Neutral Citation Number: [2021] EWHC 1312 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

The Rolls Building
7 Fetter Lane
London
EC4A 1NL

Date: 18 May 2021

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

(1) STATE BANK OF INDIA
(2) BANK OF BARODA
(3) CORPORATION BANK
(4) THE FEDERAL BANK LIMITED
(5) IDBI BANK LIMITED
(6) INDIAN OVERSEAS BANK
(7) JAMMU & KASHMIR BANK LIMITED
(8) PUNJAB & SIND BANK
(9) PUNJAB NATIONAL BANK
(10) STATE BANK OF MYSORE
(11) UCO BANK
(12) UNITED BANK OF INDIA
(13) JM FINANCIAL ASSET RECONSTRUCTION CO.PVT.LTD **Petitioners**

- and -

DR VIJAY MALLYA Respondent

- -

MARCIA SHEKERDEMIAN QC AND TONY BESWETHERICK (instructed by TLT LLP) for the PETITIONERS
PHILIP MARSHALL QC AND JAMES MATHER (instructed by RPC LLP) for the RESPONDENT

Hearing dates: 18 December 2020 and 23 April 2021

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:00hrs on 17 May 2021

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Chief ICC Judge Briggs:

Introduction

1. The Petitioners seek permission to amend the petition presented to the court on 11 September 2018. The petition debt is based on an unsatisfied demand for a judgment debt. The judgment debt presently stands at over £1bn.

Background in brief

2. Two previous judgments provide a full account of the background to the petition presented by the Petitioners. It is useful to (by borrowing from earlier judgments) provide a synopsis.

3. Dr Mallya is an entrepreneur businessman who had considerable financial success in India and other parts of the world. First, he was the chief executive officer and shareholder of Kingfisher Airways ("KFA") which formed part of United Breweries Group ("UBG"). Second he was also the controlling director and main shareholder in United Breweries Holdings Ltd ("UBHL") which had its headquarters in Bangalore. In 2003, Dr Mallya formed KFA as part of UBHL's expansion. KFA was initially a budget airline which had success flying international as well as domestic routes. It grew to have 25% of the Indian market.

4. The cost of aviation fuel rose in 2008, and the value of the rupee declined against the dollar. Dr Mallya decided to borrow substantial sums from some of the Petitioners.

5. KFA required 2000 Crores (approximately £266 million). Between April and November 2009, five of the Petitioner banks extended loans to the airline totalling 1250 Crores, but KFA needed more, and KFA reached an agreement with another bank to lend a further 750 Crores.

6. The lending did not resolve the difficulties for the airline and in 2010 a Master Debt Recast Agreement was agreed which converted some of the debt in KFA to equity. Despite further loans from the Petitioners KFA failed when the Directorate General of Civil Aviation suspended its operating license in late 2012.

7. Dr Mallya provided personal guarantees for the sums borrowed from the Petitioners in 2010. UBHL also provided a guarantee. On 19 January 2017, the Petitioners obtained a judgment against Dr Mallya, UBHL, KFA and another company, Kingfisher Finvest India Ltd, from the Debt Recovery Tribunal of Bangalore (known as the "DRT Judgment"), holding them jointly and severally liable for a sum of 6203 crores (approximately £688 million), and further interest accrued from 25 June 2013 (being the date proceedings in the DRT were issued).

8. The debt comprised principal and interest, plus compound interest at a rate of 11.5% per annum from 25 June 2013. Dr Mallya unsuccessfully tried to set aside the personal guarantee and disputed the rate of interest applied to the debt in the proceedings before the Debt Recovery Tribunal of Karnataka. I understand from counsel that Dr Mallya has made further applications in India in respect of the compound interest charge.

9. On 24 November 2017 the DRT Judgment was registered as a judgment of the High Court as against Dr Mallya under the Foreign Judgments (Reciprocal Enforcement) Act 1933. It is the registered debt that forms the basis of the petition debt.

10. The Petitioners served a statutory demand dated 20 July 2018, and this petition was subsequently presented on 11 September 2018. The Petition did not refer to any security held by the Petitioners.

The application

11. In a judgment handed down on 9 April 2020 the court found that the petition failed to disclose security that the Petitioners held or may have held. The Petitioners estimate that the value of that security is approximately £230 million against a significantly higher debt.

12. A failure to disclose the security (it was disputed that any security was held) constituted a breach of section 269 of the Insolvency Act 1986 (the "IA 1986") and Rule 10.9 of the Insolvency (England and Wales) Rules 2016 (the "Rules"). The question for the court was what were the consequences of the breach?

13. For reasons set out in my judgment dated 9 April 2020, I found that the consequences of the breach gave rise to limited prejudice to Dr Mallya. In short, Dr Mallya is a judgment debtor and had failed to pay the judgment debt for a number of years. The fact that there was a procedural error in the petition, did not alter his status as debtor. The defect in the petition was capable of cure. I adjourned to permit amendment.

14. The order following the hand down of judgment in April 2020 was not drawn until 4 May 2020. The form of order was that the "Petitioners shall have permission to amend the Petition to comply with the requirements of section 269 of the Insolvency Act 1986". This has sparked new challenges. First, it was argued that the court should take account of the assets of companies once owned and controlled by Dr Mallya over which the Petitioners have security. Dr Mallya contends that if the court takes account of those assets the Petitioners are fully secured, and the petition should be struck out.

15. In a judgment handed down on 22 July 2020, I found that as the term "security" is a specifically defined term in the legislation, the court should only take account of security held over assets of Dr Mallya: section 383(2) of the IA 1986.

16. The second challenge is before me today. It is said that the amendment permitted by the order of 4 May 2020 cannot be permitted because the Petitioners are constrained by the law of India and not able to release the security or any security they hold over the assets of Dr Mallya or the group of companies he operated. Accordingly, the Petitioners cannot, even if they wished to do so, comply with the statement on the petition; that they are willing to relinquish their security in the event that Dr Mallya is adjudged bankrupt.

17. The Petitioners and Dr Mallya subsequently served expert evidence of Indian law going to the question of whether it is open to the Petitioners to give up their rights of security, each adducing reports of a retired Justice of the Indian Supreme Court. By an order dated 20 November 2020, Deputy ICC Judge Barnett gave directions for the experts to attend the hearing on 18 December 2020 for cross-examination, as well as for a meeting to take place and a joint report to be prepared for that purpose.

18. At the hearing on 18 December 2020 both experts attended via Teams from India, gave evidence and were cross-examined. There was insufficient time for the parties to make their representations following the evidence and consequently the matter was adjourned part-heard to 23 April 2021.

The amendment is impermissible.

19. Dr Mallya argues that when one takes account of the principle behind the need to declare security held by a petitioner, the proposed amendment is impermissible as:

    19.1. it has gone outside of the permission granted;

    19.2. the amendment deprives Dr Mallya of a potential defence.

(i) The language of the amendment-an issue of form

20. The first of these relates to the wording of the amendment. The language used suggests that the Petitioners do not accept that they have security, but if they are secured, they will give it up if a bankruptcy order is made. The amendment reads:

> "By the judgment of Chief ICC Judge Briggs dated 9 April 2020 in these proceedings (BR-2018-001805) [2020] EWHC 9c (Ch) (the Judgment), it was found that we, the Petitioners, have security for the debt over Indian property of the Debtor. Without prejudice to our right to apply for permission to appeal (and if granted, appeal) the order made on 4 May 2020 consequential upon the Judgment, inter alia by reference to that finding (which is binding upon us), pursuant to Section 269(1)(a) of the Insolvency Act 1986, we will give up such security for the benefit of all the creditors of the debtor in the event of a bankruptcy order being made."

21. The language of the proposed amendment has been criticised. It is said to be self-contradictory and goes beyond the permission given to amend. In my judgment this is a matter of form rather than substance and as such, if I determine that the Petitioners are not constrained in the manner that has been argued, the court may direct the appropriate form of words to be used.

22. It is relevant to mention here that the Petitioners and Dr Mallya have sought permission to appeal against aspects of the 9 April 2020 Judgment and 22 July 2020 Judgment. I understand that Birss J (as he then was) refused permission to both parties but permitted the Petitioners to renew their application at an oral hearing. At the oral hearing Snowden J gave permission for an appeal to be heard on the issue of whether the Petitioners hold security over the assets of Dr Mallya. Miss Shekerdemian rightly accepts that permission does not mean that an appeal will succeed. The draft amendment is, she acknowledged, not suitable. The amendment should closely follow the language of the IA 1986.

(ii) Deprivation of a defence- an issue of substance

23. The second issue is one of substance and goes to the heart of this dispute.

24. As alluded to, it is said that substantial grounds exist for doubting whether the Petitioners could in fact give up their security (the "Surrender Issue").

25. Dr Mallya states there would need to be a *high degree of assurance* that the Petitioners could and would relinquish their security for the proposed amended statement in the petition to be true. If there is *a real risk* that the petitioner would not or could not do the promised act the amendment ought not to be permitted given the permanent prejudicial effect which could follow. The tests advanced appear to present a high threshold. For reasons that will become apparent the threshold test advanced is not relevant to the determination of this application.

26. Mr Marshall QC and Mr Mather argue:

    26.1. A petition could only properly contain an amendment of the type now proposed if the Petitioners are in fact willing to release their security.

    26.2. The Petitioners cannot waive or relinquish the security held as a matter of law.

    26.3. The Petitioners have obtained certain orders in the Indian courts on the basis that they have security over the assets of Dr Mallya.

    26.4. When obtaining those orders the Petitioners informed the courts that they were public bodies acting in the interests of the public.

    26.5. Indian public policy precludes the Petitioners from relinquishing their security.

27. The Surrender Issue breaks down into to a series of sub-questions that have been expanded upon in written and oral argument:

    27.1. It is argued that there is nothing in the legislature to say that a creditor may always relinquish security. The question that arises is, does the Indian legislature prevent the Petitioners from giving up security?

    27.2. Is there a public policy in India that prevents a waiver of security rights?

    27.3. *Res judicata*: has the issue of whether there is a public interest in the Petitioners' retaining the security, they represented (to the Indian courts) they held, already been subject to decision, such as to be *res judicata*? Dr Mallya relies on *Sennar (No 2)* [1985] 1 WLR 490 as summarised in the judgment I handed down in this matter on 9 April 2020 at [34-35].

    27.4. Are the Petitioners estopped from waiving (or otherwise relinquishing) security they informed the Indian courts they held?

    27.5. Can the Petitioners be permitted to approbate and reprobate?

28. These questions necessarily overlap but as they were argued separately, I shall deal with them in turn.

29. Two points of agreement may be discerned:

29.1. First, the Petitioners bear the burden of proving that the statements in the petition are true.

29.2. Secondly, the principle is that a creditor's petition can be presented in respect of a debt only if the debt is unsecured. The corollary of this is that secured creditors can only participate in a bankruptcy to the extent of the unsecured part of their debt, unless they are willing to give up their security for the benefit of the general body of creditors: *Promontoria (Chestnut) Limited v Bell* [2019] EWHC 1581.

The statutory provisions

30. The Petitioners and Dr Mallya relied on the Recovery of the Debts and Bankruptcy Act, 1993 (previously known as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the "RDBA" otherwise known as the "DRT Act") and the Provincial Insolvency Act 1920 (the "PIA 1920"). I set out here the provisions that are relied upon as this will assist in making sense of the evidence provided by the experts.

31. The short title to the RDBA (Act no. 51 of 1993) explains that it is:

> "An Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions, insolvency resolution and bankruptcy of individuals and partnership firms and for matters connected therewith or incidental thereto"

32. The RDBA has six chapters. Following the preliminary chapter, chapter II concerns the establishment of the debt recovery tribunal and an appellate tribunal. Chapter III concerns jurisdiction, powers and authority. By sections 17 and 18 of chapter III the tribunal is given exclusive (save for the Supreme Court and the High Court exercising powers under the Constitution) power to exercise:

> "and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions."

33. Chapter IV provides the procedure for making applications to the tribunal and the procedure to initiate appeals to the appellate tribunal. By section 3 of chapter IV an application for recovery "shall state the particulars of the debt secured by security interest over the properties or assets belonging to any of the defendants and the estimated value of such securities." Upon such an application being received by the tribunal directions are issued:

> "Restraining the defendant from dealing with or disposing of such assets and properties under clause (c) of sub-section (3A) pending the hearing and disposal of the application for attachment of properties."

34. Subsection 3A (c) of section 19 RDBA provides that the claimant bank may "seek an order directing the defendant to disclose" particulars of other assets he owns if the estimated value of securities is insufficient to recover the debt owed. The tribunal has the power to restrain the defendant from dealing or disposing of the assets that are

subsequently disclosed, and he is not permitted to "transfer by way of sale…except in the ordinary course of business…any of the assets over which security interest is created", without the approval of the tribunal. In certain circumstances the tribunal may:

> "order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favour or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt."

35. Chapter V concerns recovery of debts determined by the tribunal providing modes of recovery, including attachment and sale, possession of property over which a security interest "is" created, appointments of a receiver, and the arrest and detention in prison of a defendant debtor. Chapter VI contains miscellaneous provisions including a power to make rules and section 31B which provides:

> "Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority."

36. The PIA 1920 was a consolidating act relating to the law of insolvency with seven parts. Part I deals with the constitution and the courts having jurisdiction under the Act, acts of bankruptcy, presentation of petitions (including subscribed parts), challenges to the petition, the hearing of the petition and consequential orders upon the adjudication of bankruptcy. Section 7 provides:

> "Subject to the conditions specified in this Act if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by the debtor, and the Court may on such petition make an order (hereinafter call an order of adjudication) adjudging him an insolvent."

37. Section 8 is an exemption section preventing the presentation of a petition against a company or association registered under an Act. Section 9 provides the conditions for a creditor petition:

> "(1) A creditor shall not be entitled to present an insolvency petition against a debtor unless-"
>
> (a) The debt owing by the debtor to the creditor or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts to five hundred rupees; and
>
> (b) The debt is a liquidated sum payable either immediately or at some certain future time; and

> (c) The act of insolvency on the petition is grounded has occurred within three months before the presentation of the petition [Provided that where the said period of three months referred to in clause (c) expires on a day when the Court is closed, the insolvency petition may be presented on the day on which the Court re-opens].
>
> (2) If the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor.

38. Part II mostly concerns pre-adjudication issues but also provides for procedures to obtain a protection order (from arrest and detention), annulment, scheme of arrangement or composition following adjudication and discharge.

39. In contrast to Part II, Part III of the PIA 1920 mostly deals with post-adjudication matters such as proof of debts, dividends and antecedent transactions. Section 47 PIA 1920 provides:

> "(1) where a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.
>
> (2) Where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for his whole debt.
>
> (3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.
>
> (4) Where a security is so valued, the Court may at any time before realisation redeem it on payment to the creditor of the assessed value.
>
> (5) Where a creditor, after having valued his security, subsequently realises it, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

> (6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend."

40. Parts IV sets out penalties and Part V a summary form of administration where the property of the debtor is deemed to be below 500 rupees. Part VI provides an appeal procedure for any creditor, receiver or "aggrieved" persons. The last Part concerns miscellaneous matters including the costs of proceedings "including the costs of maintaining a debtor in the civil prison."

41. Having set out the relevant provisions within the RDBA and PIA 1920 I turn to the expert evidence on the Surrender Issue.

The evidence

(i)overview

42. Dr Mallya called Justice Verma to give evidence as to whether the Petitioners are able to relinquish security held over Dr Mallya's assets in India. The Petitioners called Justice Gowda.

43. Justice Verma and Justice Gowda undoubtedly did their best to assist the court with the Surrender Issue. At times, the evidence was not as clear as it could have been. This was partly due to a misunderstanding of the question and partly because of technology issues.

44. Although the evidence was given in December 2020 with submissions being made some four months later, I took notes of the evidence at the time and kept a record of the distinction I had made between the two experts.

45. The parties conducted cross-examination by reference to Indian statutes and decided cases. Justice Verma relied on the Section 31B RDBA whilst Justice Gowda referred to the importance of the PIA 1920. Justice Verma explains in his fifth report that the issue concerns "Section 31B of the DRT Act and whether the Petitioner Banks' can indeed simply waive their statutory rights under it". His reports go onto explain that the assertion of rights under the section precludes waiver.

(ii) The evidence of Justice Verma

46. The starting point for Justice Verma is that the Petitioners hold security and have held out that they hold security over the assets of Dr Mallya. Justice Gowda is not so sure and thinks that the courts in India may have made an error. In his fourth report Justice Verma states that Justice Gowda's opinion that the Petitioners do not have security is thin:

> "Justice Gowda accepts that the findings in the DRT Judgment itself appear to have led to the Singh Judgment's finding on the security enjoyed by the Petitioner Banks. Justice Gowda has, however, sought to explain this away at paragraph 66 of his Report as a 'stray observation/finding'. If it was a 'stray finding', it was a 'finding' nevertheless by a competent Court of law. Once again, the Petitioner Banks have taken no steps to modify or review the DRT Judgement in this regard."

47. In the opinion of Justice Verma the "Singh Judgement is judicial fact."

48. In all Justice Verma has produced 5 expert reports. In his first report Justice Verma opined that a settlement offer made by Dr Mallya, put before the Supreme Court of India for approval, was procedurally correct and stood a reasonable prospect of success. In his second report he opined that Dr Mallya's challenge to the compound interest accrual issue: "having been filed under Article 226 of the Constitution of India" was sustainable and there was "a reasonable prospect of the Karnataka High Court passing an appropriate Order in respect, inter alia, of the principal relief sought by Dr Mallya". He explained that Dr Mallya had been prevented from repaying the sums due to the Petitioners by the actions of the Enforcement Directorate:

> "On 11 June 2016, the Enforcement Directorate in Mumbai (a law enforcement agency that forms part of the Department of Revenue of India's Ministry of Finance) issued a Provisional Order of Attachment, which was confirmed by an order of 1 December 2016, principally over assets of UBHL under the Prevention of Money Laundering Act 2002. A further Provisional Order of Attachment was made on 3 September 2016, attaching personal assets of Dr. Mallya, UBHL and of six private limited companies owned and/or controlled by the family member of Dr Mallya."

49. And that the Enforcement Directorate acted on a request made by the Petitioners:

> "The Enforcement Directorate at the behest of the Petitioner Banks has attached the assets of, inter alia, Dr. Mallya and UBHL long prior to the DRT Judgement and rendered it impossible for Dr. Mallya and UBHL to make any payments to the Petitioner Banks under the subsequent DRT Judgment or otherwise. In my opinion no litigant can be subject to double jeopardy. A petitioning party cannot directly or indirectly incapacitate a defendant and then try not only to take advantage of such incapacity on the part of the defendant but base an entire claim on the non-adherence of the defendant due the incapacity so inflicted" (sic)

50. His third report dealt with the Surrender Issue. First, he provides the background to the actions taken by the Petitioners in India:

> "It was also on 1 October 2018 that the DRT Recovery Officer, on his own volition, moved an application before the Karnataka High Court seeking to implead himself in UBHL's Appeal against Winding Up. Pertinently, on 19 March 2019, the Karnataka High Court passed an Order in UBHL's Appeal against Winding Up allowing the DRT Recovery Officer to sell 74,04,932 equity shares of and in United Breweries Limited (a publicly listed company) owned by UBHL and as per a Sale Notice dated 11 March 2019 issued earlier by the DRT Recovery Officer. The permission so granted by the Karnataka High Court to the DRT Recovery Officer enabled the Officer to

proceed with the sale of 74,04,932 equity shares of and in United Breweries Limited (a publicly listed company) owned by UBHL, fetching approximately INR 1,008 Crores, paid to the account of the DRT Recovery Officer. For details as to the debt recovery process and the role of the DRT Recovery Officer under the Recovery of Debts and Bankruptcy Act, 1993 ("ORT Act") (and the Rules and Regulations thereunder) I would draw attention to paragraph 3.3 of the expert Report of Mr Justice Pana Chand Jain dated 05 March 2018.

Focussing once again on the Appellate Tribunal, PMLA, on 10 October 2018, the Petitioner Banks were granted a favourable Order from the Appellate Tribunal, PMLA in their appeals (i.e. Petitioner's PMLAT Appeals) whereby Dr. Mallya and the Enforcement Directorate were specifically ordered by the Appellate Tribunal, PMLA to 'maintain the status quo with regard to the properties'. I am informed that the status quo ordered by the Appellate Tribunal, PMLA by its aforementioned Order dated 10 October 2018 has been periodically extended by orders of the Appellate Tribunal, PMLA and is operational till date, with the Tribunal next slated to hear the Petitioner's PMLAT Appeals on 28 July 2020. Further, on or around 8 January 2019, the Petitioner Banks filed an application (being Crim. Misc. Appl. No. 58 of 2019 in ECIR No. ECIR/03/MBZ0/2016) ('Special Court Application') under Section 84 of the Code of Criminal Procedure, 1973 ("CrPC") before the Special Judge at Greater Bombay, designated as Special Court under the Prevention of Money Laundering Act, 2002 ('Special Court, PMLA') praying that the Special Court, PMLA consider the claim of the applicants' therein (i.e. the Petitioner Banks) and raise attachment on the assets of Dr. Mallya levied vide an earlier Order dated 10 November 2016 passed by the Special Court, PMLA (in Cri. Misc. Application No. 19 of 2016) and restore the assets to the Petitioner Banks. Pertinently, in the Special Court Application the Petitioner Banks have stated on oath as follows:

21. The Applicants, barring Applicant No. 12, are Public Sector Institutions and the amounts sought to be recovered is public money. The Applicants by initiating the action are only safeguarding public interest and hence the Applicants are within the right to enforce their dues;

22. The rights of the Applicant, who are secured creditors, to recover their dues would take precedence over the state's right to attach the assets on Dr. Mallya being declared a proclaimed offender."

51. Secondly, he draws on this factual matrix to summarise:

> "Based on the above, the Petitioner Banks conclude in ground 'g)' that they are approaching the Appellate Tribunal, PMLA as 'secured creditors' having and invoking their statutory right of 'precedence' under Section 31B of the amended DRT Act. It is of significance to note that based on similar contentions regarding the Petitioner Banks being 'Public Sector Institutions', safeguarding 'public interest' and being 'secured creditors', the Petitioner Banks have been granted a favourable order (i.e. Order dated 31 December 2019) from the Special Court, PMLA in their Special Court Application."

52. Thirdly he opines that the:

> "Petitioner Banks having already explicitly relied on and been granted favourable orders in India based on invocation of their statutory right under [section 31B of the Recovery of Debts Due and Financial Institutions Act 1993], acting to further the public interest, the Petitioner Banks could not now simply give up their security in India. It was and still is my considered opinion, that the stand now taken by the Petitioner Banks in their Amended Petition would amount to the Petitioner Banks – 'Public Sector Institutions' dealing with 'public money' - attempting to waive their statutory rights, after having expressly relied upon and advanced these statutory rights to secure favourable orders."

53. In his opinion as "a matter of Indian law such statutory rights cannot be waived, especially when they affect the larger public interest."

54. Justice Verma places particular weight on the status of the Petitioners as "Public Sector Institutions" and that they have acted or purport to act in the "public interest".

55. He refers to four Indian authorities to support his proposition that the public interest is an important factor and will prevent the Petitioners from waiving the security in the present circumstances. The authorities, says Justice Verma, demonstrate that where the courts find that public policy is engaged, a party claiming to hold security cannot waive it. It follows that the Petitioners may not relinquish their security for the benefit of all creditors.

56. He relies on the section 19(22) of the DRT Act which provides a debt collection mechanism whereby a certificate is issued, and a recovery officer appointed to collect the debt. This is not advanced with great force, but Justice Verma explains that it casts doubt on the ability of the Petitioners to conform with section 269 IA 1986 as the enforcement of the debt is "vested" in the recovery officer. Curiously, the provision relied upon does not use the noun used by Justice Verma nor can it be readily implied. A purposive reading of the provision leads me to conclude that a certificate enables the initiation of insolvency proceedings. In any event, in cross-examination he accepted it does not prevent the Petitioners from "giving up" their security.

57. Justice Verma gave honest testimony accepting the following in cross-examination:

57.1. The purpose of the RDBA is to enable the recovery of due debts;

57.2. It does not prioritise the Indian Banks. It is not concerned with security expressly held by an Indian Bank;

57.3. The RDBA is applicable to public and private banks alike and does not prevent a public bank surrendering security;

57.4. When referring to public law he was referring to the priority rights evident from a plain reading of section 31B RDBA; and

57.5. Section 31B RDBA is about priority.

58. Justice Verma was asked what he meant about the "public interest" and "public money". He accepted that the act of collecting in a debt was a "commercial act" and "it was for the benefit of the bank only":

> Q. why put public money in inverted commas, as a matter of public law…what public law?
>
> A. I don't say so, these are the rights that have accrued under the DRT.
>
> Q The public interest is not identified?
>
> A. It is public money
>
> Q. It is in the public interest for commercial banks to exercise their own commercial wisdom?
>
> A. Yes, it is.
>
> Q. It is a matter of commercial wisdom to do what it likes with its security?
>
> A Yes provided it is lawful- they have to follow their procedure as prescribed in the Act.
>
> Q You are talking about the procedure as in the DRT Act?
>
> A Yes, the banks obtained a judgment in their favour under the provisions of the DRT Act 1993.

59. He was asked what the Petitioners were estopped from doing. Referring to the security he responded:

> "they are precluded from prosecuting two different matters at two different times unless they have relinquished- I am pointing out that they have not relinquished."

60. It appears that the opinion of Justice Verma differed depending upon whether security had been relinquished. I take from this evidence that consistency of approach was the key

factor. If the Petitioners had not asked the Indian courts to take priority over other creditors on the basis that they are secured, there would be no difficulty in giving up any security. That is a curious proposition as a party can only relinquish something if they have rights to give up in the first place. He was later tested on his understanding of the PIA 1920 and in particular, sections 9-11.

61. He was asked how the Indian statutory provisions prevented a secured creditor from surrendering its security. Justice Verma was clear that nothing prevented them: "provided that sections 7 and 9 are satisfied". The questioning went deeper:

> Q. There is no rule of public policy that prevents [the Petitioners] from giving up their security rights?
>
> A. Provided, it is as to the law- section 7 and 9 of the Provincial Insolvency Act 1920 is important…
>
> Q. Look at section 47(2). It is recognition that a bank can give up security isn't it?
>
> A. Yes, as long as the provisions are followed.

62. It appeared at one stage, from his oral evidence, that Justice Verma was operating under a misunderstanding that the Petitioners had been paid in full. That may have coloured his view of the operation of an estoppel or waiver in this case, it is not clear. He later accepted there was no general public law that would prevent the Petitioners from giving up security.

63. When asked about the basis of the waiver argument Justice Verma said that Dr Mallya had relied on the representations made by the Petitioners in the Indian Courts, that they held security, when agreeing to provide a personal guarantee: they had "permitted him to believe a thing to be true and to act upon such belief". This is an example of Justice Verma trying to assist the court but not having the requisite knowledge of the facts to provide evidence. He accepted that he knew of no representation made by the Petitioners that they would not rely on their security. It is of some note that the personal guarantee was provided years prior to the DRT Judgment. His approach to giving evidence, as demonstrated by this example, leads me to treat it with some caution.

(iii) The evidence of Justice Gowda

64. Justice Gowda says that Justice Verma fails to have regard to the PIA 1920, Companies Act 1956, or the Insolvency and Bankruptcy Code, 2016. In short, his evidence is that the Companies Act 1956 recognised the right of secured creditors to relinquish their security and informed the Insolvency and Bankruptcy Code 2016. He particularly relies on section 47 of the PIA 1920 which enables secured creditors to "realize or relinquish their security for the general benefit of other creditors". His argument is attractively simple. Where a statute permits a bank to relinquish security it holds, it is constitutionally permitted to do so unless the legislation is revoked. He explains that the highest courts in India:

> "accorded primacy to the commercial wisdom of Banks in making apposite decisions in such matters. Arguably, Banks as public institutions in charge of public money would exercise

> the choice vested in them under the applicable insolvency laws by being sagaciously informed by commercial wisdom that would ensure the best possible rate/quantum of debt recovery in the prevailing circumstances…Notably, the Provincial Insolvency Act, 1920 still holds the field and has not been repealed yet insofar as individual bankruptcies in India are concerned as the provisions of the 2016 Code in this regard have not yet been brought into force. The right of a secured creditor to choose to realize or relinquish security has been consistently recognized since the Provincial Insolvency Act, 1920"

65. Justice Gowda was first asked about his instructions and to agree that the Indian court had regarded the dispute between the Petitioners and Dr Mallya as involving a substantial "amount of public money". He responded that the public money is so called because it is money provided by customers of the bank when making deposits. He did not think that the recovery of the money lent to Dr Mallya was a matter of public interest save that it involved ensuring that the depositors did not suffer. He thought that the term 'public money' was unfortunate and it was better to describe money lent by the banks as money of the public as provided by depositors. The term 'public money' would be better used to describe money raised by taxes and used by the government for public purposes. He explained that not all the banks are nationalised.

66. Justice Gowda was taken to paragraph 7.2.8 of the third report provided by Justice Verma. It was put to him that the underlying principle of waiver, as is expounded *All India Power Engineer Federation v Sasan Power Ltd* (2017) 1 SCC 487 represented the law in India.

67. He responded:

> "I cannot say this is a current statement of law.
>
> My view is that section 47(2) of the PIA 1920 provides that the secured creditor may relinquish security.
>
> Even though there are a number of judgments which said that the Banks are secured this section does not prevent the bank from relinquishing the security."

68. He was pressed on the matter and responded:

> "It is not too late to give up the security even if a party relies on it for other reasons. There is no estoppel in law, as the rights are enshrined in statute."

69. He disagreed that any estoppel applied and referred to section 47 of the PIA 1920.

70. His evidence was straight forward and reliable.

Petitioner's right to relinquish security- a question of statute.

71. As I have mentioned Justice Verma's evidence is that "Section 31B of the DRT Act" inhibits the Petitioners from "simply waiv[ing] their statutory rights under it". In my judgment there is nothing in the RDBA or PIA 1920 that precludes the Petitioners from releasing their security. I do not accept the argument advanced that as the RDBA does not expressly provide that the Petitioners may give up their security there is a bar from doing so. I see no reason, and no reason has been advanced, that the entirely general words of the section should be read restrictively. I accept the evidence of Justice Gowda that the statutory provisions create no bar. Justice Verma's evidence that section 47(2) PIA 1920 is subject to the fulfilment of sections 7 and 9 does not disturb my finding that a secured creditor may relinquish security held.

72. It is true that there will be no insolvency proceeding unless the "debtor commits an act of insolvency", that a creditor's petition needs to be for a liquidated debt payable immediately or at some point in the future, and that section 9(2) provides that a secured creditor must state his security in the petition and either value it or provide a statement that he is willing to relinquish it.

73. None of those matters detract from the proposition that the Petitioners are able, if they are willing, to relinquish any security they hold on an adjudication of bankruptcy. Similarly, the priority section 31B RDBA is not subject to any other statutory provision. It does not fetter the right of the Petitioners to relinquish any security. It maybe that section 47(2) PIA 1920 concerns the consequences of relinquishment, "he may prove for his whole debt", but that consequence can only arise in circumstances where "a secured creditor relinquishes his security for the benefit of the creditors".

Petitioner's inability to relinquish security- public policy

74. Justice Verma turns to the common law to make good his opinion that public policy prevents the Petitioners from relinquishing any security they may hold: there is a principle of Indian law that the waiver of a statutory or non-statutory right affecting a public interest is impermissible.

75. The authorities relied upon by Justice Verma, are as follows:

    75.1. *Waman Shriniwas Kini vs. Ratilal Bhagwandas and Co*. [AIR 1959 SC 689;

    75.2. *Dhirendra Nath Goari v. Sudhir Chandra Ghosh* [AIR 1964 SC 1300];

    75.3. *Lachoo Mal v. Radhey Shyam* (1971) 1 SCC 619; and

    75.4. *All India Power Engineer Federation v Sasan Power Ltd* (2017) 1 SCC 487

76. The Petitioners and Respondent subsequently made submissions on the effect of the authorities.

77. Mr Marshall submitted that the English court is entitled to interpret the cases without expert evidence. In my judgment it remains useful to understand the principle the experts seek to tease out of the authorities. In his third report Justice Verma relies on [7.2.6] *Waman Shriniwas Kini* as authority for the proposition that a right conferred by statute may not be waived if the right is conferred in the public interest. Particular reliance is

placed on paragraphs 13 and 15. Paragraph 13 explains the question for the Supreme Court:

> "In the instant case the question is not merely of waiver of statutory rights enacted for the benefit of an individual but whether the Court would aid the appellant in enforcing a term of the agreement which Section 15 of the Act declares to be illegal by enforcing the contract the consequence will be the enforcement of an illegality and infraction of a statutory provision which canoe be condoned by any conduct or agreement of the parties."

78. Reference is made to two other cases: *Dhanukudhari Sing v Nathima Sahu* (1907) II CWN 848,852 and *Norwich Corporation v Norwich Electric Tramways Company* [1906] 2 KB 119. These cases state that a waiver of a statutory right is not favoured and will be struck down if the waiver is against public interests. That is a different proposition to that advanced by Justice Verma.

79. The principle that a party may waive a provision agreed between parties in a private law capacity but not where a right is conferred in the public interest is illustrated in *Waman Shriniwas Kini*. A tenant had protection under landlord and tenant legislation. The landlord wanted possession to redevelop the building. The tenant agreed to give up his occupation on the basis that he could occupy similar space nearby. The tenant had previously sub-let part of the premises that was to be redeveloped. The landlord agreed that he would continue to have the right to sublet in the replacement premises. The main issue was whether the landlord could repossess the new premises on the ground that the tenant had sublet. The court found that section 15, Bombay Hotel and Lodging Houses Rates Control Act 1947 constituted a non obstante clause. Section 15 prohibited subletting. Consequently, notwithstanding any agreement to the contrary it was not permissible to rely on an agreement between landlord and tenant, that the tenant could sublet. The finding that the bar to subletting was contained in a non obstante clause is critical, in my judgment, to an understanding of the case. In my judgment to pick out passages and contend that they are of general principle is to risk taking those passages out of context, and likely to lead to a misunderstanding of the law. Section 15 of the Bombay Hotel and Lodging Houses Rates Control Act 1947 imposes a statutory restriction on activities overriding other provisions making waiver impermissible; by contrast section 31B of the DRT Act concerns priority afforded to secured creditors.

80. *Dhirendra Nath Goari* concerned a mortgagor's right to sell mortgaged property to obtain satisfaction in respect of secured debts. The mortgagee challenged a sale of the mortgaged property on the grounds that the sale was vitiated by reason of an infringement of section 35 of the Bengal Money-Lenders Act, 1940. The question for the court was whether the sale was a "nullity" or an "irregularity". It was found that the distinction could be determined by asking whether the party could waive the objection. It was found that a party could not waive an objection to jurisdiction "for consent cannot give a court jurisdiction where there is none". The Judge in *Dhirendra Nath Goari* explains that the court assumed section 35 was a mandatory provision. It followed that the court had to consider whether the section was intended to protect the interests of the public. It was found that it was not. It was intended to protect the interests of a judgment-debtor. As such the judgment-debtor was entitled to waive the requirement of section 35 of the Bengal Money-Lenders Act 1940.

81. Two comments may be made. First, section 31B is a priority section giving secured creditors priority over "all other debts". It is a provision that protects the bargain reached by a secured creditor with the debtor. As such it is not understood to protect the public interest. Justice Verma was not able to explain how or why section 31B protected the public interest. Secondly, section 31B raises no question of "nullity" or "irregularity". It concerns vindication of proprietary rights. It provides no bar to waiver.

82. A bar to waiver was a matter considered in the *Lachoo Mal* case which concerned protection afforded to tenants under section 3 of U.P (Temporary) Control of Rent and Eviction Act 1947. The tenant occupied a shop and the landlord wanted possession for construction purposes. They reached an agreement that the tenant would vacate until the construction was complete and then resume possession of the shop. The court found that there was no bar to making the agreement as it was not illegal, nor contrary to public policy, it did not involve or imply injury to a person or property, did not defeat the provisions of any law nor was it otherwise forbidden by law. The waiver of security rights does not defeat the provision or purpose of section 31B RDBA. The Petitioners will simply be put into a position where they will not take priority over other creditors as they will be treated as unsecured.

83. *All India Power Engineer Federation* is another example of the court finding that a statutory provision had been implemented as a matter of public policy. The provision under examination was section 63 of the Electricity Act which was a non obstante clause. The court explained [20]:

> "It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to public policy."

84. That maybe taking the principle too far as the court in *Dhirendra Nath Gorai* pointed out: many provisions are conceived in the interests of the public but not all are intended to protect the public. Having found that section 63 was a non obstante clause the commission had to adopt the statutory tariff where the tariff had been determined through a transparent process of bidding in accordance with government guidelines. Section 63 protected the public from paying too much for electricity.

85. The parallels between the above cases and the present one are difficult to draw. I have no doubt that public policy was involved in drafting section 31B RDBA to encourage lending to businesses by permitting secured creditors to take priority over other creditors, including government bodies. However, the protection afforded is to secured creditors and not the public at large. There is nothing within the provision or the PIA 1920 that bars a waiver of security rights; indeed it expressly contemplates such waiver. As Justice Gowda pointed out section 9(2) uses very similar language to section 269 IA 1986: "if the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of creditors in the event of the debtor being adjudged insolvent…" It does not prevent a secured creditor who is a public body or has public shareholders, who once asserted the security, from relinquishing. The only consequence of relinquishment is that it would lead a creditor, who once had a proprietary interest in the property of the debtor, and stood first in the queue for payment, to join the general pool of creditors: in my judgment that is not contrary to public policy: section 47 of PIA 1920.

Res judicata

86. I have mentioned that in the opinion of Justice Verma the "Singh Judgement is judicial fact." His opinion related to the issue of whether the Petitioners held security. Dr Mallya argues that by the representations made by the Petitioners in the Indian courts and the judgments given the Petitioners cannot deny that they are public bodies, holding security and act in the public interest. Reliance is made on the following:

    86.1. In the DRT judgment the court found that the Petitioners were:

> "Not only … dealing with public money, but it was also the defendants 1 to 3, who knowingly availed public money from the Banks with a promise to repay the same. It is the bounden legal duty of the banks and the borrowers to ensure that such loans are properly secured…The second and third defendants cannot expect the banks to give away public money as loans to them without even guarantee from them for the repayment in addition to other loan securities…In fact, the banks will be failing in their legal and public duty in discharging of their functions if such guarantees are not obtained."

    86.2. In his judgment, Justice Singh also spoke of the "public sector banks" and "public monies".

    86.3. Before the Special Court at Bombay the Petitioners submitted that they represent:

> "…Public Sector Institutions and the amounts sought to be recovered is public money. The [Petitioners] by initiating the action are only safeguarding public interest and hence the [Petitioners] are within the right to enforce their dues"

87. It can be said about these submissions and the subsequent rulings, that the Petitioners were asserting security rights and seeking to obtain priority over other creditors. It may be said that the Petitioners made an averment that as publicly owned banks, any losses suffered would be suffered by the public (the state holds the share capital in the banks).

88. How then can these matters said, and judgments relied upon give rise to *res judicata*? It is perhaps worth setting out what is meant by *res judicata*: "A *res judicata* is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes, once and for all, of all the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment. A party to a *res judicata* will be estopped, as against any other party, from disputing the correctness of the decision, except on appeal": *Allsop v Banner Jones* [2020] EWCA Civ 7.

89. Once accurately described it is readily apparent that *res judicata* cannot succeed as an argument. The submissions made by the Petitioners at hearings in India do not constitute "a decision pronounced". The judgments relied upon do not dispose of the fundamental matters to be decided on this application.

90. The specific argument advanced by Dr Mallya relied on *The Sennar (No 2)* [1985] 1 WLR 490. It does not advance the case of *res judicata*. In that case Lord Brandon [at page 499] explains that there are three elements to estoppel that need to be satisfied. The third requirement "is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action".

91. For the reasons I have given, in my judgment, reliance on *The Sennar (No 2)* does not assist as:

    91.1. it cannot be said the issue in this application, in which the estoppel is said to give rise to a bar, is the same issue as that decided by any of the judgments in the earlier actions;

    91.2. the assertions made at hearings are not judgments (and certainly not final decisions) of the court; and

    91.3. in any event asserting security rights in India is consistent with an application to amend to disclose the security and waive it for the general body of creditors.

Estoppel

92. I have mentioned the cross-examination concerning the raising of an estoppel. Justice Verma candidly explained that the estoppel arose because Dr Mallya agreed to provide a personal guarantee in 2010. In short there is no evidence from Dr Mallya that he relied on any representations that give rise to an estoppel to the effect that the Petitioners cannot relinquish their security. He could not have done so when agreeing to enter the personal guarantee in 2010. Accordingly, the defence of estoppel fails on the facts.

93. In any event, I prefer the evidence of Justice Gowda given in cross-examination that it is "not too late to give up the security even if a party relies on it for other reasons. There is no estoppel in law, as the rights are enshrined in statute." A simple example helps. A secured creditor may have security over different property interests of a debtor. The creditor may seek to appoint a receiver who in turn seeks, under powers provided to him, to assert security rights. The receiver may even assert such rights in court. By acting upon such rights, there is nothing to preclude the secured creditor from relinquishing security in the event of a bankruptcy. There is no inconsistency with acting on the security held at one point in time and relinquishing the security at another in the event of an insolvency. I accept the evidence of Justice Gowda that a clear statutory provision would be required to prevent a secured creditor, whether that be a private of public body secured creditor, from exercising rights pursuant to section 47 PIA, 1920.

Approbate and reprobate

94. The submissions are of a similar nature to the estoppel arguments advanced. The Petitioners cannot say one thing in one set of proceedings between the same parties and say the opposite in these proceedings. In other words, the Petitioners may not approbate and reprobate. It does not follow that the Petitioners cannot relinquish their security if that is what they chose to do. There is no inconsistency of approach. The amendment to be made is, if anything, entirely consistent with the contentions previously made that the Petitioners hold security over the assets of Dr Mallya.

95. None of the authorities relied on to support the proposition that the Petitioners cannot waive the security on public policy grounds, relate to section 31B RDBA or support such a proposition. They are taken out of context. I find that the opinion given by Justice Verma at paragraph 7.2.10 and 7.2.11 of his third report is not based in law or supported factually.

Conclusions

96. In answering the questions posed by this application:

    96.1. There is nothing in the Indian legislature that states that a creditor may always relinquish its security. It is seldom the case that a statute would expressly state that a right may be exercised no matter what the circumstance, and the absence of express words to state that the right is always exercisable is insufficient to conclude that the Petitioners may not do so in the event of a bankruptcy order being made. There is nothing in the statutory provisions that prevent the Petitioners from giving up security;

    96.2. There is no public policy that prevents a waiver of security rights. The authorities cited do not support a public policy that blocks a waiver. If such an authority did exist (which it does not) it would be inconsistent with section 47(2) PIA, 1920;

    96.3. There has been no decision in the Indian courts that gives rise to a r*es judicata*. At its highest, the Indian courts have found that the Petitioners have security over the assets of Dr Mallya. The issue in this action is not the same issue as that decided in the earlier Indian actions;

    96.4. The Petitioners are not estopped from waiving (or otherwise relinquishing) security asserted in the Indian courts. I accept the evidence of Justice Gowda given in cross-examination that it is "not too late to give up the security even if a party relies on it for other reasons. There is no estoppel in law, as the rights are enshrined in statute.";

    96.5. There is no question of the Petitioners seeking to approbate and reprobate. There is no inconsistency of approach.

97. In my judgment the simple stance taken by Justice Gowda that section 47 PIA 1920 is evidence of the ability of a secured creditor to relinquish the creditor's security is to be preferred. The language of the provision is not cut down to prevent the Petitioners from taking advantage of it if they believe it to be in their best interests. Justice Verma's own evidence, which I accept, is that there is no difference between private and public security holders.

98. There is no rule, statutory provision or non-statutory authority to support the position contended for by Justice Verma namely, the Petitioners cannot relinquish their security under Indian law because of the engagement of a principle concerning public interest.

99. The evidence of Justice Verma that the Petitioners could and are entitled to act in their own commercial best interests is not in dispute. The entitlement is inconsistent with the Petitioners being barred from relinquishing security when they calculate it to be in their commercial interests to do so.

100. I order that permission be given to amend the petition to read as follows: "The Petitioners having the right to enforce any security held are willing, in the event of a bankruptcy order being made, to give up any such security for the benefit of all the bankrupt's creditors".

101. I invite the parties to agree an order and fix a hearing to determine any matters arising.