
(2012) 02 CAL CK 0071

In the Calcutta High Court

Case No : A.P.D. No. 406 of 2010 and C.S. No. 223 of 2008

AI Champdany Industries Limited

APPELLANT

Vs

Duncan International (I) Limited

RESPONDENT

Date of Decision : 16-02-2012

Acts Referred:

Companies Act, 1956 — Section 18(8), 211, 211(7), 32(1), 433

Citation : (2012) 1 CALLT 559 : (2012) 5 CHN 182

Hon'ble Judges : J.N. Patel, C.J.;Sambuddha Chakrabarti, J

Bench : Division Bench

Advocate : S.B. Mookherjee, Mr. Jishnu Saha, Mr. Sabyasachi Chowdhury, Mr. D. Basak, Mr. Abhijit Guha Roy, Mr. S. Singhvi, for the Appellant; Ranjan Deb, Advocate, Ms. Manju Bhutoria, for the Respondent

Final Decision : Allowed

Judgement

J.N. Patel, C.J.—All these appeals arise out of a common judgment and order dated 23.8.2010 passed by the learned Single Judge in C.S. No. 220 of 2008, C.S. No. 221 of 2008, C.S. No. 222 of 2008, C.S. No. 223 of 2008, C.S. No. 224 of 2008 and C.S. No. 225 of 2008.

2. As facts and issues arising in all these suits are common, the appeals preferred by the appellant/original defendant and the cross objection filed by the respondent/original plaintiff are being disposed of by this common judgment and order.

3. The suit (C.S.220 of 2008) has been filed by the plaintiff's company on October 31, 2008 in order to claim the following reliefs :

a) Decree for Rs. 32,53,750/- against the defendant as claimed in paragraph 32 herein;

b) Interim interest upon judgment @15% per annum;

c) Receiver;

- d) Injunction;
- e) Attachment;
- f) Costs;
- g) Such other and/or further relief or reliefs as may be deemed fit and proper.

4. The suit (C.S.221 of 2008) has been filed by the plaintiff's company on October 31, 2008 in order to claim the following reliefs :

- a) Decree for Rs. 2,22,62,500/- against the defendant as claimed in paragraph 32 herein;
- b) Interim interest upon judgment @15% per annum;
- c) Receiver;
- d) Injunction;
- e) Attachment;
- f) Costs;
- g) Such other and/or further relief or reliefs as may be deemed fit and proper.

5. The suit (C.S.222 of 2008) has been filed by the plaintiff's company on October 31, 2008 in order to claim the following reliefs :

- a) Decree for Rs. 14,40,884/- against the defendant as claimed in paragraph 32 herein;
- b) Interim interest upon judgment @15% per annum;
- c) Receiver;
- d) Injunction;
- e) Attachment;
- f) Costs;
- g) Such other and/or further relief or reliefs as may be deemed fit and proper.

6. The suit (C.S.223 of 2008) has been filed by the plaintiff's company in order to claim the following reliefs :

- a) Decree for Rs. 2,48,61,027/- against the defendant as claimed in paragraph 33 herein;
- b) Interim interest upon judgment @15% per annum;
- c) Receiver;
- d) Injunction;
- e) Attachment;

f) Costs;

g) Such other and/or further relief or reliefs as may be deemed fit and proper.

7. The suit (C.S.224 of 2008) has been filed by the plaintiff's company on October 31, 2008 in order to claim the following reliefs :

a) Decree for Rs. 1,41,61,130/- against the defendant as claimed in paragraph 32 herein;

b) Interim interest upon judgment @15% per annum;

c) Receiver;

d) Injunction;

e) Attachment;

f) Costs;

g) Such other and/or further relief or reliefs as may be deemed fit and proper.

8. The suit (C.S.225 of 2008) has been filed by the plaintiff's company on October 31, 2008 in order to claim the following reliefs :

a) Decree for Rs. 41,17,172/- against the defendant as claimed in paragraph 32 herein;

b) Interim interest upon judgment @15% per annum;

c) Receiver;

d) Injunction;

e) Attachment;

f) Costs;

g) Such other and/or further relief or reliefs as may be deemed fit and proper.

9. It was the case of the plaintiff that the claims made in all suits fell within the term of Rule 1 Chapter XIII A of the Original Side Rules of the High Court at Calcutta and there was no defence to the claim of the plaintiff and, therefore, final judgment for the one claimed together with interest and cost might be passed. It was contended that the amounts claimed in the suits virtually stood admitted by the defendants and they were stopped from denying the claim of the plaintiff and, therefore, the plaintiff was entitled to claim made in the master summons.

10. The facts on the basis of which the respondents/original plaintiffs have filed all the suits are common.

11. It is the case that plaintiffs that they are public limited companies within the meaning of the Companies Act, 1956 having its registered office at "Duncan

House", 31, Netaji Subhas Road, Kolkata-700001.

12. On or about May 19, 2005 the name of Anglo India Jute Mills Co. Ltd. was changed to the present name of the defendant being AI Champdany Industries Ltd. having its registered office at 25, Princep Street, Kolkata 700072. According to the plaintiff, at all material times, plaintiff's controlling shareholders and/or promoters have been the Goenkas and their associates. Till or about April, 1994, the promoters of the plaintiffs and/or the persons in the management of the plaintiff were also in control of the management of the defendant.

13. In or about 1987, the defendant had become a sick industrial company within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as SICA) and a reference relating to the defendant was made in accordance with the provisions of SICA. A Scheme came to be sanctioned by an order dated March 28, 1989 by the Board for Industrial and Financial Reconstruction (hereinafter referred to as BIFR) for rehabilitation of the defendants. In terms of the said Scheme and as agreed the plaintiff and other associate companies of the plaintiff had advanced various sums of monies as unsecured loans to the defendant by cheques and were shown in the balance sheet of the defendant. The Scheme which had been sanctioned by the BIFR by the order dated March 28, 1989 had failed and thereafter BIFR initiated steps for preparation of a fresh scheme for rehabilitation of the defendant.

14. On February 4, 1994 a rehabilitation scheme for the revival of the defendant was sanctioned by the BIFR which envisaged, inter alia, that the management of the defendant would stand transferred to and in favour of Champdany Industries Limited (CIL) and its associates. Such new promoters continue to be in the management of the defendant.

15. The said Champdany Industries Limited, under a Scheme of Amalgamation, sanctioned by an order dated March 22, 2006 passed by this Hon'ble Court, amalgamated with the defendant.

16. It is the case of the plaintiff that as per order dated February 4, 1994 and the sanctioned Scheme it was specified that unsecured loans frozen till the year 2003 would be Rs. 386 lac. It is such sum of Rs. 386 lac which was then the sum payable to the erstwhile promoters of the defendant and their associates meaning thereby the Goenkas and their associate concerns including the plaintiff and while sanctioning the scheme BIFR rejected the contention of CIL (Champdany Industries Limited) seeking waiver of dues of the existing promoters.

17. According to the plaintiffs, new management accepted the sanctioned scheme and participated in implementation thereof including taking over the shares in the defendant company.

18. By an order dated September 14, 1994 the BIFR, inter alia, held that the liability to the extent of Rs. 386 lac to the erstwhile promoters cannot be

disputed by the new promoters namely the defendant.

19. Against such an order of the BIFR of September 14, 1998 the defendant through its new management preferred an appeal before the Appellate Authority for Industrial and Financial Reconstruction (hereinafter referred to as AAIFR). The said appeal was disposed of by the AAIFR by a judgment and order dated June 4, 1999 wherein the AAIFR reduced the sum payable by the defendant to the erstwhile promoters and their associates by the said sum of Rs. 66,98,420/- following which the total amount due from the defendant to the erstwhile promoters and their associates on account of unsecured loans was rounded off to Rs. 319 lac. The AAIFR also confirmed that such amount would remain frozen upto the year 2003.

20. By a letter dated August 8, 2002 the plaintiff wrote to the BIFR requesting the BIFR to pass a specific order to ensure repayment of a sum of Rs. 90.31 lakh owed by the defendant to the plaintiff in addition to the sum owed by the defendant to the plaintiff on account of unsecured loan that had been frozen upto the year 2003. The plaintiff urged before the BIFR that the plaintiff was entitled to such sum of Rs. 90.31 lakh as a sundry creditor of the defendant that had been duly acknowledged in the balance sheets of the defendant. A copy of such letter had been endorsed to the Monitoring Agency, IFCI Ltd. The said sum of Rs. 90.31 lakh was paid by the plaintiff in the form of advances from time to time to the defendant and the same has been shown under the head "Current Liabilities and Provisions" in the sub head "Sundry Creditors" by a foot note appended thereto in the books of the defendant.

21. By a letter dated September 13, 2002 the BIFR had directed, inter alia, the defendant that the dues of the erstwhile promoters had been frozen upto the year 2003 in terms of the directions given by the AAIFR and advised the defendant that the defendant and/or its present promoters should ensure that payment of all amounts due to the erstwhile promoters of the defendant whether as sundry creditors or unsecured loans be made immediately thereafter and, therefore, according to the plaintiff they are entitled to receive such payment immediately upon the conclusion of the year 2003.

22. It is the case of the plaintiff that by letter dated 15th March, 2004 the plaintiff duly demanded payment of the unsecured loan of Rs. 54,86,389/- [C.P. 372 of 2004 (Arindam Investments Private Ltd.-Rs. 19,00,000/-) C.P. 332 of 2004 (Cosmopolitan Investments Ltd.-Rs. 1,30,00,000/-), C.P. 374 of 2004 (Disciplined Investments Limited-Rs. 8,41,391/-), C.P. 376 of 2004 (Haldia Investment Company Ltd.-Rs. 82,69,273/-) and C.P. 377 of 2004 (New India Investment Corporation Ltd.-Rs. 24,04,189/-)] due to the plaintiff from the defendant together with the said sum of Rs. 90.31 lakh due to the plaintiff from the defendant as an unsecured creditor along with interest from January, 2004.

23. It is the case of the petitioners that they are entitled to interest @ 15% per annum on the said claim.

24. In response to the summons for judgment the appellants/defendants submitted that the plaintiffs/respondents could not take resort to Chapter XIII A of the Original Side Rules for summary judgment for want of any pleading as there was no mention of any contract.

25. It is contended that the amount alleged to have been advanced pursuant to the Scheme dated March 28, 1989 admittedly had failed and a fresh scheme of rehabilitation was propounded later and sanctioned on February 4, 1994 and, therefore, the case of the plaintiff that the defendant was and is under an obligation to repay the sums alleged to have been given as loan to the defendant by the plaintiff pursuant to the scheme which had been sanctioned by BIFR in 1989 are absolutely vague and without any particulars whatsoever.

26. It is disputed on behalf of the appellants/defendants that the order of BIFR dated February 4, 1994 sanctioning a rehabilitation scheme does not contain any admission of liability to the plaintiff and that the plaintiff was not a party to the proceeding and, therefore, the question arises as to whom the alleged acknowledgement was made by the defendant and the defendant could not acknowledge a liability to itself. It is disputed that the affidavit in support of Summons, where the appearance of the parties is recorded, does not contain any admission of liability to the plaintiffs. The alleged creditors were not present at the meeting nor did they make any concession.

27. According to them, the projection of balance sheet is shown but not of any admission as claimed. Further particulars of the alleged schedule of compliance has been set out which does not contain any mention of the alleged loans.

28. It is disputed that the order of BIFR dated October 12, 1993 in support of summons, records an agreement of the existing promoters, and that the Bench rejected the contention of AI Champdany Industries Limited seeking waiver of the dues of the existing promoters. It was further recorded that the representative of AI Champdany Industries Limited did not agree to the freezing of the dues owed by the company to the erstwhile promoters and their associates which amounts to a tentative view and the order further directs final views subsequently.

29. It is further pointed out that BIFR was favourably inclined for waiver of the interest of the dues of the earlier promoters and AI Champdany Industries Limited also claimed that the present promoters would not be entitled to any claim for interest for the past period or for the future. This was not an admission at all and even if it is considered to be an admission it was a conditional one and not an unequivocal admission.

30. It was the stand of the defendant that so far as the claim of Rs. 90 lakh was considered the claim should be investigated or verified. Further, the scheme contains a proposal, inter alia, for transfer of immovable property being 8/7, Alipore Road, Woodland Flat, Kolkata. This was reciprocal obligation on the part of the plaintiff.

31. It was the case of the appellants/defendants that by letter dated November 1, 1993 it was requested that the scheme should provide for reduction of the dues of the present promoters to the extent of any liability and any loss, if any, being discovered in future and the scheme should be finalized only after incorporation of the modification suggested in the letter and that by letter dated May 29, 2002 the plaintiff requested the BIFR to pass necessary orders to ensure payment of Rs. 90.31 lakh by the defendant and the letter was replied to by the BIFR by a letter dated July 16, 2002 but no such order was passed.

32. It is disputed that no contract has been pleaded in regard to the extra claim of Rs. 90.31 lakh set up in these proceedings and, therefore, cannot be covered under the present application under Chapter XIII A of the Original Side Rules.

33. It is disputed that reliance was placed by letter dated September 13, 2002 by Section Officer cannot be construed to be an order of BIFR.

34. According to the appellants/defendants BIFR has no jurisdiction to adjudicate on the quantum of disputed claims or direct a sick company to acknowledge any liability in its balance sheet as has been done in the instant case and there has been no admission of the alleged claims of the plaintiff by the defendants.

35. On the other hand, the proceedings initiated by the plaintiffs for winding up of the defendants' company came to be dismissed by a judgment and order dated 18th January, 2006 wherein the company Judge has held that it cannot be said that the company has no defence at all to the claim of the petitioning creditor or that the defence taken is a moonshine defence and, therefore, the application under Chapter XIII A of the Original Side Rules is liable to be dismissed.

36. It is further contended that in appeal the Division Bench of this Court observed that "in view of the above statement, it is not necessary for this Court to express any observation on the merits of the case. We, therefore, relegate the appellant for the ordinary remedies permissible under the law" and the matter was taken to the Supreme Court and the SLP came to be dismissed by observing "we are not inclined to interfere with the impugned orders. However, the time for filing the suit is extended by three weeks beyond the period fixed by the High Court".

37. It is, therefore, submitted that there was no admission on the part of the defendant. In any event, the admission has to be taken either as a whole or not at all. In the instant case, there are counter claims and also reciprocal obligations of the parties and the plaintiff did not hand over possession of the Woodland flat as a result of which suit had to be filed for recovery of possession of the said flat. Unless both parties discharged their respective obligations, the Court would not entertain any claim by any of the parties leaving the other conditions.

38. It is the contention of the appellants/defendants that entries in the balance sheets cannot be considered as admission on the part of the appellant/defendant

as it was objected to by the defendants. In case of a debt in respect of which there is a qualifying remark, cannot be taken as an admitted debt.

39. By letter dated 8th June, 2004 the plaintiffs caused notice u/s 434 of the Companies Act, 1956 seeking payment of the aforesaid sums from the defendant. Despite due receipt of such notice and a period of 21 days having elapsed therefrom, the defendant neither paid the amount due to plaintiff nor secured or compounded the same to the reasonable satisfaction of the plaintiff.

40. In August, 2004 the plaintiffs filed six petitions under Sections 433, 434 and 439 of the Companies Act, 1956 inter alia, praying for winding up of the company against defendant and their associate companies.

41. By a judgment and order dated 18th January, 2006 the plaintiff's petition for winding up was dismissed and appeal preferred against the order of dismissal by the plaintiff and other five appeals of the associate company petitions also came to be disposed of by judgment and order dated July 2, 2008 the appeal Court, inter alia, accepted the offer of the defendant to secure the claim of the plaintiff and directed the defendant to furnish separate six bank guarantees in favour of the Registrar, Original Side, High Court, Calcutta within eight weeks and the claim of the plaintiff was relegated to civil suit. The Court of Appeal granted four weeks time to the plaintiff to file a civil Suit.

42. On July 16, 2008 the order dated July, 2008 was modified to the extent that a default clause was provided and the defendant was permitted to furnish bank guarantee either of a nationalized bank or a scheduled bank. Pursuant to which on September 26, 2008 the defendant duly furnished the bank guarantee and the Registrar, Original Side duly accepted the pay order.

43. On being served with and received a copy of a Master's Summons the defendant (appellants/original defendants) sought leave to defend.

44. We have heard learned counsel for the parties and with their able assistance gone through the records and proceedings. The only point which arises for our determination is whether the appellants/defendants are entitled for leave to defend.

45. It is the contention of the plaintiffs/respondents that

a) the respondent does not rely upon the balance sheet for the purpose of any admission;

b) the admission is contained in documents other than the balance sheet as would be evident;

c) Furthermore the judgment impugned is strictly not based upon an admission only. It is based upon the question whether the defendant has any defence to the claim of the plaintiff. From the factual background, it is demonstrated that the defendant/appellant has sought to raise a sham and illusory defence;

d) The conclusiveness of the Sanctioned Scheme cannot be questioned by the defendant/appellant by virtue of Section 18(8) of the said Act.

45. It is an admitted fact that in the year 1993 AI Champdany Industries Limited showed interest to take over the management of the sick company. Pursuant to which the BIFR circulated a draft rehabilitation scheme and invited comments/suggestion thereon from AI Champdany Industries Limited.

46. On February 4, 1994, by the consent of all parties including CIL a Rehabilitation Scheme being SS-94 of 1994 was formulated.

47. It is the case of the plaintiffs/respondents that one of the conditions of such Sanctioned Scheme was that a sum of Rs. 386 lakh was to be paid by CIL to the plaintiffs and the amount of Rs. 386 lakh (subsequently reduced to Rs. 319 lakh) was to remain frozen till 2003 and only thereupon CIL (the new promoters) was to pay this amount to the plaintiffs which fact has been disputed by the appellant/defendant.

48. It is the case of the appellant/defendants that the letter dated November 1, 1993 written by CIL to BIFR was merely a proposal and was in no way connected with either the plaintiff or the defendant and nor did it belong to the Goenka group and, therefore, without being furnished with any particulars or details of the so called claims of the erstwhile promoters it was stated that the interest of the claim of the erstwhile promoters may be reduced and this was merely on the proposal stage. It is specifically contended that the plaintiff in the last sentence of paragraph 4 of the plaint stated "in terms of the said scheme the plaintiff and other associated companies of the plaintiff had advanced various sums of money as unsecured loan", however, no particulars of cheques were given; no rate of interest was mentioned and no the repayment amount was mentioned and therefore even if the defendant was not there to defend the claim, the plaintiff would have to prove this allegation regarding advancing of various sums of money as unsecured loan, either by documentary evidence or by calling witnesses.

49. In course of hearing of this appeal, the defendants/appellants' advocate on record wrote a letter dated November 25, 2004 come to produce for inspection the cheques and other particulars as referred to in paragraph 4 of plaint and paragraph 5 of the XIII A of the Original Side Rules application which have been replied to by the plaintiff's learned Advocate by November 11, 2004 stating that the documents referred to on the ground is unwarranted in the facts and circumstances of the case and the same stand sought for only to delay the hearing of the application and, therefore, this Court should draw an adverse inference against the plaintiff.

50. In the impugned judgment, the learned Judge held that the Chapter XIII A application is maintainable as the claim was based on an implied contract and that in the proceedings before BIFR and AAIFR the liability of the defendant stood finally determined and also given the break up of the amounts which the

plaintiffs are entitled to recover from the defendant.

51. The contention of the defendant that the plaintiffs were not parties to the proceedings before BIFR and AAIFR and, therefore, the finding or scheme made/sanctioned by the BIFR did not vest any right in the plaintiffs, was not accepted.

52. The learned Judge, thereafter by referring to the various decisions held in *Sm. Kiranmoyee Dassi vs. Dr. J. Chatterjee*, reported in (1945) 49 CWN 246, *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, *Santosh Kumar Vs. Bhai Mool Singh*, and referring to the decision in *Neebha Kapoor Vs. Jayantilal Khandwala and Others*, and two judgments of this Court in *SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd.*, and also *Coal India vs. Apeejay Private Ltd.* reported in 2009 (4) CHN 192 and other judgments arrived at a finding that there is no dispute that sums of money were lent and advanced by the plaintiffs to the predecessor in interest of the defendant. There may be some dispute regarding exact principal amount but in the proceedings through BIFR and AAIFR it had been determined that the predecessor-in-interest had received loans and advances of RS. 386 lakh from the plaintiffs and a company which is now a subsidiary of the defendant. The said loan and advance from such subsidiary was determined as Rs. 66,98,420/- and according to the said tribunal the defendant was liable to pay the "old promoters and their associates Rs. 319 lakh" and held that the defendant could not take a stand that the said order of the AAIFR asking the defendant to acknowledge the above liability unconditionally is invalid and hence the said statements of accounts are disputed and it is submitted that thus, a question of law arises, which is a triable issue, on the face of the admission arrived at a conclusion is indeed a very weak defence because that order of the appellate authority is still valid. Nevertheless, although this defence is practically non-existing the defendants might have possibly come under sub-paragraph (e) of the judgment in *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, read with *Coal India vs. Apeejay Private Ltd.* reported in 2009 (4) CHN 192 had the unambiguous admission contained in the letter dated 1st November, 1993 of the predecessor in interest of the defendant, CIL admitting Rs. 344 lakh after deducting Rs. 42 lakh on account of interest was not made and arrived at finding that even if this disputed interest is deducted, then Rs. 277 lakh is an amount which is due and payable by the defendants to the plaintiffs in a summary manner.

53. In the latter part of the judgment, the learned Single Judge held that the plaintiffs were entitled to a decree for Rs. 277 lakh only and so far as claim of interest is concerned granted leave to the defendant to file written statement by six weeks from the date of judgment and order.

54. The learned Single Judge has expressed his displeasure by referring to the conduct of the plaintiffs in prosecuting six winding up applications which came to be filed in the year 2000. The plaintiffs/respondents having taken a decision to recover the suit claim (as claimed in six suits) first elected to approach the Company Judge by initiating a proceedings under Sections 433, 434 and 439 of

the Companies Act, inter alia, praying for winding up of the company.

55. After giving notice to the appellants/defendants u/s 433 of the Companies Act the company Judge dismissed all the six petitions on common ground.

56. The learned Single Judge has highlighted from the judgment and order dated 18th January, 2006 the reasons given by the learned Company Judge in dismissing the winding up applications as hereunder :

.....It is well-settled principle of law that the company court adjudicating a winding up application is not a debt collecting court. It is not for this Court to adjudicate the disputed claims. All that this Court is required to see is whether the claim is bonafide disputed, this Court would outright reject the winding up application and relegate the case to a suit, if the court found that the defence sought to be used was ex facie, not bonafide this Court would direct that the company be wound up.

In the instant case, the claim of the petitioning creditors has been disputed by the company by reasoning of serious questions of law. The power of the BIFR to determine disputed dues is in issue. The authority of BIFR to waive limitation is questioned. It is true as argued by Mr. Banerjee that CIL, the new promoters took over the company on condition of payment of Rs. 380 lacs to its erstwhile promoters or its associates. However, if the liability by the BIFR is seriously disputed, this Court would not proceed to direct that the company be wound up.....

.....There is some substance in Mr. Mookerjee's submission that there was never any adjudication of the claim. The claim had to be reflected in the Balance Sheets of the company by reason of orders of the BIFR. The claims, however, were at all material times shown as disputed. The claim could not, therefore, be said to be admitted.

In my opinion, it cannot be said that the company has no defence at all to the claim of the petitioning creditors or that the defence taken is a moonshine defence. Even otherwise, the power of this Court under Sections 433, 434 and 439 to winding up a company is discretionary. This Court would be reluctant to exercise its discretionary jurisdiction to wind up a company at the instance of those very persons who were in the management of the company at the time when the company became sick and had to be referred to the BIFR.

.....It cannot, therefore, be said that the winding up application was not at all maintainable on the date on which the application was filed. The reference of a sick company to the BIFR and/or pendency of a reference before the BIFR is not an absolute bar to the institution or continuance of a winding up proceedings. Winding up proceedings might be instituted or continued with the permission and/or leave of BIFR. Such leave need not be prior leave. Leave might be granted at any stage before the winding up application is actually taken up for consideration.

.....Even assuming for the sake of argument that the declaration of the

Company as a relief undertaking does not suspend the operation of the order of BIFR in terms whereof the petitioning creditors have raised their claims, this Court would still be reluctant to exercise its discretionary jurisdiction to pass the coercive order of directing the winding up a company that has been declared a relief undertaking in the greater public interest of its rehabilitation. The winding up applications are, therefore, dismissed. The dismissal of the winding up proceedings will not prevent the petitioning creditors from instituting civil proceedings for realization of their dues, if any, in accordance with law.

57. It is further observed that while disposing of the appeals the Division Bench presided over by the Hon"ble Chief Justice in the final order dated 2.7.2008 recorded as follows :

The Court : These matters have been argued at length. However, ultimately Mr. Mookherji has submitted that the companies are prepared to furnish the bank guarantees (six in number) from the Nationalized bank to secure the claims, which are the basis of the winding-up petitions.

In view of the above statement, it is not necessary for this Court to express any observation on the merits of the case. We, therefore, relegate the appellants to their ordinary remedies permissible under the law.

The respondents shall furnish the bank guarantees (six in number) equivalent to the amount claimed in the respective winding-up petitions within a period of eight weeks from date in favour of the Registrar, Original Side of this Court. The appellants shall file civil suits within four weeks thereafter. In default of filing the suits within the time specified, the bank guarantees furnished shall be further dealt with on the basis of any order that may be passed by a competent Court of jurisdiction.

The appeals and the applications are, accordingly, disposed of.

Xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

58. The matter was carried further by preferring a SLP which came to be dismissed by the Supreme Court by observing as follows:

We are not inclined to interfere with the impugned orders. However, the time for filing the suit is extended by three weeks beyond the period fixed by the High Court.

59. The learned Single Judge was right in observing "inter alia, the disposal of the above appeal by the Division Bench of our Court in the circumstances in which it was disposed of, could not preclude the plaintiffs from filing the summary proceedings. There is no finding of the Court which could operate as a bar or create an estoppel". Therefore, this Chapter XIII A application is competent.

60. There cannot be any two opinion as to the correctness of the aforesaid finding of the learned Single Judge on the maintainability of the proceedings and

it is obviously so, as the appellate court did not express any observation on the merits of the case in the context of dismissal of the winding up petitions by the Company Judge and relegated the appellant to their ordinary remedies permissible under the law and directed the appellants to file civil suits within four weeks thereafter which led to the filing of the suits i.e. six applications under Chapter XIII A of the Original Side Rules, High Court, Calcutta. Therefore, it is quite clear that the findings of the learned Company Judge of this Court while dismissing the six applications for winding up of the companies were not disturbed after considering the case of the plaintiffs who has sought winding up petitions on similar ground on the basis of which they are seeking a judgment by adopting a summary proceeding by filing an application u/s XIII A of the Original Side Rules.

61. The learned Single Judge could not have denied to the appellant/defendant leave to defend the six applications under Rule XIII A by rejecting the prayer of the defendant for leave to defend on entering appearance as the appellants/defendants had already furnished security as directed by the appellate Court by way of bank guarantee.

62. In *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, the Supreme Court considered pre-requisites and principles for exercise of power u/s 433 (e) of the Companies Act and held :

18. This Court in a catena of decisions has held that an order u/s 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression "unable to pay its debts" in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a company.

19. The respondent is not a creditor and the appellant is not a debtor insofar as US \$ 11,000 is concerned. The defence raised by the appellant is a substantial one and not mere moonshine which is to be finally adjudicated upon on merits before the appropriate forum.

20. Section 433 of the Companies Act says:

"433. A company may be wound up by the court,-

(a)-(d) * * *

(e) if the company is unable to pay its debts;

(f) * * *

From the above it follows:

(1) there must be a debt; and

(2) the company must be unable to pay the same.

An order under clause (e) is discretionary.

21. The debt u/s 433 of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date. We are informed that the financial position of the appellant is sound.

22. This apart, both, the learned Single Judge and the Judges of the Division Bench have granted interim relief which can be granted only in aid of, and as ancillary to the main relief which may be available to the party on final determination of its rights in a suit or proceeding.

23. The Bombay High Court has laid down the following principles in *Softsule (P) Ltd., Re: (Comp Cas pp. 443-44)* Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make the order.

Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.

Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not "due" within the meaning of Section 434(1)(a) and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability u/s 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

24. The Madras High Court in *Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd.*, Comp LJ at p. 326 has evolved the following principles relating to bona fide disputes:

(i) if there is a dispute as regards the payment of the sum towards the principal, however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a civil court;

(ii) the existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to a civil court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding-up proceedings; and

(iii) if there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company.

25. The rules as regards the disposal of winding-up petition based on disputed claims are thus stated by this Court in *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd.* This Court has held that if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The principles on which the court acts are:

(i) that the defence of the company is in good faith and one of substance;

(ii) the defence is likely to succeed in point of law; and

(iii) the company adduces prima facie proof of the facts on which the defence depends.

63. The learned Company Judge arrived at a finding that the claims of the petitioner had been disputed by the Company by raising serious questions of law, the power of the BIFR to determine disputed dues is in issue. The authority of the BIFR to waive limitation is questioned. The learned Company Judge also held that the claim could not said to be admitted and that the company had no defence at all to the claim of the petitioning creditors on that the defence taken is a moonshine defence.

64. The other reason according to us which entitles the appellants/defendants to seek leave to defend in the facts and circumstances of the case is the nature of the admission on which reliance is placed by the plaintiffs/respondents, this is apart from the controversy whether a statement made in the balance sheet of the defendant company acknowledging the liability of its promoters is an admission of debt. Considering that it was an admission on the part of the defendant company before the BIFR acknowledging the debt in favour of the plaintiff companies as reflected in its balance sheet in so far as the appellant/defendant are concerned they have disputed the sum and at the most it is in the nature of a qualifying admission.

65. In the present case, the appellants/defendants have rather questioned the liability to pay the amount as well as interest to the six companies as they have expressed doubt about the transactions. Even before us during the hearing of the appeal advocate for the appellant issued notices to the respondents to give them inspection as regards lending of such funds to the sick industry by cheque or otherwise which was declined as unwarranted.

66. In the aforesaid background and particularly when the claim of the respondents has been sufficiently secured by directing the appellants to furnish security, the Court in its discretion ought to have given leave to defend. In *Santosh Kumar vs. Bhai Mool Singh* (supra) it was held :

The discretionary power entrusted upon the court must be exercised along

judicial lines, and that in turn means, in consonance with the principles of natural justice that form foundations of our laws. Whenever the defence raises triable issue" leave must be given, and later cases say that when that is the case it must be given unconditionally, otherwise the leave may be illusory. If the court is of opinion that the defence is not bonafide, then it can impose conditions and is not tied down to refusing leave to defend.

But it cannot reach the conclusion that the defence is not bonafide arbitrarily. It is as much bound by judicial rules and judicial procedure in reaching a conclusion of this kind as in any other matter.

No hard and fast rules can, however, be laid down in matters affecting discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts.

this has been affirmed in *Milkhiram (India) Private Ltd. and Others Vs. Chamanlal Bros.*,

67. The learned Single Judge has himself referred to the decision in *Sm. Kiranmoyee Dassi and another Vs. Dr. J. Chatterjee and Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, Supreme Court in *Mechalec Engineering (supra)* placed reliance on the proposition formulated by the Calcutta High Court in *Sm. Kiranmoyee Dassi (supra)* :

8. In *Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee* (1945) 49 Cal WN 246 at p.253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37. C.P.C. in the form of the following propositions (at p.253) :

(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to

establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence.

68. In the present case, the foundation of the plaintiffs/respondents' scheme is based on the order passed by the BIFR and AAIFR in the matter of sanctioning of a rehabilitation claim regarding Anglo India Jute Mills Ltd. (AIJML), the sick industrial company. The initial promoter, the J.P Goenka group, having failed to implement the sanctioned rehabilitation scheme SS-89 which was sanctioned on 28.3.1989 the BIFR was required to sanction a fresh rehabilitation scheme on 4.2.1994 known as SS-94 based on the change of management of the Goenka Group to M/s. AI Champdany Industries Limited (CIL) and in the said scheme, a figure of Rs. 386 lac is shown as "unsecured loans/deposits, frozen upto the year 2003, from the corporate bodies" (including subsidiary and interest accrued and due). This amount was finally reduced to Rs. 319.02 lac and was shown as disputed in their annual accounts in the financial year 31.3.1996 by the appellant/defendant. The said dispute was finally settled by an order passed by AAIFR on 4.6.1999 it held as under :

11. We have examined the contentions of the senior advocates for AIJML and respondents and our conclusions are :-

a) AIJML's self-seeking claims against old promoters and associates cannot be treated as "dues" payable by the old promoters and associates. The claims or any part thereof will become "dues" only if finally adjudicated by competent courts in favour of AIJML or admitted by the old promoters/associates. Therefore, on the basis of these claims, AIJML cannot show the dues of Rs. 319 lakhs payable to six corporate bodies (No. 1 to 6 in para 5 (c) above) as disputed in their annual accounts. These dues have to be acknowledged without being shown as disputed. However, if any part of these claims is admitted by any of the aforesaid creditor corporate bodies, it can be adjusted against the loans/deposits given by corporate bodies making such admission and correspondingly reflected in the annual accounts. Similarly, if AIJML approaches the competent court(s) and finally gets any of its claim or part thereof adjudicated in its favour against of the aforesaid corporate bodies, then also it can adjust such adjudicated

amount against the dues payable by it to such corporate body.

b) The plea of legal complication and possibility of penal action in view of section 211(7) of the Companies Act, 1956, is without merit and vexatious for several reasons; by virtue of the non obstante clause in section 32 (1) of the Act, the provisions of SS-94 over-ride such provisions of the Companies Act, 1956 as may be inconsistent with the provisions of SS-94; clause 3.L(iv)(c) binds the new promoters (CIL) to bring in interest free funds of their own to meet any contingent or other liability not known or not disclosed at the time of sanction of SS-94; additional liabilities coming to the notice of the new promoters after the transfer of management in their favour in April 1994 are, therefore, to be met by them by bringing in additional interest free funds on their own; the expenditure on such additional liabilities, incurred by AIJML, is required to be reflected in the annual accounts and, therefore, the question of the annual accounts not giving a true and fair picture of the financial position does not arise; even otherwise, incorporation of notes in the annual accounts in pursuance of the provisions of SS-94, as reviewed/modified by BIFR from time to time, will over-ride the provisions of section 211 of the Companies Act, 1956, if any provisions in section 211 of that Act is inconsistent with the provisions of SS-94 as reviewed/modified by BIFR from time to time.

c) BIFR has not restrained AIJML from pursuing its claims against any parties in the appropriate court of law. Moreover, even if a claim is treated as ""contingent gain" it cannot be treated as a likely receipt to be adjusted against proven debt or used as an excuse for showing such debt as disputed, nor can it be treated as a "receipt"/"receivable" in the profit and loss account/balance sheet;

d) In view of clause 3.L(iv)(c) of SS-94 and the examination already done by BIFR, it is not necessary for BIFR/O.A. to make any further inquiry into AIJML's claims referred to in the impugned order and this appeal.

12. In conclusion, in the Annual Accounts prepared for any financial year hereinafter, the unsecured loans/deposits of Rs. 319 lakhs (rounded off) have to be acknowledged by AIJML as the undisputed, unsecured interest-free/deposits, frozen upto the year 2003, from the following corporate bodies :

1.

Haldia Investments Limited

8269273

2.

Duncans International (India) Limited

5486389

3.

Discipline Investments Limited

841391

4.

Globe Tea and Industries Limited

2404189

5.

Arindum Investments Limited

1900000

6.

Cosmopolitan Investments Limited

13000000

Rs. 31901242

The appeal stands disposed of.

69. Therefore, considering the nature of the scheme for rehabilitation the liability to discharge arises for failure to fulfil the commitment in the scheme which gave cause of action to the plaintiffs/respondents to initially take resort to filing of six winding up petitions which they lost in the Company Court, and were directed to file suits to recover their claims. The appellant/defendant set up a case disputing the claim as put forth by the plaintiffs/respondents and pleaded that the scheme contained reciprocal arrangement and plaintiffs/respondents had failed to perform their part of the obligation such as transfer of immovable property at 8/7, Woodland Flat, Alipore Road, Calcutta and contended that the plaintiffs/respondents having failed to fulfil the conditions could not seek a judgment and decree in the matter without giving an opportunity to the appellant/defendant to contest the suit.

70. In our view, the appellant/defendant having accepted the scheme are bound to implement it but nothing prevents them from disputing the claim of the plaintiffs/respondents which was found by the learned Company Judge to be a bonafide dispute.

71. Furthermore, the AAIFR while considering the dispute as regards the claim has also observed in clause (a) of paragraph 11.

Similarly, if AIJML approaches the competent court(s) and finally gets any of its claim or part thereof adjudicated in its favour against of the aforesaid corporate bodies, then also it can adjust such adjudicated amount against the dues payable by it to such corporate body.

72. Therefore, what is made clear is that the appellant/defendants" right to dispute the claim of the plaintiffs/respondent so as to seek its adjudication and

insist for performance of reciprocal arrangements apart from raising the issue of limitation is not taken away by the scheme.

73. In *Sm. Kiranmoyee Dassi* (supra), clause (e) of the proposition provides as under :

If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence.

74. The finding of the learned Company Judge and the offer of the defendant company to secure the claims of the plaintiffs/respondents which has been finally accepted and acted upon by the defendant sufficiently protect and secure the claims of the plaintiffs/respondents and, therefore, the learned Single Judge ought to have exercised the discretion by granting leave to the defendant.

75. We, therefore, quash and set aside the judgment and order in all the six suits and grant leave to the appellants/defendants to defend as a result of which now they will be at liberty to file their written statement before the learned Single Judge as required for which we grant them six weeks" time from the date of this judgment and order. Needless to say that having quashed and set aside the judgment of the learned Single Judge the cross-objections filed by the plaintiffs/respondents stands allowed as the learned Single Judge will have to consider the claim of the plaintiffs/respondents afresh as regard the claim of interest. The appellants/defendants will keep the bank guarantees furnished in the suits alive till the conclusion of the suit.

76. The appeal stands allowed in the aforesaid terms with no order as to costs.

Sambuddha Chakrabarti, J.

77. I agree.