
(2008) 12 MAD CK 0308

In the Madras High Court

Case No : Company Petition No. 134 of 2008

Dallah Albaraka (Ireland) Ltd.

APPELLANT

Vs

Pentasoftware Technologies Ltd.

RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Administration of Justice Act, 1920 — Section 10
Civil Procedure Code, 1908 (CPC) — Section 13, 38, 39, 40, 44A
Companies Act, 1956 — Section 433, 434(1), 439(1), 443, 443(2)
Partnership Act, 1932 — Section 44

Citation : (2011) 101 CLA 177 : (2010) 157 CompCas 413 : (2011) 105 SCL 274

Hon'ble Judges : Chitra Venkataraman, J

Bench : Single Bench

Advocate : S.R. Rajagopal, for the Appellant; Sriram, for Kailasam Associates, for the Respondent

Final Decision : Dismissed

Judgement

Chitra Venkataraman, J.—The petitioner herein seeks an order of winding up of the respondent-company u/s 433(e) and (f) read with Sections 434(1)(a) and 439(1)(b) of the Companies Act, 1956. The petitioner traces its claim to a decree obtained before the High Court of Justice, Queen's Bench Division, Commercial Court, England and Wales.

2. Under an agreement dated September 20, 2000, the petitioner granted a finance facility to Pentafour International Singapore P. Ltd., which subsequently, came to be known as Pentasoftware Singapore P. Ltd., in a sum of US \$ 10 million for the acquisition of software and related products for onward sale to buyers. Under the terms of the agreement, the respondent herein furnished a corporate guarantee guaranteeing payment. The allegation of the petitioner is that Pentasoftware Singapore P. Ltd., committed defaults in payment of a sum of US \$ 9,464,562.40 with interest awarded as on December 31, 2003, to a sum of US \$ 484,686.53, thus aggregating to a sum of US \$ 9,949,248.93.

3. It is alleged that Pentasoft Singapore P. Ltd., the respondent-company incorporated Ruby Orifice Group Inc., under the laws of the Seychelles. This company entered into a settlement with the petitioner-company agreeing that Ruby Orifice Group Inc., would repay the amount due to the petitioner and thereby discharge the liabilities of Pentasoft Singapore P. Ltd., and all its guarantors as a consideration of transfer of securities by Pentasoft Singapore P. Ltd. It is stated that the petitioner made a demand on Pentasoft Singapore P. Ltd., for repayment of sum of US \$ 11,390,164.29 by July 31, 2005, the amount due under its letter dated July 7, 2005, as on June 30, 2005. Taking the defence that the claim was barred by limitation, the respondent referred to the agreement that Pentasoft Singapore P. Ltd., had entered into with Ruby Orifice Group Inc., on March 19, 2004, as resulting in novation of the contract, and thereby denied its liability. This resulted in the petitioner moving the High Court of Justice, Queen's Bench Division, UK.

4. By judgment dated July 13, 2007, in claim No. 2006 Folio 1140, the Queen's Bench Division, Commercial Court, High Court of Justice granted the decree for a sum of US \$ 858,708.42 profit from August 24, 2006, to the date thereof at a daily accrual of US \$ 2,658.54 on account of liquidated and ascertained damages, totalling to a sum of US \$ 13,362,754.05.

5. Thereafter, the petitioner issued a statutory notice under the Companies Act, 1956, on December 18, 2007, that the judgment of the Queen's Bench Division being final, the respondent was liable to pay the sum; that as the decree was passed by the reciprocating country, the decree was executable against the respondent in India and called upon the respondent to pay the decreed amount of US \$ 13, 362, 754.05 or to its rupee equivalent as at the exchange rate prevalent as on the date of the decree, failing which, the petitioner threatened to proceed u/s 433(e) and (f) read with Sections 434(1)(a) and 439(1)(b) of the Companies Act, 1956, before this Court.

6. This was replied to by the respondent. Referring to the petitioner's agreement entered into with Ruby Orifice Group Inc., the respondent pointed out that the same was entered into without the respondent's concurrence; that the decree obtained from the English court could not be enforced in India, as the respondent had not submitted to the jurisdiction of the courts in the United Kingdom. They further denied that they were ever served with any notice dated December 18, 2008 and denied their liability. By letter dated March 15, 2008, the petitioner replied to the said letter of the respondent, reiterated the claim; thus ultimately invoked this Court's jurisdiction seeking winding up of the company.

7. On notice, the respondent has filed its counter reiterating the contention taken in the reply to the notice.

8. Learned Counsel appearing for the petitioner pointed out that the decree obtained from the English court is binding on the respondent and executable as per Section 13 of the Civil Procedure Code. He alleged that the respondent had

full knowledge of the proceedings. The judgment being one on the merits, the respondent is a defaulter and the decree is executable, this Court has the jurisdiction, to declare the respondent as commercially insolvent. Learned Counsel referred to the service of notice on the respondent and the affidavit filed before the English court and submitted that the decree being one based on the judgment on the merits, it is a debt in terms of Section 434(1)(a) and (b) of the Act. He placed reliance on the decision reported in *M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd.*, . As to the defence of the respondent that contrary to the FEMA and RBI provisions, the respondent cannot give any guarantee, Learned Counsel, appearing for the petitioner submitted that the defence is a fraudulent one and that having given such guarantee, the respondent cannot escape from its liability. He pointed out that the claim as to the novation of the original agreement is a false claim, considering the fact that the directors of the company V. Chandrasekar and S. Chandrasekar are the beneficial directors of Ruby Orifice Group Inc., forming part of the respondent group companies. Placing reliance on the decision reported in *State of U.P. and Others Vs. Renusagar Power Co. and Others*, , he pleaded that once the corporate veil is pierced, the real state of affairs will show the falsity of the claim of the respondent.

9. Setting up an alternate plea that even otherwise, the petitioner is entitled to maintain the petition on the debt, which is still a live one, the debt would still survive to exercise the equitable jurisdiction of this Court.

10. Countering the claim of the petitioner, Learned Counsel appearing for the respondent pointed out that the judgment obtained before the English court is not a judgment on the merits to fall u/s 13(b) of the Civil Procedure Code, 1908 but one obtained under the summary jurisdiction of the court. Contending that there was no service of notice in the suit, he pointed out that no evidence was let in or materials produced to say that the court in England considered the materials to grant the judgment as one on the merits. He pointed out that the supporting affidavit of Counsel therein in the proceedings before the English court could not be taken as evidence of the claim of the petitioner. He referred to the decision reported in *M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd.*, and submitted that since the judgment of the Queen's Bench was not on the merits but one given in a summary proceedings, the petitioner cannot make its claim on the basis of the decree as one on merits. Hence, the judgment is not binding on this Court for its enforceability as per Section 13(b) of the Civil Procedure Code. He pointed out to the replies sent denying the jurisdiction of the English court and questioned the jurisdiction of the English court to pass the decree. He referred to the decision reported in *Raj Rajendra Sardar Maloji Marsingh Rao Shitole Vs. Sri Shankar Saran and Others*, and pointed out that there was no averment to this aspect in the petition and there are no sufficient pleadings as to the jurisdiction of the English court to try the claim. He referred to the decision reported in *R.N. Kumar Vs. R.K. Soral*, and pointed out that the petitioner has not made out any case for exercising the jurisdiction of the court u/

s 433(e) and (f) of the Companies Act, 1956.

11. In reply, Learned Counsel appearing for the petitioner, pointed out that the respondent is guilty of committing corporate fraud in contending that Ruby Orifice Group Inc., is a different entity when the fact remains that the directors of the respondent-company are the beneficial directors of Ruby Orifice Group Inc. Hence, there is no novation of contract as alleged by the respondent. Placing reliance on Section 434(1)(b) of the Companies Act, 1956, Learned Counsel pleaded for ordering winding up of the company.

12. Heard Learned Counsel on either side and perused the materials placed before this Court.

13. It is seen from the financial statement of Pentasoft Singapore P. Ltd., that it is a wholly owned subsidiary of Esoft com (Mauritius) Ltd. The ultimate holding company is Pentasoft Technologies Ltd., incorporated in India, the respondent herein. The financial statement for the financial year ending March 31, 2002, of Pentasoft Singapore Ltd., gives the address of the branch office in the United Kingdom at 15, Cambridge Court, 210, Shepherds Bush Road, Hammersmith, London W6 7NJ. It is seen from the records that in the meeting held on September 21, 2000, the Singapore company passed a resolution as to the borrowing and authorised V. Chandrasekar, director to negotiate and finalise the terms of the facility and execute the necessary document.

14. In the meeting held on September 21, 2000, the board of directors of the respondent-company referred to the resolution of Pentafor International (Singapore) P. Ltd., to avail of financial facility up to US \$ 10 million from the petitioner herein for the purchase of software and related products and passed after detailed discussions, the following resolutions:

Resolved that Pentafor International (Singapore) Pte. Ltd., do avail a Murabaha Facility from Dallah Albaraka (Ireland) Ltd., London of up to USD 10 million for which Pentasoft Technologies Ltd., has provided the corporate guarantee.

Resolved, further that Shri V. Chandrasekaran be hereby authorised to sign and execute necessary documentation in respect of the said Murabaha facility.

15. Accordingly, the respondent executed a guarantee agreement on September 21, 2000. The respondent undertook to indemnify the petitioner against any loss accruing from the breach of the agreement with the borrower. It is seen from the averments in the petition and not denied by the respondent that the agreement on the borrowing by the Singapore company was later on transferred to Ruby Orifice Group Inc., of Seychelles, who undertook to make the payment due from the Singapore company, The petitioner's contention, is that Ruby Orifice Group Inc., is part of the respondent-company represented by S. Chandrasekaran, who was the C. F. O., and who happened to be the director in the respondent-company also.

16. It is an admitted fact that the petitioner moved the English court for a money

decree against the respondent on the strength of the guarantee executed by the respondent. The submission of the petitioner is that in the face of the decree remaining unsatisfied, and even assuming there is no decree on the merits, still, as the respondent has neglected to pay the amount due to the petitioner as per the guarantee executed and having regard, to the respondent's inability to pay its debts as evident from the balance-sheet confirming that the respondent-company has reached a stage of commercial insolvency, the petitioner, as a creditor, can maintain its claim u/s 434(1)(a) of the Act and alternatively, as per Section 434(1)(b) of the Act, to invoke the jurisdiction of this Court u/s 434(1)(e) of the Act. The said submission assumes significance in the light of the respondent's contention that the decree obtained is not a decree on merits but an ex parte decree and hence not binding on this Court as per Section 13(b) of the Civil Procedure Code.

17. The question as to whether a creditor who obtained a decree against the company is compelled to confine his remedy u/s 434(1)(b) alone or could resort to Section 434(1)(a) of the Act also came up for consideration in the decision reported in (1980) 50 Comp Cas 422 (Mad) (Seethai Mills Ltd. v. Perumalsamy (N.)). While considering the issue as to whether a decree holder had to proceed u/s 434(1)(b) of the Companies Act and not u/s 434(1)(a) of the Act that he ceases to be a creditor, this Court pointed out that the fact that the original debt had merged into a decree and the person who was originally a creditor had become a decree holder does not destroy his character as a creditor or the character of money due to him from the company as a debt. This Court pointed out (page 424) : "From the very language of Section 434(1) (b), it may be stated that it does not even contemplate a money decree or order for payment of money and it generally uses the expression "if execution or other process issued on a decree or order of any court in favour of a creditor of the company". Therefore, the decree or order that is contemplated by Section 434(1)(b) is not confined only to a money decree or an order for payment of money. On the other hand, it is general in nature. However, what we have to concentrate on is, whether a person who had obtained a decree for money against a company will cease to be a creditor because of that fact, so as to take his case out of Section 434(1)(a) of the Act. We are of the opinion that there is no warrant for such a contention. A creditor, who has instituted a suit and obtained a decree against the company, will still be a creditor of the company to whom money is due by the company". This Court further held that there is no mutual exclusion between Section 434(1)(a) and (b) of the Act. In the light of the law declared, there is no impediment in the petitioner's alternative plea u/s 434(1)(a) of the Act.

18. As to the enforceability of the foreign award and when an ex parte decree could be called as one on merits, Learned Counsel referred to the decision of the Supreme Court reported in M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd., . The facts therein show that the respondent therein obtained an ex parte decree based on which he moved the civil court in Ludhiana. The judgment debtor resisted the execution petition. Since the same were filed

without following the procedure under Sections 38, 39, 40 of the CPC, the decree holder took the stand that the execution was u/s 44A of the CPC and hence, there was no need to comply with the provision under Sections 38, 39 and 40. The judgment debtor filed another application that the decree was not on merits and as per Section 44A read with Section 13(b), the court had to refuse the execution. The apex court pointed out that the burden of proving whether the foreign judgment is on the merits or not lies with the person so alleging; that (page 277) : "...amongst other things, the party must show that the decree does not show that it is on merits, if necessary the rules of that court, the existence or lack of existence of material before the court when the decree was passed and the manner in which the decree is passed. All this has been done in this case".

19. The Supreme Court pointed out to the facts of the case therein that after receiving some affidavit to which all documents were once again enclosed, no documents were tendered or any evidence led. However, the English court judgment did not indicate whether the documents were looked into and/or the merits of the case considered. The court had not referred to the objection of the defendant as contained in the reply to the notice. The Supreme Court further pointed out that at the stage of issuance of summons, the court forms a prima facie opinion. Only thereafter, the court has to consider the case on the merits by looking into the evidence led and documents proved before it, as per its rules. It is only if this is done, that the decree can be said to be on the merits. The Supreme Court pointed out that even in cases where the defendant remained ex parte, it is possible for the plaintiff to adduce evidence in support of the claim, so that the court may consider the claim in the background of the evidence and give a decision on the merits. It cannot be said that such a decision on the merits is possible only in cases where the defendant enters appearance and contests the plaintiff's claim. Thus, the non appearance of the defendant will not by itself determine the nature of the judgment one way or other.

20. A decree not on the merits could not be enforced in India. It pointed out (page 273 of (2001) 5 SCC):

To say that a decree has been passed regularly is completely different from saying that the decree has been passed on merits. An ex parte decree passed without consideration of merits may be a decree passed regular if permitted by the rules of that court. Such a decree would be valid in that country in which it is passed unless set aside by a court of appeal. However, even though it may be a valid and enforceable decree in that country, it would not be enforceable in India if it has not been passed on merits. Therefore for a decision on the question whether a decree has been passed on merits or not, the presumption u/s 114 would be of no help at all. It must be mentioned that in support of the submission that it must be presumed that all formalities were complied with and the decree passed regularly reliance was also placed on cases of Krishna Kumari and Anr Vs. State of Haryana and Ors, and Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, . In our view these authorities are of no help in

deciding the question under consideration. Even if we presume that all formalities were complied with and the decree was passed regularly it still would not lead to the conclusion that it was passed on the merits.

21. If we apply the law declared in the decision reported in M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd., to test whether, the judgment passed by the Queen's Bench, Commercial Court dated July 13, 2007, is one on the merits or not, the inescapable conclusion is that the judgment is not one on the merits as contended by the petitioner. I am in entire agreement with the submission of Learned Counsel for the respondent that the decision was not rendered based on an appreciation of the evidence and materials produced but a summary judgment given after referring to the affidavit as to the service of notice alone. The order passed by the court reads as follows:

Upon reading the claimant's application notice sealed on March 12, 2007.

And upon reading the supporting witness statement of Robert Anthony Kerns dated March 1, 2007.

And upon hearing leading Counsel for the claimant.

It is ordered that:

- (1) The claimant's application for permission to apply for summary judgment and the claimant's application for summary judgment be heard together;
- (2) The claimant have permission to apply for summary judgment;
- (3) Final judgment for the claimant against the defendant for the sum of US \$ 12, 504, 045.62;
- (4) In addition, final judgment for the claimant against the defendant for the sum of US \$ 858, 708.42 profit from August 24, 2006, to the date hereof at a daily accrual of US \$ 2,658.54 on account of liquidated and ascertained damages, giving a total judgment sum of US \$ 13, 362, 754.05.
- (5) The defendant to pay the claimant's costs of the application and the action summarily assessed at ? 47,512.15.

22. Learned Counsel for the petitioner, however, pointed out that contrary to the submission of the respondent the decree had not been granted on what was prayed for. The claim made before the court sought for a decree on a sum of US \$ 12,504,045.62 and accruing thereafter at a daily rate of US \$ 2,658.54 until payment as particularised in the form stated therein; that the court granted a decree for US \$ 858,708.42 profit from August 24, 2006, to the date of the judgment at a daily accrual of US \$ 2,658.54 on account of ascertained liquidated damages, thus totalling to a sum of US \$ 13,362,754.05. He further pointed out that the affidavit filed before the court clearly showed that the respondent was served with notice of the proceedings and there was an affirmation of service of the notice on respondents Nos. 1 and 2. He further

pointed out that the claim form with all the details were hand delivered to the respondents' representative who had also put his signature and seal of the company therein. Counsel's affidavit as to the service was also filed before the court. The petition filed before the court extracted the contentions of the respondent as found in their reply to the notice. Hence, it cannot be again said that the merits of the respective parties' claim was not considered by the court to pass a judgment summarily.

23. It is no doubt true that the petitioner had placed before the English court the proof regarding the service of notice on the respondent and the fact that the address as disclosed in the financial statement as to the borrower's office falls within the jurisdiction of the English court and hence has the jurisdiction to decide the issue. So too, the claim petition gives the details of the defence of the respondent. The certificate issued u/s 10 of the Administration of Justice Act, 1920, clearly referred to the respondent not acknowledging the service of the claim form, in the sense of filing an objection either as to the jurisdiction of the court or to the merits of the claim. The certificate also mentions that the petitioner had obtained the judgment on the merits against the respondent. The judgment was also served on the respondent in accordance with the provisions of Part 6 of the Civil Procedure Rules, 1998; that no appeal had been preferred against the judgment within the time prescribed. Yet, the order of the court would show, the extract of which had already been given in the preceding paragraph, that the application to apply for permission to apply for summary judgment had been ordered granting a final judgment. This is self-explanatory to reject the plea of the petitioner that the judgment is one on merits.

24. Learned Counsel referred to the claim petition, wherein the petitioner had extracted the reply of the respondent to the petitioner's letter dated July 25, 2005, wherein, the respondent had taken the plea that the guarantee executed in India would be governed by the laws applicable in India. Apart from that, the respondent had also pointed out to the agreement entered into by the petitioner herein with Ruby Orifice Group Inc. In the circumstances, by the subsequent agreement, there was novation of the contract, in which there was a plea of limitation too. Hence, going by these facts given in the claim petition, it cannot be said that the English court has granted the summary judgment without adverting to the merits of the claim and the materials supporting the claim. I do not agree with the said submission.

25. The answer to the said contention can be found in the very same decision of the apex court referred to above, wherein, the apex court approved the decision of the Kerala High Court reported in *Govindan Asari Kesavan Asari Vs. Sankaran Asari Balakrishnan Asari*, , which, in turn, referred to the Madras High Court decision reported in *R.E. Mahomed Kassim and Co. Vs. Seenii Pakir Bin Ahmed and Others*, and AIR 1928 Ran 319 (*A.N. Abdul Rahman v. J.M. Mahomed Ali Rowther*). The apex court extracted the decision of the Kerala High Court which contained the extract from the Rangoon decision which reads as follows (page

206):

It will not satisfy even the minimum requirements of a judgment on the merits of the claim. What such requirements are, have been explained in *A.N. Abdul Rahman v. J.M. Mahomed Ali Rowther* AIR 1928 Ran 319, in the following terms:

A decision on the merits involves the application of the mind of the court to the truth or falsity of the plaintiff's case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed *ex parte*, a decision passed without evidence of any kind but passed only on his pleadings cannot be held to be a decision on the merits.

26. As already pointed out, the facts in the decision of the Supreme Court reported in *M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd.*, are no different from what prevails herein before this Court. It is no doubt true that in the claim petition, the petitioner had adverted to the reply of the respondent refuting the claim. However, by that itself one cannot say with any reason that the merits of the claim were considered with reference to the materials and evidence supporting the claim of the petitioner to deliver the judgment on merits. To borrow the phrase from the decision of the Kerala High Court in the decision reported in *Govindan Asari Kesavan Asari Vs. Sankaran Asari Balakrishnan Asari*, referred to and approved in the aforesaid decision of the apex court (page 206 of AIR 1958 Ker) : "To decree the plaint claim solely on account of the default of the defendant and without considering the question whether the claim is well-founded or not and whether there is any evidence to sustain it, can only mean that such a decree is passed against the defendant by way of penalty."

27. In fact, in the order passed by the Queen's Bench Division, the Commercial Court refers to the application dated March 12, 2007, that upon reading the supporting witness statement of Robert Antony Kearns dated March 1, 2007, upon hearing the leading Counsel for the claimant and on the application for permission to apply for summary judgment, the final judgment was passed on July 13, 2007, granting a decree to the petitioner. The order sheet thus referring to the judgment delivered as summary judgment clearly goes against the petitioner's contention that the judgment of the English court has to be taken as one on the merits. The evidence of the attorney referring to the service of the notice along with the covering letter on the respondents, by no means, can be taken as a piece of evidence to prove the claim of the petitioner to have a judgment on the merits. It must be noted herein that although the petitioner had stated in the claim petition in paragraph 8 that they would refer to the relevant documents in full at trial, admittedly, no documents were marked at the time of trial. Although Learned Counsel for the petitioner refuted the service of the notice on the proceedings before the English court for the purpose of the present proceedings, it is not necessary to consider the same.

28. Going by the very terms of the decree passed by the English court, I have no hesitation in rejecting that the contention of the petitioner decree-holder is binding on this Court. However, this does not prevent the petitioner from seeking a prayer for winding up u/s 434(1) (a) of the Companies Act. As pointed out by the Division Bench of this Court, an alternative prayer is nevertheless maintainable provided, there is a debt enforceable.

29. As already seen in the preceding paragraphs as to the facts herein, the respondent herein gave a corporate guarantee under the resolution of the board of directors of the respondent. Hence, having given the guarantee to the amount borrowed and the petitioner informed of the board resolution, as seen from the endorsement in the bottom of the page giving details of the extracts of the meeting of the board of directors of the respondent, it is difficult to accept the case of the respondent that by reason of the assignment of the debt to Ruby Orifice Group Inc., there is novation of contract. Hence, the respondent could not be mulcted with any responsibility to meet the demands of the petitioner.

30. In considering the said contention, the reply by the respondent to the statutory notice issued by the petitioner needs to be seen. In the reply dated February 15, 2008, the respondent admitted that they extended the guarantee dated September 21, 2000, in respect of the borrowing of Penta-four International Singapore P. Ltd., subsequently renamed as Pentasoft Singapore P. Ltd. However, the respondents stated that in view of the agreement with Ruby Orifice Group Inc., entered into without the consensus and concurrence of the guarantor, there was novation of contract. The respondent also pointed out to the laws of India relating to foreign exchange transactions including guarantees by an Indian to obtain the prior sanction by the Central Government, that failure to obtain the permission, rendered the guarantee void. They further pointed out that the company court cannot be used as an execution court to collect the disputed debts, since the validity of the agreement is questioned both on procedural grounds as well as on the question of limitation. They also pointed out that they had been honouring the payment of several other creditors; thus the respondent denied their liability to make the payment under the guarantee agreement, apart from denying that circumstances existed to order winding up of the company. Learned Counsel for the respondent pointed out that except for placing the claim on the judgment of the foreign court, the petition had not stated the grounds demanding the winding up of the company.

31. In the decision reported in (1972) 42 Comp Cas 125 (Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd.) the apex court considered the parameters to be considered while dealing with the petition on winding up of a company. Interpreting the phrase "unable to pay its creditor" found in Section 433(e) of the Companies Act, the Supreme Court, in the decision reported in and pointed out (page 131):

Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company....

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (see *A Company In re* (1894) 94 S.J. 369 : (1894) 2 Ch. 349 (Ch. D)). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (see *Tweeds Garages Ltd. In re* (1962) 32 Comp Cas 795 (Ch. D) : (1962) Ch. 406). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding up order by the creditors the court will consider their wishes and may decline to make the winding up order. u/s 557 of the Companies Act, 1956, in all matters relating to the winding up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows:

This right to a winding up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order.

The wishes of the creditors will however be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well-settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case (see *P. and J. Macrae Ltd. In Re* (1961) 31 Comp Cas 424 (CA) : (1961) 1 All ER 302).

32. In the decision reported in (1965) 35 Comp Cas 456 (*Amalgamated Commercial Traders P. Ltd. v. A.C.K. Krishnaswami*), the apex court referred to the following passage, from Buckley on the Companies Acts, 13th edition, page 451 (page 463):

It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court.

33. As already noted that the grounds alleged in the petition seeking winding up

u/s 433(e) and (f) are that the decree passed by the reciprocating country is executable against the respondent u/s 44A of the CPC and that the decree amount is a debt due to the petitioner; that the respondent had failed to liquidate the outstanding amount despite several correspondences calling upon them to make the payment; that this disclosed the inability of the respondent to pay the debt; secondly, it had come to the knowledge of the petitioner that there are several claims from various creditors which had not been honoured by the respondent and that there are winding up petitions; that from the above said facts, it is clear that the respondent has become commercially insolvent unable to pay debts of a sum exceeding Rs. 1,00,000 as and when they fell due. The claim of the petitioner is contested by the respondent as follows : that the English court has no jurisdiction to pass a decree, since there is no office in England; that in view of the subsequent agreement with Ruby Orifice Group Inc., there is a novation of the contract and as per the provisions of the Indian Contract Act, 1872, the guarantor stands discharged; that the guarantee given is void as there is a failure to obtain permission from the RBI and as per the Foreign Exchange Regulation Act, 1973; that the judgment given by the English court is not one on merits and hence, hit by Section 13(b) of the CPC; that the company court cannot be used as a execution court to collect the debt disputed on various grounds including a plea of limitation. Apart from these, the respondent denied the claim of the petitioner as to the several claims of the creditors, remaining outstanding and unhonoured.

34. In the decision reported in (2001) 104 Comp Cas 533 (Tata Iron and Steel Co. v. Micro Forge (India) Ltd.), the Gujarat High Court listed various aspects exhaustively which need to be kept in mind while considering the petition for winding up. The Gujarat High Court pointed out (pages 540 to 543):

Certain important chronicles and contours to be kept in the mental radar, before reaching the conclusion in a winding up petition can be articulated as under:

(1) The remedy u/s 433 in general and under Clause (e) in particular is not a matter of right, as such, and it is the discretion of the company court. It does not confer any right on any person to seek order that the company should be wound up. It is a provision empowering the court by a statutory provision to pass an order of winding up in an appropriate case.

(2) Merely because any one of the circumstances enumerated in Section 433 of the Companies Act exists, the court is not bound to order winding up of the company. Nobody can aspire to wind up the company as a matter of course. The court has wide power and discretion. In this connection, inability to pay debts is required to be judged from various sets of facts and circumstances. It may also be stated that inability to pay debts in all cases, ipso facto, could not be construed as an appropriate case for winding up.

(3) A debt is money which is payable or will be payable in future by reason of a person's obligation. The expression "debt" would refer to liability to pay and it

rests on certain contingencies, conditions and causalities. Even if the debt is proved and even if the inability to pay the debt is also shown, it is not a launching pad, in all cases, for a successful winding up order. Inability may arise for a variety of reasons and the court is obliged to consider whether the inability is the outcome of any deliberate or designed action or mere temporary shock and effect of economy and market. In a given case, it may happen that a party may become unable to pay its debts for a while, but that by itself is not a criterion for exercise of the power to wind up, ipso facto.

(4) It is necessary for the company court to consider the financial status, strength and substratum of the company, in the overall context. It is possible, at times, that there may be a cash crunch. It may be also, possible, at times, that there is temporary cash crisis despite high sales and heavy turnover and, therefore, in such a situation, mere disability or only on the ground of inability to pay would not constitute a ground empowering the court to wind up the company.

(5) If the company is an ongoing concern having regular business and employment of employees, the court cannot remain oblivious to this aspect. The effect of winding up would be of putting an end to the business or an industry or an entrepreneurship and, in turn, resulting in loss of employment to several employees and loss of production and effect on the larger interest of the society.

(6) Even dividend declared by the company regularly and having profit in the light of the profit and loss account, though temporarily, there may be inability to pay the debt or in the case of any eventuality, the company is unable to make the payment of dues and that by itself could not be construed as a ground to wind it up.

(7) Winding up of a company, as such, is nothing but a commercial death or insolvency and, therefore, the company court is obliged to take into consideration not only the temporary inability, or disability to make the payment of debts, but the entire status and position of the company in the market.

(8) When grounds on which the winding up order can be denied, upon an evaluation of the facts of the case, after admission, exist from the record already placed before the court, it would be a sound exercise of discretion to reject the petition instead of admitting it. This view is very much celebrated.

(9) Inability to pay debts in terms of Section 433 (e) read with Section 434(1) (a), demand of the debt would raise a presumption as to inability to pay its debts. But such a presumption is rebuttable. Such a presumption may be rebutted on existing material and what evidence is sufficient depends on the facts and circumstances of the case.

(10) If the company has shown considerable growth in a reasonable span and is a growth oriented enterprise, even in a case of temporary inability would not be sufficient to drive it to winding up.

(11) Though, ordinarily, an unpaid creditor may aspire for an order of winding

up, the "ex debito justitiae" rule is not of inflexible mandate, but is, as such a matter of discretion of the court.

(12) Section 433 is also indicative of the fact that even if one or more grounds mentioned in Section 433 exist, it is not obligatory for the court to make an order of winding up. The court has discretionary power. The court must in each case exercise its discretion in deciding whether in the circumstances of the case, it would be in the interest of justice to wind up the company. It is a well known rule of prudence that even in a case where indebtedness to the petitioning person is undisputed, the court does not pass an order for winding up where it is satisfied that it would not be in the larger interest of justice to wind up the company.

(13) It is also well-settled that a winding up order shall not be made on a creditor's petition, if it would not benefit him or the company's creditors in general.

(14) The court is also obliged to consider that it would be in the interest of justice to give the company some time to come out of the momentary financial crisis or any other temporary difficulty as winding up is a measure of last resort.

(15) Winding up course cannot be adopted as a recourse to recovery of the debt.

(16) The court must bear in mind one more celebrated principle and consider whether the company has reached a stage where it is obviously and plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such as to make the court feel clearly satisfied that current assets would be insufficient to meet the current liabilities, along with other principles.

(17) It is also necessary to consider whether the respondent-company has become defunct or has closed its business, for quite some time, whether it is commercially insolvent. For the purpose of finding commercial insolvency, a mere look into the financial data is relevant to examine about its soundness. In all matters relating to winding up, the court may have regard to the wishes of the creditors and contributories and may, if necessary, ascertain their wishes appropriately. If the company is solvent, the wishes of the contributories would carry more weight as they are persons, mainly, interested in the assets.

(18) The element of public policy in regard to commercial morality has, likewise, to be taken into account before determining the winding up issue. The court has also to consider the purpose and policy behind Sections 443 and 557 of the Companies Act.

(19) Winding up is the last thing the court would do and not the first thing to do having regard to its impact and consequences. Winding up of a company would ensue:

(a) closing down of a company which is engaged in production or manufacture or which provides some services;

(b) it would throw out of employment numerous persons and result in gross hardship to the members of families of the employees;

(c) loss of revenue to the State by way of collection of taxes which otherwise should have been collected, on account of customs, excise duties, sales tax, Income Tax, etc.;

(d) scarcity of goods and diminishing of employment opportunities.

(20) A winding up petition has to be submitted in the prescribed form highlighting all the facts and emphasising the inability of the company to pay its debts. The form prescribed under the Companies (Court) Rules, clearly, indicates that the petitioner should provide all the necessary material particulars. The petitioner is obliged to show that the financial status or the monetary substratum or the commercial viability of the company has gone so low and down that winding up is obviously, and evidently, unavoidable.

(21) It is a settled proposition of law that a winding up petition is not a legitimate means of seeking to enforce the payment of a debt which is disputed by the company, bona fide. A winding up petition ought not to be aimed at pressurising the company to pay the money. Such an attempt would be nothing but tantamount to blackmailing or stigmatizing the concerned company by abusing the process of the court.

(22) A winding up petition is not an appropriate mode enforcing bona fide disputed debts and it is nothing but misuse and abuse of the process of the court.

(23) A winding up petition is not an alternative form for resolving the debt dispute. In certain cases disputes are such that they are fit for resolving through the civil court rather than through the company court.

(24) What is bona fide and what is not is a question of fact. The expression "bona fide" would mean genuine, in good faith and when a dispute is based on substantial grounds or when a defence is probable and with some substance, it is a bona fide dispute. It must be strictly noted that a winding up petition is not an alternative to a civil suit.

35. Keeping these parameters in mind, it may be seen from the facts herein that the respondents had not denied the guarantee given under the board's resolution. The petitioner has pointed out that Ruby Orifice Group Inc., is a group concern of the respondent herein, which has not been denied by the respondent in any manner. The petitioner has also produced necessary evidence that the directors of the company Ruby Orifice Group Inc., are the directors in the respondent-company. No materials are placed before this Court to show that there was novation of contract and that the respondent is not bound by the guarantee given. Although the details of the guarantee and indemnity executed by the respondent are not enclosed in the material papers before this Court, yet, the details of the same are found extracted in the claim petition before the English court, which are not denied by the respondent. Going by the terms of the

guarantee executed, I do not find any justifiable ground in the defence taken by the respondent as one in good faith.

36. This leads us to the further question as to whether this Court should order winding up in the face of the decision of the apex court in the decision reported in (1972) 42 Comp Cas 125 (Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd.) holding that where the debt is undisputed, the court will not act upon the defence that the company has the ability to pay the debt but the company chooses not to pay the particular debt. In the decision reported in Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, after referring to the decision of the Supreme Court reported in (1972) 42 Comp Cas 125 (Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd.) held the expression "unable to pay its dues" in Section 433(e) should be taken in its commercial sense that is to say the company should be unable to meet its current demands. It held (page 842 of 79 Comp Cas):

As stated by William James, V.C.; it is "plainly and commercially insolvent-that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain-as to make the court feel satisfied-that the existing and probable assets would be insufficient to meet the existing liabilities". (European Life Assurance Society In re (1869) L.R. 9 Eq. 122, V.V. Krishna Iyer Sons v. New Era Manufacturing Co. Ltd. (1965) 35 Comp Cas 410 (Ker) : (1965) 1 Comp. LJ 179).

37. As far as the just and equitable clause in Section 433(f) is concerned, the Supreme Court held in the decision reported in (1976) 46 Comp Cas 91 (Hind Overseas P. Ltd. v. Raghunath Prasad Jhunhunwalla) that the company court has to keep in mind the position of the company as a whole while considering a petition for winding up under this clause. The apex court pointed out (page 105):

The only limitations are the force and content of the words themselves, "just and equitable". Since, however, the matter cannot be left so uncertain and indefinite, the courts in England for long have developed a rule derived from the history and extent of the equity jurisdiction itself and also born out of recognition of equitable considerations generally. This is particularly so as Section 35(6) of the English Partnership Act, 1890, also contains, inter alia, an analogous provision for the dissolution of partnership by the court. Section 44(g) of the Indian Partnership Act also contains the words "just and equitable".

Section 433 (f) under which this application has been made has to be read with Section 443(2) of the Act. Under the latter provision where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

38. It may be noted that even though the reported case is with reference to a closely held company, yet, the decision has relevance on the scope of Section 433(f) when the Supreme Court held that a prima facie case has to be made out before the court takes action under this section, since any admission of a petition which leads to an advertisement of the winding up would cause immense injury to the company if ultimately the application has to be dismissed.

39. It is relevant to point out herein that when a petitioner invokes a just and equitable ground u/s 443(2) to wind up a company, the petitioner must convince the court not only of just and equitable ground for ordering winding up, but also that there is no alternative remedy open to the petitioner. Apart from this, the petitioner is bound to substantiate the conditions of insolvency existing to persuade the court to exercise the equitable jurisdiction. If the details as to the insolvency are wanting and no supportive documents are produced, then the petitioner could not be said to have proved prima facie the status of the respondent-company's insolvency. The creditor has to show the prima facie evidence that the existing assets and the probable assets are insufficient to meet the existing liabilities that the company is heavily indebted to various debtors that there is no possibility of the respondent-company making profit or the business being carried on.

40. From the details given in the petition or in the materials relied on, I do not find any support to the contention of the petitioner demanding exercise of this Court's jurisdiction, either u/s 433(e) or (f).

41. In the matter of ordering winding up, the court has to bear in mind that winding up is not an alternative to the ordinary procedure for realisation of a debt due and winding up would not be ordered even where the court is satisfied of the debt existing if the court is satisfied that the company has not reached a stage where, to use the phrase of Sir William James V.C. in *European Life Assurance Society In Re* (1869) L.R. 9 Eq. 122, the company "is plainly and commercially insolvent" and hence winding up of the company would not be in the interest of justice. I hold, in this aspect, the defence put up by the respondent cannot be brushed aside as lacking in bona fides that defence taken could be taken as one in good faith.

42. Learned Counsel for the respondent, however, pointed out to the petition filed by the petitioner seeking winding up that except for resting the claim on the judgment passed by the English court, the petition does not disclose the materials justifying a winding up on just and equitable grounds. The allegation as to several of the claims of the creditors remaining outstanding is not borne out by records that the respondent has reached a stage of commercial insolvency. However, Learned Counsel for the petitioner pointed out that in paragraph 11 of the petition, it is pointed out that there are several winding up petitions pending against the respondent and that the respondent is commercially insolvent and unable to pay its debts of a sum exceeding Rs. 1 lakh. He also referred to the balance-sheet of the respondent-company as to the secured loans and unsecured

loans to show that all is not well with the company. Hence, Learned Counsel for the petitioner pointed out that the petition merited to be admitted.

43. It may be seen, as already pointed out, that the jurisdiction of this Court is a summary jurisdiction that unless there are materials before this Court to show that the company has reached the stages of commercial insolvency, this Court will not order a winding up. No doubt there is a corporate guarantee to support the claim of the petitioner as a creditor, but can one say that by itself is a good ground for this Court to invoke its discretionary jurisdiction to wind up the company. Except for an averment that there are several creditors' petitions pending, there are no details to substantiate the allegation that the substratum of the respondent-company is lost. The petitioner has based its claim for winding up on the judgment of the English court alone. There are no circumstances given to justify the claim as falling under, the just and equitable clause u/s 433 (f). Even though in the face of the guarantee given, the defence of the respondent cannot be called as a substantial defence, yet, the balance-sheet, as such, does not support the claim of the petitioner that the respondent-company had reached a stage of commercial insolvency that it had lost all its relevance to exist in terms of the articles of association to warrant an exercise of jurisdiction of this Court to wind up a company.

44. The reply affidavit filed by the petitioner refers to the pendency of several winding up petitions, as against the respondent. The counter, however, asserts that these statements of the petitioner are merely self-serving statements to support its claim for winding up.

45. As already pointed out, winding up proceedings are not proceedings for the purpose of recovering the amount from a defaulting borrower. The petitioner is bound to disclose in its petition the grounds which justify the winding up of a company. The mere fact that there is a judgment of the English court or a guarantee executed, per se, does not result in this Court exercising the jurisdiction to order winding up. It is not denied by the petitioner that the respondent is still carrying on business. It must be remembered that the averments in the petition are the sole evidence for the court to decide the petition one way or other. Hence, unless the petitioner makes a definite case as to the commercial insolvency of the respondent, the mere fact that there is a corporate guarantee would not entitle the petitioner to go for this relief under an equitable jurisdiction to order winding up of the company. While considering the merits of the claim for winding up presented by one creditor the court has the duty to consider the status of the balance-sheet and the relevancy of the company carrying on business in terms of the articles of association to see as to whether the company has lost its substratum to order winding up. From the materials placed and from the averments in the petition, I do not find any material good enough to establish as a fact that the respondent-company is commercially insolvent, that it is unable to pay its debts and that its substratum is gone. As the apex court pointed out in (1972) 42 Comp Cas 125 (Madhusudan

Gordhandas and Co. v. Madhu Woollen Industries P. Ltd.), the mere fact that the company has suffered losses will not destroy its substratum unless there is no reasonable prospect of it making a profit in the future. Consequently, I have no hesitation in rejecting the plea of the petitioner. Even if the claim is substantiated, so long as the inability to pay is not established and when there are no grounds to order winding up under the just and equitable clause, I do not find any justifiable reason to order winding up. Even if the balance-sheet filed by the petitioner may show liabilities, so long as the respondent is able to meet its current liabilities and there being no evidence to the contrary, except for a general assertion that the respondent is not in a position to meet the liabilities and that there are several petitions pending for winding up, there are no materials to support such allegation to order winding up of the company. It is not as though the petitioner is remedyless as to its claim against the respondent. The passing of the order, or not passing such an order of winding up would not affect the petitioner adversely considering the fact that the petitioner is not remedyless as to its rights. On the other hand, the company is a going concern whose substratum is not shown to have been eroded, a fact which the petitioner could not deny. In these circumstances, it would be wholly inequitable to bring the insolvency of the company at the behest of a creditor. In the decision reported in (1986) 59 Comp Cas 183 (New Swadeshi Mills of Ahmedabad Ltd. v. Dye-Chem Corporation), which related to a case of a company heavily indebted and inability to pay its liabilities itself evident, as a matter of policy, the Gujarat High Court held (page 186):

Even so, a court will exercise a sound discretion in deciding whether to wind up a company or not and in doing so consider many relevant factors. It may be that despite the inability to pay its debts, a company has still prospects of coming back to life and if the court is told of any specific proposal, which in the opinion of the court is likely to materialise, the court will be inclined to give a chance to resurrect the company. It should be the policy of the court to attempt to revive though at the moment the company may not be solvent and may not be able to meet its obligations to its creditors. But this should be only if it is shown that there is reasonable prospect for resurrection and survival. It may be easy for a court when once it is shown that the company is unable to pay its debts to bury it deep and distribute whatever is available as distributable surplus. But it is the duty of the court to welcome revival rather than affirm the death of the company and for that purpose the court is called upon to make a discreet exercise.

46. In (1994) 79 Comp Cas 835 (Pradeshia Industrial and Investment Corporation of Uttar Pradesh v. North India Petro Chemical Ltd.), the Supreme Court pointed out that admission of a winding up petition is fraught with serious consequences. Hence when the company is a going concern and it is functioning, an order of winding up may prove disastrous unless there are materials to point out that the existing and probable assets are insufficient to meet the existing liability. I agree with the view of the Gujarat High Court that winding up of a company is not a matter of course to be taken up whenever there is an inability

to pay the debts. Going by the facts herein and the evidence, I have no hesitation in rejecting the petition. Hence, this company petition is dismissed. It is however, open to the petitioner to take recourse to such remedies as are available under law to enforce its claim.

47. In the result, this company petition stands dismissed. No costs.