State Bank of India and others v Mallya

[2021] EWHC 191 (Ch), [2021] All ER (D) 119 (Feb)

Guarantee – Enforcement. The applicant's application for the release of certain funds that were being held with the Court Funds Office (the CFO money) succeeded in part. The Chancery Division held that it was appropriate to permit payment out of the CFO money regarding living expenses and past and future petition litigation costs. However, the applicant's claim for a validation order in respect of the costs of proceedings in India would be refused, and he would not be entitled to the costs of other legal proceedings.

Catchwords

Guarantee — Enforcement — Release of funds

Background

In January 2017, a judgment was given in favour of the petitioners in respect of a monetary claim pursued before the Debt Recovery Tribunal of Bangalore, India, for a sum of INR 62,033,503,879 (approximately £688m) (the DRT judgment). The debt was said to be due in respect of a personal guarantee provided by the respondent (M) in respect of certain company loans made by the petitioners to Kingfisher Airlines Ltd. In addition to M's personal guarantee, the petitioners also held a guarantee from another company owned and controlled by M (UBHL).

Steps were taken by the petitioners in India to enforce the security held by them and to attach the assets of M and UBHL. Proceedings were also instituted by the Indian government to declare M a fugitive economic offender under the Indian Fugitive Economic Offenders Act, so as to entitle the Indian government to seize M's assets (the FEO proceedings). M commenced three sets of proceedings in India: namely, to offer a settlement, to challenge aspects of the DRT judgment and to challenge attachment orders obtained by the Indian government under the Fugitive Economic Offenders Act.

Following registration of the DRT judgment as a judgment of the High Court under the Foreign Judgments (Reciprocal Enforcement) Act 1933, the petitioners obtained a worldwide freezing order in the English court in respect of M's assets (the WFO). In September 2018, the petitioners presented a bankruptcy petition against M in respect of the English judgment.

In June 2019, M sought orders pursuant to s 284 of the Insolvency Act 1986 (IA 1986) seeking, among other things, retrospective and prospective validation of legal fees and disbursements payable to his legal advisers, payment of living expenses and payment of a costs order due to the Crown Prosecution Service in respect of the extradition proceedings. In July 2019, a validation order was granted (the first validation order).

M applied for the release of certain funds that were being held with the Court Funds Office (the CFO money).

Issues and decisions

(1) Whether M's application regarding living expenses and past and future petition litigation costs succeeded.

The logical starting point was to determine whether a validation order was required or whether the expenditure remained within the ambit of the first validation order (see [23] of the judgment).

It was clear on the face of the first validation order that it did continue to apply to both living expenses and past and future petition defence costs. Accordingly, the court would proceed on the basis that a validation order was not required in respect of that aspect of the application (see [25] of the judgment).

The question was whether it was appropriate to permit payment out of the CFO money. It was liquid and readily available. On the evidence, the CFO money was the most appropriate source for payment of the transactions that had already been validated and the court would order accordingly (see [31] of the judgment).

In Re Sinclair (1885) 15 QBD 616 considered; *Debtor (No 490 of 1935), Re* [1937] Ch 92 considered; *Rio Properties Inc v Al-Midani* [2002] All ER (D) 135 (Oct) considered; *Masri v Consolidated Contractors (Oil and Gas) Company SAL* [2009] All ER (D) 56 (Feb) considered; *National Westminster Bank plc v Lucas; Estate of Jimmy Savile (deceased), Re* [2014] All ER (D) 92 (Mar) considered.

(2) Whether M was entitled to validation in respect of outstanding litigation costs due to two Indian law firms and a senior member of the Indian bar, totalling £555,680.60. He also sought future litigation costs in relation to one of the law firms and in respect of senior counsel totalling £203,200. It was established principle that the court would need to be satisfied by credible evidence that a debtor was solvent and able to pay their debts as they fell due, or that a particular transaction or series of transactions in respect of which the order was sought would be beneficial to or would not prejudice the interests of all the unsecured creditors as a class. Consideration was given to the exception to that rule in *In Re Sinclair* (1885) 15 QBD 616, for the provision of funding for legal representation to oppose the bankruptcy petition.

It was clear that the *Sinclair* exception was a limited exception only applying in respect of costs directly referable to the bankruptcy proceedings and not collateral litigation, notwithstanding that such litigation might have a bearing on the bankruptcy proceedings. Applying the *Sinclair* exception to validate funding in respect of such litigation would be an impermissible extension of the principle (see [39] of the judgment).

Accordingly, M's claim for a validation order in respect of the costs of the Indian proceedings would be refused (see [40] of the judgment).

In Re Sinclair (1885) 15 QBD 616 considered.

(3) Whether M was entitled to his costs in connection with the WFO proceedings, his unsuccessful opposition to extradition proceedings and an adverse costs order in favour of other companies (the Diageo entities) in respect of which an unless order had been obtained against the defendants.

The WFO costs, whether past or future, could not be said to fall within the ambit of the *Sinclair* exception. That being so, payment would simply serve to prefer one creditor over the general body of creditors in the event that a bankruptcy order was made in respect of M. His claim for a validation order in respect of the costs of the WFO proceedings would be refused (see [44] of the judgment).

There was little information regarding the extradition costs. Moreover, they were historic costs in respect of a failed defence and a validation order would simply prefer one creditor over the general body of creditors in the event that M was made bankrupt. M's legal advisers in respect of the extradition proceedings had to, or ought to, have appreciated that they were at risk of not being paid (see [47] of the judgment).

Whilst a party could apply for relief from sanctions, in the light of the evidence, coupled with the lack of any material supporting the proposition that the pursuit of the litigation would be in the best interests of M's creditors, the application for a validation order in respect of the Diageo entities would be refused (see [54] of the judgment).

In re Sinclair (1885) 15 QBD 616 considered.

Toby Frost, Barrister.

Judgment date

8 February 2021

Judge

Deputy Insolvency and Companies Court Judge Barnett

Representation

Philip Marshall QC and James Mather (instructed by Reynolds Porter Chamberlain LLP) for the Applicant/Debtor.

Tony Beswetherick (instructed by TLT LLP) for the Respondent/Petitioners.

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