. It must, therefore, be held that the Company is unable to pay its debts.

(9) In the result, the petition is admitted. It is ordered to be advertised not less than 14 days before the next date of hearing in the official gazette of the State of Haryana and in one issue each of the Daily Tribune (English) and Jan Satta.

(10) To come up for further proceedings on 11th August, 1995.

J.S.T.

Before Hon'ble G. S. Singhvi & N. K. Sodhi, JJ.

BHIKKU RAM,—Petitioner.

versus

THE PRESIDING OFFICER, INDUSTRIAL TRIBUNAL-CUM-  
LABOUR COURT, ROHTAK & ANOTHER,—Respondents.

C.W.P. No. 11851 of 1994

28th November, 1994.

Industrial Disputes Act, 1947—Ss. 2(oo) (bb), 25-F & 25-G—  
Retrenchment—Interpretation of—Unfair labour practice—Applica-  
tion of Section 2(oo).