



Neutral Citation Number: [2020] EWHC 1981 (Ch)

Case No: BR-2018-001805

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: 22/07/2020

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

Hearing date: 7 July 2020

Approved Judgment

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.

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 12.30 on 22 July 2020.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. Dr Vijay Mallya is a judgment debtor. This hearing follows the handing down of my earlier judgment ([2020] EWHC 96) (the “First Judgment”) adjourning a petition presented on 11 September 2018 seeking an adjudication of bankruptcy. Save for the 13th petitioner, all petitioners are state-owned Indian banks. The 13th petitioner is an asset restructuring company that purchases debt.
2. The hearing of the petition took place on 10 and 11 December 2019. The First Judgment was circulated soon after vacation in January 2020. Due to the availability of the parties it was not immediately handed down. In the meantime, Dr Mallya made written representations to the court that the petition should be dismissed on the basis that the petitioners are fully secured for their combined debt. The decision hearing was eventually listed for 2 April 2020 but adjourned due to the Covid-19 pandemic. At the time it was not known when a further hearing could be listed to accommodate the parties. A postscript was added to the First Judgment:

61. This judgment was produced in December 2019 and circulated in January 2020. Handing-down was adjourned for further argument, at the request of the parties. The parties agreed to a hearing after 1 June 2020. The outbreak of Covid-19 has made fixing a date uncertain. In my judgment it is in the interests of the administration of justice and in the public interest that this judgment be handed down now. In any event the agreed adjournment is not inconsistent with the judgment. Two matters arise. First, I shall order that the decision hearing for the purpose of CPR 52.3(2) is to be adjourned to a date to be fixed, and I shall extend time for filing an appellant’s notice to 21 days after the decision hearing, subject to permission. Secondly, no decision has been made in respect of the further argument referred to above, namely that as a matter of fact the whole of the debt owed by the Respondent to the Petitioners is secured. Consequently, it is argued, the court should not adjourn the hearing of the petition but exercise its discretion to dismiss

the petition. Further evidence may be served in respect of this argument at the adjourned hearing.

3. The issue before the court concerns the second matter referred to in the postscript: how the court should exercise its discretion.

Background in brief

4. Dr Mallya had diverse business interests which were conducted through corporate vehicles. These included the United Breweries Group and the Force India Formula One team. Dr Mallya took control of the United Breweries Group in 1983 and pursued a number of acquisitions expanding its market to over 20 countries.
5. He has been resident in the UK for a long period but visited India frequently. He represented the State of Karnataka in India's Council of States (the upper house of the Parliament of India) from 2002 to 2008 and 2010 to 2016 and received several honours and awards. His ambition to own an airline may have led or partly led to his present predicament. At first, Kingfisher Airlines Limited (the "Airline"), part of the United Breweries Group, experienced success, but the 2008 financial crisis affected the Airline and led to Dr Mallya requiring debt finance for support. He turned to the first petitioner who agreed to provide a loan. More finance was required and in 2009 the first four petitioners provided loans totalling 1250 Crores, but 2000 Crores was said to have been required. Later that year, the fifth petitioner was approached for the additional 750 Crores which was advanced.
6. The petitioners subsequently combined and agreed the Master Debt Recast Agreement dated 21 December 2010 ("MDRA") with the Airline. This agreement restructured the outstanding loan obligations and 30% of the petitioners' debt was converted to equity in the Airline. Dr Mallya provided a personal guarantee for the loans and a guarantee was provided from the successful United Breweries (Holdings) Limited ("UBHL") which had its headquarters in Bangalore.
7. By 2011 the Airline required more finance and a further 1,158 Crores was lent to keep it in the air, but not for long.

8. The Airline stopped offering budget flights by April 2012 and the first petitioner declared the loans non-performing soon after. There followed an intervention by the Indian Civil Aviation Authority which suspended the operating licence. Winding-up proceedings were issued. In April 2013, the petitioners called-in their loans under the MDRA, and in June, the petitioners began proceedings in the Bangalore Debt Recovery Tribunal (“DRT”) against Dr Mallya pursuant to his personal guarantee, UBHL pursuant to the corporate guarantee, the Airline and others.
9. In January 2017, the DRT made an order entitling the petitioners to recover INR62,033,503,879 from Dr Mallya and UBHL and interest at the rate of 11.5% pa with yearly rests from June 2013 until payment in full. In November 2017 Picken J ordered that the DRT judgment be registered as a foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act 1933.
10. The petition debt is based on an unsatisfied demand for the judgment debt. The judgment debt presently stands at over £1bn. The reason for the growing debt is the imposition of the compound interest awarded, which accrues at 11.5%.
11. During the hearing on 7 July 2020 it was mentioned that Dr Mallya is the subject of criminal proceedings in India arising out of loan arrangements with IDBI Bank (the fifth petitioner). This led the Indian Government to request his extradition from England in February 2017. On 10 December 2018 Senior District Judge Arbuthnot found there to be a prima facie case and ordered extradition. The Divisional Court dismissed an appeal on 20 April 2020, upholding the decision of the Senior District Judge and finding that a jury could draw adverse inferences from the evidence and that a tribunal of fact, properly directed and considering all the relevant evidence could be reasonably sure of guilt. It is said that this court should treat with scepticism any criticism Dr Mallya makes of the petitioners because of the adverse inferences drawn in the extradition proceedings. I shall not do so as: (i) the hearing of the petition for bankruptcy is, to date, based on the documents; and (ii) the test for extradition is quite different to the test applied for an adjudication of bankruptcy.
12. In the same month as the Divisional Court dismissed the appeal against extradition the First Judgment was handed down. I shall turn to that now.

The First Judgment

13. The first hearing of the petition took place over two days on 10 and 11 December 2019. Two grounds were advanced for an adjournment or dismissal. First, the petitioners were secured creditors. The petitioners had failed to state their security on the face of the petition. Secondly there was a reasonable prospect of the DRT Judgment being compromised within a reasonable period of time. The compromise would bind all creditors regardless of their agreement.
14. In the First Judgment I found that the chairman of the DRT hearing, Shri. K. Srinivasan had asked (indirectly) whether the petitioners had a first charge over the movable and immovable properties of the Airline, UBHL and Dr Mallya. The matter before him was a competition between the Commissioners of Service Tax and the petitioners. Shri. K. Srinivasan found that the Commissioners may have a second charge, but their claim would be subject to the petitioners' first charge. In another judgment, chaired by Justice Manmoham Singh sitting in the Prevention of Money Laundering Appellate Tribunal, the tribunal set out the contentions made by the petitioners that by reason of the contractual provisions contained in the personal and corporate guarantees, they enjoyed prior rights over assets of the same parties. In that matter, the contest was between the petitioners and the Enforcement Directorate, who vied to be first in the line to the assets. I was taken to the Indian legislation by the advocates. I said [15]:

“A secured creditor shall have the meaning assigned to it in section 2(1)(zf) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002. By section 2(1b) a security interest means “a mortgage, charge, assignment or any other right, title or interest of any kind whatsoever upon property, created in favour of any bank or financial institution”. The definition states that secured creditor means “any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified...in whose favour security interest is created by any borrower for due repayment of any financial assistance”. The term ‘pledge’ is also defined as a security interest. It is not a far reach to conclude that

having cited section 31B of “the RDDB & FI Act” Shri. K. Srinivasan would have (i) known the meaning of security (ii) known how security operates and (iii) applied section 31B to the facts of the case. There has been no appeal against this part of the decision by the Banks. In my judgment it is highly likely that Shri. K. Srinivasan was finding not only that the debt was due but that the Banks were secured and as holders of a first charge have priority over other charges.”

15. In respect of Justice Singh’s judgment, I noted that he found [paragraphs 20 and 21] that “The banks are the secured creditors [for]... the unpaid loans [advanced to] ... Vijay Mallya and his associate companies.”
16. I concluded that the petitioners had contested and succeeded, in India, with an argument that the personal guarantee given by Dr Mallya provided them with security over some of his assets (see paragraphs 12 to 27).
17. As the petitioners had actively promoted their priority by claiming security in the Indian courts and tribunals, they should have known that they were, at least in part, secured for the petition debt over assets of the petitioner. The petition for bankruptcy failed to disclose any security. It followed that there was 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?
18. The court was referred to *Barclays Bank Plc v Mogg* [2004] BPIR 259 as the leading authority on the consequences of a failure by a secured creditor to comply with the requirements of section 269 of the IA 1986. Although it is a first instance decision there are few decisions on the issue and it has the distinction of being a judgment of David Richards J. a preeminent judge in the field of insolvency, and now a judge of the Court of Appeal. He explained that a breach of section 269 of the IA 1986 does not lead to the automatic conclusion that a petition should be dismissed. The court should consider if the petition can be cured by amendment.

19. After a brief analysis of the term “security” by reference to *Bristol Airport Plc v Powdrill* [1990] 1 Ch 744 in paragraph 33 of the First Judgment, I explained “that it matters not that the [petitioners] have security rights over property belonging to other parties. The issue is whether the [petitioners] hold security over (some or all of the) property rights of Dr Mallya.”
20. I found that a bankruptcy order should not be made on a defective petition and at paragraph 40 “In my judgment where there is a breach of section 269 of the IA the court should take account of at least the following factors when exercising its discretion: (i) the consequence of the breach (ii) the conduct of the parties and (iii) all the circumstances of the case.” Mr Marshall and Mr Mather submit the First Judgment is plainly right but argue that the third factor should permit the court to take account of security held by the petitioners over assets not owned by Dr Mallya. If third party security can be taken into account, it is argued, the discretion should be exercised to dismiss the petition.

Security over third party assets

21. In order to succeed with the argument Dr Mallya has to demonstrate that as a matter of law it is permissible to take account of security over third party assets, and as a matter of fact (i) the petitioners have security over the assets of the associated companies and (ii) the combined value of the security over the assets of Dr Mallya and the associated companies is equal or greater than the petition debt. In respect of the second of these Dr Mallya contends that the compound interest ordered by the DRT in January 2017 should be discounted as there is a dispute on substantial grounds as to whether such interest can or should be awarded. For the purpose of this hearing only it is conceded by the petitioners that as (a) an application has been issued to contest the compound interest element of the judgment debt, and (b) expert reports provide diametrically opposite conclusions as to the likely outcome of the application in India, there is a substantial dispute about the interest claim.

Security over the assets of the associated companies- the arguments

22. The DRT judgment and the judgment of Justice Singh refer to the petitioners’ security over the assets of Dr Mallya and UBHL. It is argued that it would be illogical to

conclude that those judgments provide evidence of security against the assets of Dr Mallya and not evidence of security against the assets of UBHL, the Airline and other companies. Reliance is made on a schedule of assets produced for the hearing in December 2019.

23. The petitioners claim they have no security over the assets of the associated companies. That being so, the argument fails.
24. Dr Mallya asserts that the position taken by the petitioners is untenable and cannot be trusted. That is due to them having taken an inconsistent line about holding of security. Mr Marshall and Mr Mather argue, in their skeleton argument, that the inconsistencies call for an explanation:

“... paragraph 84 of Mr Gair’s First Witness Statement dated 14 February 2019, served in support of the Petition, had repeated the statement contained in the Petition that the Indian Banks do not have any security for the Petition Debt and that under the Personal Guarantee they “*merely have contractual rights, rather than security giving priority or any kind of proprietary interest*” (paragraphs 84 and 86) [7/64]. Mr Gair also stated that he had relied for the purposes of his statement on information provided by Dua Associates, the Indian Banks’ lawyers in India.

Just over a month previously, on 8 January 2019, Dua Associates had filed an application on behalf of the Indian Banks in the Special Court of PMLA, Mumbai seeking the lifting of the attachment orders obtained by the [Enforcement Directorate] so as to enable the immediate enforcement of the liability under the DRT Judgment against them (see, especially, [SB/2/94-106] (the “**Bombay Application**”)). The application (which was one of a number of similar applications) was verified by a statement of truth signed on behalf of the State Bank of India.

The stated grounds for the application were that the Indian Banks had an interest in the assets of Dr Mallya, UBHL, KFA and KFIL by

virtue of the Personal Guarantee, the Corporate Guarantee, the DRT Judgment and the recovery certificate issued thereto (paragraph 19). It was accordingly stated that the Indian Banks were the “*secured creditor*” (paragraph 20) and had “*a legitimate interest in all the properties belonging to KAL, UBHL, Dr. Vijay Mallya and KFIL, including movable and immovable properties attached by the Enforcement Directorate*” (paragraph 22).

It was further stated that the Indian Banks “have in fact already proceeded against the various assets of KFIL, UBHL and Dr. Vijay Mallya but are unable to proceed against their assets mentioned in **Schedule A** on account of the Attachment Orders of the [Special Court of PMLA]” (paragraph 21, underlining added). It therefore sought immediate “restoration” of the assets in the said Schedule A to the Indian Banks in order to enable their realisation and recovery of the debt owed to them (paragraph 22 and prayer).

The assets set out in Schedule A ([SB/2/107-111]) include the same assets in the name of the Associated Companies also set out in the Banks’ Valuation Schedule (the “**Associated Company Assets**”). It therefore was and still is the Indian Banks’ position before the Indian Courts that those assets are among the assets to which their security rights extend (apparently on the basis of a contention that they are to be treated as assets of Dr Mallya or UBHL).

The Bombay Application is still extant: the Indian Banks maintain the position in that jurisdiction that the Associated Company Assets are subject to their prior rights of security.”

25. The inconsistencies are said to be exacerbated by the third statement of Mr Gair (a partner of the law firm representing the petitioners) where he states [paragraph 13] that the DRT Recovery Officer has sold 7,404,932 shares of UBHL in March 2019 pursuant to an order of the High Court of Karnataka. Mr Marshall submits that the sale can only have been made if it were pursuant to security held by the petitioners.

26. I do not accept the submission for two reasons. First, the fact of the share sale made pursuant to a court order does not of itself signify that all assets of UBHL were and are secured for the benefit of the petitioners. Secondly, the statement makes clear that the petitioners gave an undertaking to the DRT that if the Enforcement Directorate or any other creditor of UBHL are found to be entitled to the proceeds of sale from the shares, the recovery would be returned within 24 hours. This suggests that the petitioners accept that there may be a prior claim. In any event the Official Liquidator of UBHL has made an application to the DRT that the proceeds be distributed in accordance with the statutory scheme for winding up where no security is claimed by the petitioners.

High Court of Karnataka, Bengaluru

27. The focus of submissions at the December hearing was on the assets of Dr Mallya and not the associated companies and in particular not on UBHL. The DRT judgment and the judgment of the Prevention of Money Laundering Appellate Tribunal had great significance.
28. A writ dated 12 April 2019 submitted to the High Court of Karnataka by the Official Liquidator, verified on oath, states in terms that “the Consortium of banks led by the State Bank of India are unsecured creditors with respect to UBHL.” The writ gave rise to an application to permit the Official Liquidator to participate in an appeal brought by UBHL. I turn to the judgment determining the appeal now.
29. The appeal was heard by Mr Justice Alok Aradhe and Mr Justice Ravid V. Hosmani sitting in the High Court. The judgment is dated 6 March 2020 (post-dating the December hearing and the circulation of the draft First Judgment).
30. The appeal was from a single “Company Judge” who made an order to wind up UBHL on 7 February 2017. The appellate court noted that the Company Judge had found that the Airline was unable to pay its debt “and therefore an order of its winding up was passed”. In relation to UBHL the Company Judge commented that the “balance sheets, audit reports, independent auditors reports and annual reports from 2011-2012 to 2015-2016” demonstrated a “constant increase in losses and there has been complete erosion of net worth of assets of the company and there has been

reticent refusal of the appellant to square up [to] its obligations under the guarantee furnished by it.” Further that “the substratum of the [UBHL] has disappeared, and heavy losses have already been suffered by the appellant and it is incapable of carrying on any business.”

31. The main issue for the appellate court to determine was whether the assets of UBHL and Dr Mallya combined were greater than the liabilities of UBHL under its corporate guarantee [para 21]: “There is no serious challenge on behalf of [UBHL] to the order passed by the learned Single Judge and the only submission on merits with regard to the order passed by learned Company Judge, which has been urged is that the assets of the company are more than its debts.” The court found that no reliance could be placed on the “summary of market value of assets” provided by UBHL and dismissed the appeal.
32. Senior counsel in India argued that the winding-up order should stand, and that there were insufficient assets to pay the secured and unsecured creditors. The petitioners stated in open court (as a consortium of banks) that they fall into the latter category, namely unsecured creditors. The Official Liquidator submitted that the petitioners could not deal with the assets of UBHL as they are to be distributed “as per provisions of the Companies Act”. The court explained that there is Indian authority for the proposition that upon a winding up the assets of the company “come to the custody of the company court and no arrangement after the winding up order can be recognised in respect of assets of the company”.
33. The judgment exposes a difficulty for Dr Mallya that does not lend itself to an easy resolution. The High Court of Karnataka explained that the Enforcement Directorate was able to deal with attached assets in accordance with orders it had obtained. The orders prevent UBHL from dealing with its own assets and making payments to creditors or making realistic proposals for payment due to the prior rights of the Directorate [paragraph 22]: “Therefore the proposal for settlement made on behalf of [UBHL] cannot be accepted as this court cannot issue directions for sale of the assets which have been attached.” Unless the Directorate relaxes its position and reverses the attachment orders there are no free assets for payment to creditors and the petitioners have accepted, in the liquidation proceedings, they are unsecured creditors.

34. Ms Shekerdemian argues, by adopting submissions made by the Official Liquidator in India, this is not a case where the petitioners can point to the assets of UBHL to say, “they are mine” and realise them for their own benefit. The corporate guarantee provided by UBHL to the petitioners may have been in a different form to the guarantee provided by Dr Mallya. She says that Indian authority provides that a guarantee with a promise to pay is insufficient to provide proprietary rights. Something more is required. A guarantee carrying a pledge, mortgage or deposit or creating a lien in any property may be equated with security. This is not dissimilar to the analysis of English security law stated in the First Judgment at paragraph 33. The corporate guarantee provided by UBHL did not create such rights over its assets.
35. The parties have filed expert evidence on Indian law and procedure which will assist in determining whether the petitioners have security over the assets of UBHL and any other associated company where relevant. The experts are retired members of the Indian Supreme Court. They disagree on several issues. At this hearing I refused to entertain submissions based on the written expert reports alone. The petitioners and Dr Mallya through their legal teams accepted that the court could only determine the differences between them after cross examination.

The breach

36. By s 264(1)(a) of the IA 1986 a creditor may present a bankruptcy petition against an individual. By s 267(1) such petition must be in respect of one or more debts owed by the debtor and the petitioning creditor must be a person to whom the debt or at least one of the debts is owed. Section 267(2) provides that such a petition may be presented only if at the time the petition is presented certain conditions are satisfied.
37. Section 267(2)(b) of the IA 1986 provides one of those conditions: a creditor or the creditors may present a petition against a debtor where “the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured.”
38. The requirement in para 2(b) that the debt be unsecured is qualified by s 269 which provides:

“A debt which is the debt, or one of the debts, in respect of which a creditor’s petition is presented need not be unsecured if either—

(a) the petition contains a statement by the person having the right to enforce the security that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of all the bankrupt’s creditors, or

(b) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt.

(2) In a case falling within subsection (1)(b) the secured and unsecured parts of the debt are to be treated for the purposes of sections 267 to 270 as separate debts.”

39. Reference needs to be made to the definition in section 383(2) of the IA 1986 which provides:

“...any provision of the rules requiring a creditor to give up his security for the purposes of proving a debt, a debt is secured for the purposes of this Group of Parts to the extent that the person to whom the debt is owed holds any security for the debt...over any property of the person by whom the debt is owed.”

40. In computing what Dr Mallya owed for the purposes of the petition, the petitioners in effect did not state they held security over Dr Mallya’s assets, seek to quantify the value of any security held or state that they were willing to give up their security in the event of a bankruptcy order.

41. Continuing with the statutory provisions, the court on hearing the bankruptcy petition “may make a bankruptcy order” (s 264(2)). It has no jurisdiction to make an order if an essential condition, such as that contained in s 267(2)(b) is not satisfied.

42. By r. 10.24(1) of the Rules the court only has jurisdiction to make a bankruptcy order “if satisfied that the statements in the petition are true, and that the debt on which it is

founded has not been paid, or secured or compounded.” Rule 10.24 corresponds to section 267(2)(b).

43. I found in the First Judgment that a bankruptcy order could not be made because of the failure to state the security on the petition but that the statutory framework and authority did not compel a conclusion that a breach of section 269 IA 1986 required dismissal. Indeed section 266(3) of the IA 1986 provides the court with a “general power” to dismiss, “if it appears [to the court] appropriate to do so on the grounds that there has been a contravention of the rules or for any other reason”. The question was how the court should exercise its power in the present circumstances.
44. At paragraph 40 of the First Judgment I answered the question by stating that the power should be exercised judicially and in a principled way taking account of the consequences of the breach, the conduct of the parties and all the circumstances of the case. I found that the consequences of the breach gave rise to limited prejudice for Dr Mallya. He 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 did not alter his status as debtor. If the assets owned by Dr Mallya were free and not secured, they would be insufficient to satisfy liability under the judgment. The only identified prejudice suffered by Dr Mallya was delay: an adjournment would be required to amend the petition to identify the security. As Dr Mallya resisted the making of a bankruptcy order the delay by itself posed little prejudice. The prejudice, if any, fell on the shoulders of the petitioners.
45. As regards the conduct of the parties there was no evidence that the petitioners deliberately failed to state the security and comply with the relevant provisions of the IA 1996 and the Rules. There was more likely to have been a mistake and confusion.
46. I took account of all the circumstances relevant to the failure to disclose the security in the petition. Consistent with the provisions of section 269 of the IA 1986, paragraph 33 of the First Judgment states: “It follows that it matters not that the Banks have security rights over property belonging to other parties. The issue is whether the Banks hold security over (some or all of the) property rights of Dr Mallya.”

47. Mr Marshall and Mr Mather attractively advance an argument that the court should focus on the debt not the debtor. Standing back from the fray enables one to see that the Airline debt is, by reason of the corporate guarantee, a debt of UBHL; the exact same debt is the debt of Dr Mallya by reason of his personal guarantee. It is argued that the petitioners will suffer little prejudice since (i) they have at least partial security for their debt (ii) they are able to enforce like any other creditor and (iii) their rationale for a bankruptcy order is to enable an independent investigation into Dr Mallya's affairs but that is defeated due to their own extensive investigations. In favour of dismissal, it is argued, is the very real prejudice to Dr Mallya of his inability to access funds and defend proceedings in India and the UK by reason of the engagement of section 284 of the IA 1986.

Conclusions

48. It is not disputed that the court may take account of all the circumstances of a case as part of the exercise of discretion when determining whether to permit a petition to be amended or dismissed. Although this is a broad statement for any test, the court is constrained to take account of relevant and not irrelevant matters. The purpose for a bankruptcy petition is relevant as a petition may be struck out if the court finds that it represents an abuse of process. The fact that a petitioner seeks a collective process rather than selecting, as it may, a first past the post procedure is not relevant. All the circumstances may include matters directly relevant to the procedure such as: (a) bankruptcy petitions involve just one remedy which alters the status of an individual; (b) the remedy is different from an ordinary action in that it is a class remedy; (c) there is a public interest in most petitions being processed quickly as bankruptcy proceedings affect third parties; and (d) the date of presentation is a relevant date for a variety of transaction avoidance actions, and renders dispositions of the bankrupt's property void without permission of the court.
49. In my judgment, as a matter of law, it is impermissible to take account of third-party security when deciding whether to dismiss the petition pursuant to section 266(3) of the IA 1986. Security is a specifically defined term in the legislation: section 383(2) of the IA 1986. There are two part to the definition. The first is that the person to whom the debt is owed must hold security for that debt rather than some other debt; and the second is that the security must be over the property of the person who owes a

debt. It is the assets of the debtor that are relevant. Although Dr Mallya may avail himself of the first part of the definition, he cannot avail himself of the second. There is no room for permitting a consideration of other security for the purpose of dismissing a petition where IA 1986 is so clear. To do so would be to take account of an irrelevant factor.

50. The circumstances that a court should take into account will have a connection to the breach of the IA 1986 or Insolvency Rules. The breach in this case concerned a failure to disclose security held for the petition debt over Dr Mallya's assets only. There was no failure to disclose any purported security over third party assets because that is not a requirement of the IA 1986.
51. That does not mean that security over assets of a third party are irrelevant for all purposes in a bankruptcy context. The assets of a third party are relevant to a consideration for a time to pay proposal where those assets are to be used for the payment of the petition debt. The same debt argument may also be relevant if the intentions of the parties reflect a release of some type: the giving of security over the third party assets releases debtor's liability; a payment in full made by a co-debtor releases the debtor; or that a compromise agreed with the a co-debtor gives rise to a release.
52. In any event it would be inappropriate to make a determination at this stage on the issue of whether the petitioners hold security over the assets of UBHL and other associated companies. The experts hold different views as to the security. The matter, if it retains any relevance, can only be determined following cross-examination.
53. Although appeal judgment given by Justices Alok Aradhe and Ravid V. Hosmani in the High Court of Karnataka expresses the view that the value of assets claimed by the associated companies and Dr Mallya are less than the total debt, it follows from my conclusions that I need express no view on the issue myself.