
(2011) 12 AP CK 0077

In the Andhra Pradesh High Court

Case No : Company Petition No. 165 of 2009

Deutsche Bank AG

APPELLANT

Vs

Prithvi Information Solutions Limited

RESPONDENT

Date of Decision : 26-12-2011

Acts Referred:

Companies (Court) Rules, 1959 — Rule 21, 95
Companies Act, 1956 — Section 291, 433, 434, 434(1), 439
Penal Code, 1860 (IPC) — Section 120B, 34, 405, 406, 409

Citation : (2012) 171 CompCas 116 : (2012) 3 CompLJ 490 : (2012) 114 SCL 115

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Advocate : S. Ravi, for the Appellant; C. Kodandaram, for the Respondent

Final Decision : Dismissed

Judgement

B. Seshasayana Reddy, J.—This company petition has been taken out by Deutsche Bank AG under Sections 433, 434 and 439 of the Companies Act, 1956 read with Rule 95 of the Companies (Court) Rules, 1959 seeking an order of winding up of Prithvi Information Solutions Limited (in short, 'the respondent-company').

2. The petition averments, in brief, are:

2(a) The petitioner carries on business as a banking company and is an Authorised Dealer and a scheduled commercial bank in India. The respondent-company is a public limited company incorporated and registered under the provisions of the Companies Act, 1956 (in short, "the Act") having its registered office at 10 Q3-A1, 10th Floor, Cyber Tower, HITEC city, Madhapur, Hyderabad 500081. The respondent company is a listed public company. It is engaged in the business to develop, import, export and deal in computer software & hardware, establishing and running data processing and computer centres and offering consultancy, data processing etcetera.

2(b) The respondent-company approached the petitioner for sanction of multi-purpose trade/cash facilities and agreed to enter into/undertake foreign exchange and derivative transactions ("FX and Derivative Transactions") in accordance with the applicable regulations and guidelines of Reserve Bank of India. The petitioner granted credit facilities to the respondent company up to Rs.25,00,00,000/-. The respondent-company executed required documents for the facilities sanctioned to it. The respondent-company placed on record the Resolution dated 5.12.2007 passed by the Board of Directors authorising the company to avail the credit facilities. Pursuant to the sanction of credit facilities, the respondent company availed packing credit facility of Rs.50,000,000 on January 14, 2008, Rs.155,000,000/- on January 25th, 2008 and USD 1, 075,000 on 2nd April, 2008. The representatives of the respondent-company approached the petitioner on various occasions representing that the respondent-company is not in a position to comply with its obligations under the packing credit facilities. The representatives of the respondent-company further represented to the petitioner that the company has good business relationships inter alia with T-Mobile USA, Johns Hopkins Hospital, Ovs-Starpont Solutions LLC, Amdocs, Inc, University of Pittsburgh Medical Centre, PPG Industries, Inc., PNC Bank National Association, Meijer Inc., Mckesson Corporation, Franklin Templeton Companies LLC, Dick's Sporting Goods Inc., Comsys IT Partners Inc., and that it has executed and is executing works for T-Mobile USA, John's Hopkins Hospital and Starpoint Solutions LLC and in respect of such works, the respondent-company is to receive certain amounts within a short period. On these representations, the respondent-company sought to avail bills purchase/bill discounting facility with the petitioner.

2(c) The petitioner, in good faith, agreed to allow the respondent Company to avail of the export bills purchase/bill discounting facility up to Rs.30,000,00,000/-. The respondent-company executed the required documents for availing bills purchase/bill discounting facility. The Chairman of the respondent company stood as a guarantor for the bill discounting facility and accordingly, executed personal guarantee bond dated 04.12.2008. The Managing Director of the respondent company also executed guarantee bond dated 12th October 2008. The representative of the respondent company produced three notices of assignment addressed to the Foreign Purchasers assigning the receivables in supply contracts absolutely in favour of the petitioner and instructing the Foreign purchasers to make payment to the petitioner. The petitioner allowed post-shipment credit facility against the invoices raised by the company on the above-referred foreign purchasers. As the petitioner did not receive any payments on the respective due dates from the foreign purchasers, it addressed letters to T-Mobile USA, John's Hopkins Hospital, Starpoint Solutions LLC, calling upon them to make payments in respect of the invoices raised by the company. The petitioner received letter dated 24-4-2009 from Starpoint Solutions LLC, wherein it is stated that the documentation produced by the company is fraudulent and that it never entered into the business relationship

with the respondent company. M/s. John's Hopkins under letter dated 7-5-2009 denied of entering into contract with the respondent-company. T-Mobile USA orally informed to Deutsche Bank AG, New York office that it has not executed any notice of assignment as projected by the representatives of the respondent-company. The petitioner, vide its letter dated 29-4-2009 called upon the respondent-company as to why the account of the settlement dues of Rs.100,969,700.00 and export credit facility of USD 195,123.20 and INR 30,57,94,962.84 cannot be classified under wilful default category.

2(d) The petitioner filed a complaint against the respondent-company and its representatives. The petitioner also filed original application being O.A.No.403 of 2009 before the Debt Recovery Tribunal, Bangalore against the respondent-company and the guarantors for recovery of the amount due under various credit facilities and obtained an ex parte interim order dated 6-8-2009. The respondent-company filed a civil suit being O.S.No.4013 of 2009 on the file of the City Civil Judge, Bangalore and obtained ex parte temporary injunction on 27th June 2009 restraining the petitioner from publishing any defamatory statement against it. However, the City Civil Judge, Bangalore refused to stay any recovery proceedings. The petitioner entered appearance in the said suit and filed various interlocutory applications questioning the very jurisdiction of the Court to entertain the suit.

2(e) The respondent-company and its representatives obtained the credit facilities by producing forged and fabricated documents in respect of various foreign exchange derivative transactions. The respondent-company by its letters dated 14-5-2009 and 20-5-2009 admitted its liability on account of foreign exchange derivative transactions and assured to clear the amounts due to the petitioner.

2(f) The petitioner sent a statutory notice dated 20-8-2009 detailing the amounts due under various credit facilities and calling upon the respondent-company to pay the following amounts:

(a) Rs.315,574, 537.62 together with interest at the rate of 16.5% per annum from the respective dates of discount until date of crystallization amounting to Rs.11,447,046.86 and thereafter, until August 11, 2009 at the rate of 16.5% per annum amounting to Rs.1,77,93,737.71 totalling to Rs.34,48,15,322.19 together with further interest at the rate of 16.5% per annum from August 11 2009 on 315, 574,537.62 till payment and/or realization towards the credit facilities; and

(b) USD 2, 117,587.68 (i.e., USD 2,116,208.12+USD 1, 379.56) together with further interest at the Default Rate on USD 2,117,587.68 to be compounded daily, from August 11, 2009 till date of actual payment and/or realization, with regard to the FX and Derivative transactions within 21 days from the date of receipt of the notice by the company, failing which the respondent-company was cautioned that the petitioner shall be constrained to file proceedings for winding up of the company.

2(g)The respondent-company failed to liquidate its liability despite receipt of statutory notice. The respondent company is deemed to have become commercially insolvent and is unable to discharge its debts warranting an order of winding up. Hence this petition seeking the prayer stated supra. Para (32) of the petition needs to be noted and it is thus:

The petitioner states and submits that more than 21 days have passed since the service of the aforesaid statutory notice dated August 20, 2009 on the Company and the Company has wrongfully, purposely, intentionally and with a malafide intention to defraud the petitioner and without any just or sufficient cause and despite having no defence whatsoever failed and neglected to pay to the petitioner its legitimate outstanding dues and have by its letter dated September 16, 2009 raised all false and frivolous contentions which are hereby denied. Copy of the letter dated September 16, 2009 is annexed and marked as Annexure No."44". The liability of the company to repay its dues is absolute and unconditional, particularly in view of the express acknowledgment. In view of the aforesaid, the petitioner submits that it should be deemed that the Company is unable to pay its debts owned to the petitioner. The petitioner submits that the Company is, therefore, liable to be and should be wound up, by and under the orders of the Companies Act, 1956. The petitioner also submits that it is just and equitable to wind up the Company on account of the reasons stated hereinabove.

3. Notice before admission came to be ordered on 27-10-2009. The respondent entered appearance and filed counter. M.Durga Prasad, Vice President (Finance) & Company Secretary of the respondent-company has sworn to the counter affidavit. The counter affidavit, in brief, is as follows:

(a) The company petition is liable to be dismissed for non compliance of Rules 21 and 95 of the Companies (Court) Rules, 1959. The contract for hedging Foreign exchange (FX) transactions is governed by "The 2002 Master Agreement dated 14-2-2002" and the contract is not in accordance with the guidelines issued from time to time by Foreign Exchange Dealers Association of India (FEDAI) and the Reserve Bank of India. The petition is bad for misjoinder of two different transactions relatable to two separate banks. The postshipment facility (Factoring Facility) i.e., Insurance Wrapped Accounts Receivables Purchase Facility (IWARP Facility) was provided by Deutsche Bank AG (petitioner herein), a banking company registered in accordance with the laws of India, governed by the laws of India and whereas 2002 Master Agreement dated 14-2-2008 entered between the respondent company and Deutsche Bank AG, Head Office, Theodor-Heuss-Allee 70, 60486 Frankfurt, Germany to deal/undertake with the respondent-company's foreign exchange and derivative transactions ("FX and derivative transactions") is governed by English Laws and the International Swaps and Derivatives Association, Inc. The FX and Derivative transactions have been entered by the German Bank. The present company petition has not been filed by the German Bank. Clubbing of both the transactions, which are governed by two different laws amounts to misjoinder of transactions and therefore, the

petition for winding up of the respondent company is liable to be dismissed.

(b) The company petition is not maintainable in view of the arbitration clause in the contract between the parties. The parties conferred jurisdiction on Courts at Mumbai for settlement of disputes between them. The petitioner has already initiated recovery proceedings before the Debt Recovery Tribunal, Bangalore. As the respondent-company disputed its liability to the petitioner and exposed various irregularities committed by the petitioner by filing written statement before the Debt Recovery Tribunal, the issues between the petitioner and respondent are triable issues and they cannot be decided in a summary proceedings. The respondent-company has nearly 2702 employees, who are working directly and indirectly in India and overseas contributing substantial Foreign exchange to the nation. The respondent is a commercially solvent company and has 28125 shareholders. The respondent-company declared dividends up to 30% continuously during the last three financial years. It enjoys excellent credit limits from its bankers namely 1) UCO Bank, 2) IDBI bank and 3) ING Vysya Bank up to Rs.80 crores. The secured creditors namely, ING Vysya Bank, UCO Bank and IDBI Bank issued letters 9-12-2009 and 10-12-2009 respectively confirming the prompt payment of the dues to them. The Standard Chartered Bank which is a major unsecured creditor has issued a letter dated 14-12-2009 stating that the respondent-company has repaid the fund based (pre and post shipment) facility of Rs.25 Crores.

(c) The petitioner filed a criminal complaint against the respondent-company and others before Halasur Police Station. Thereupon, the SHO, Halasur P.S., registered a case in Crime No.213 of 2009 and after due investigation filed a final report stating that the disputes between the parties are purely civil in nature. The petitioner knowing fully well of the final report filed by the police before the X Additional Chief Metropolitan Magistrate, at Bangalore filed the present company petition suppressing the said fact and as such, the company petition is liable to be dismissed. The Debt recovery Tribunal, Bangalore has observed in the order dated 16-9-2009 in an application being I.A.No.2186 of 2009 that the petitioner secured interim order dated 6-8-2009 by suppressing material facts.

(d) The respondent-company grew from a humble turnover of Rs.3 Crores in the year 1999 to around Rs.1950 Crores as on 31-3-2009. It is the petitioner, which induced the respondent-company to undertake Foreign Exchange (FX) and Derivative transactions representing that they have the expertise in these transactions and assured of profitable transactions. Because of the petitioner not handling the foreign exchange transactions properly, the respondent-company sustained loss of Rs.57 Crores. The respondent-company filed I.A.No.3 of 2009 in O.S.No.4013 of 2009 before II CCH, CCC at Bangalore seeking for resolution of disputes between the petitioner and the respondent by way of arbitration to be conducted at London Court of International Arbitration. The petitioner adjusted the receivables of the company to a tune of Rs. 25 Crores under the pre-shipment loan facility dated 20-11-2007 towards the FX and derivative account

unilaterally and it is contrary to the terms and conditions of the counter guarantee indemnity agreement. The petitioner bank on its own volition came out with a scheme and advanced post-shipment facilities of Rs.30 Crores to the respondent-company. The post-shipment facility provided by the petitioner company is an Insurance Wrapped Accounts Receivables Purchase Facility ("IWARP Facility"). The assured receivables for the projects executed by the respondent-company which carry a payment period of 90 days to 120 days are sold to the petitioner bank at a discount of 10%. The petitioner bank is thus the owner of the receivables having purchased at discounted price. The IWARP facility has insurance coverage. In the event of the amounts being not paid by the customers of the respondent-company, the petitioner bank has to initiate steps to recover the amounts from the insurance company. The respondent-company had paid Rs.34 lakhs as premium to New India Insurance Company as a prerequisite condition for advancing the IWARP facility by the petitioner bank. The petitioner bank having purchased the receivables/invoices, it is the sole responsibility of the petitioner bank to interact and recover the amounts from the respondent's customers, i.e., M/s.OVS Starpoint Solutions LLC, M/s. John's Hopkins medicine International, LLC and M/s. T Mobile USA and the respondent-company is not responsible for the repayments thereof.

(e) The respondent-company has been doing business with T-Mobile USA, John's Hopkins Hospital and Ovs-Starpoint Solutions LLC for the last six years, ten years and one year respectively. There were inflow of funds to the account of the respondent-company pertaining to the invoices/receivables for the period from 2007 till April, 2009. The petitioner instead of adjusting the said funds into the pre-shipment facility, adjusted the said funds towards FX and hedging account without the instructions of this respondent and against the terms and conditions of the agreement. The respondent-company through its letter dated 14-5-2009 issued a reply to the petitioner denying its liability. The petitioner never disclosed to the respondent company the so-called letter issued by M/s. John's Hopkins Hospital dated 7-5-2009 and it came to the knowledge of the respondent-company only through the criminal complaint lodged by the petitioner bank on 8-5-2009 at Halsoor Police Station, Bangalore. M/s. John's Hopkins Hospital and T-Mobile USA through letters dated 14-5-2009 and 15-5-2009 confirmed that they owe money to the respondent-company.

(f) The respondent-company has been in the business of providing information technology (IT) Services to national and global customers. The Board of the respondent-company has several distinguished professionals and eminent people from different walks of life. The company being a public limited company is highly regulated by the guidelines of Securities Exchange Board of India (SEBI) and The Reserve Bank of India (RBI) in its foreign transactions. The alleged liability on account of transaction in FX are not crystallized and are not in accordance with the applicable laws in India. The disputes between the parties relating to Foreign Exchange derivative transactions are required to be resolved by way of arbitration, vide clause in ISDA 2002 Master Agreement dated

14-02-2008. Indeed the petitioner has already invoked arbitration by filing an affidavit before the Debt Recovery Tribunal at Bangalore. The respondent-company being in the business of providing information technology services, its main assets are its employees and their skill sets. Para 57 of the counter affidavit needs to be noted and it is thus:

57. In view of the facts and circumstances above mentioned respondent company respectfully submits that there is no amount outstanding as claimed by the petitioner bank much less the amounts claimed by it as submitted above all the transactions relating to IWARP are governed by RBI circulars and amount outstanding is a result of the petitioner bank failure to recover the amounts under the IWARP facilities and the amounts claimed under the FX and Derivative transactions and hedging activities are as a result of extreme fluctuation in foreign exchange rates and the prevailing economic meltdown globally which the petitioner bank is trying to accuse and recover from the respondent company for no fault of it and the said amounts are disputed by the respondent company. More so FX and Derivative transactions are construed and governed by the English Laws, as such this Hon"ble Court may be pleased to dismiss the company petition.

4. The petitioner filed reply affidavit, which, in brief, is as follows:-

(a) The petitioner bank is a scheduled bank and is included in the Second schedule of the Reserve Bank of India Act, 1934. Once the petitioner is a scheduled bank, it is authorised to carry on banking operations in India. The petitioner is also a Category I Authorised Dealer in Foreign Exchange under the Regulations of Reserve Bank of India. The respondent-company never questioned the legal status of the petitioner bank when it obtained loans and facilities from the petitioner. Mr. Sudarsan Sreedharan and Mr. Damodaran Sreenivasan are authorized signatories and have a valid and subsisting authority to act and appear on behalf of the petitioner bank. The petitioner is a non-resident banking company, operating through its branch offices. The petitioner after obtaining requisite statutory permissions is carrying on business of banking in India. The head office of the petitioner bank is located in Germany. The petitioner and the Deutsche Bank AG are one legal entity. They are not two separate banks. In fact, in the ISDA Agreement, it is clearly mentioned that the petitioner is a multi branch party. The respondent company filed O.S.No.4013 of 2009 on the file of II CCH, CCC, Bangalore against the petitioner bank for a declaration that it did not avail any export bill credit facility and bill discounting facility, and the said suit came to be rejected. The review petition allegedly filed by the respondent has not even numbered. Non disclosure of the proceedings initiated by the petitioner before the Debt Recovery Tribunal, Bangalore as well as existence of arbitration clause in the ISDA Agreement is not much material since the relief sought for in this petition is one of winding up of the respondent-company. Filing O.A.No.403 of 2009 before the Debt Recovery Tribunal for recovery of the amounts is not a bar for filing company petition seeking an order of winding up of the respondent

company. HSBC Ltd., which is also a scheduled Bank filed C.P.No.204 of 2009 for winding up of the respondent-company on the ground that it has become commercially insolvent and the said company petition is pending.

(b) A Japanese company Sojitz Corporation filed a criminal complaint in C.C.No.410 of 2010 on the file of IX Additional Chief Metropolitan Magistrate, Cyberabad at Miyapur under Sections 420, 405, 406, 409, 120-B and 34 IPC against the respondent-company and its Directors alleging fraud to the tune of about Rs.200 crores and the said criminal case is pending. Sojitz Corporation filed an application Index No.602511-2009 against the respondent-company for an order of Attachment without notice in Aid of Arbitration before the Supreme Court of the State of New York county of New York. The respondent-company filed a suit in O.S.SR.No.14886 of 2009 on the file of the District Judge, R.R.District at L.B.Nagar, Hyderabad against Sojitz Corporation and 2 others for declaration that the acts of Sojitz Corporation, Japan in filing cases against the plaintiff in the Supreme Court of the State of New York, i.e., Suit/Index No.602511-2009 and the Superior Court of California County Los Angeles, i.e., Case No.SS018525 are in violation of procurement agreement. The District Judge, by order dated 17-09-2009 returned the plaint for presentation before the proper Court. The respondent filed C.M.A.No.998 of 2009 assailing the order dated 17-9-2009 passed by the District Judge, Ranga Reddy in OSSR 14886 of 2009. A Division Bench of this Court by order dated 08-10-2009 dismissed the CMA as withdrawn.

(c) The petitioner after following the procedure as per the guidelines/instructions of the RBI, declared the respondent as a wilful defaulter. This declaration has become final and its name has been published as a defaulter in the website of CIBIL. With regard to criminal case against the Directors of the respondent-company, the petitioner filed a protest petition and also Additional Protest Petition in Crime No.213 of 2009 against the report of the police referring the case as civil in nature. The said protest petition is pending for orders. The petitioner did not mention about the criminal proceedings in the company petition since the criminal proceedings are basically against the persons responsible for committing the offence of cheating, fraud etc., and whereas the present winding up petition is only against the company and not against its Directors or officers. The petitioner obtained an order of attachment of accounts of the respondent-company in I.A.No.1945 of 2009. One of the current accounts happened to be an Escrow Account and Sojitz Corporation had a lien over it. On an application being moved by Sojitz Corporation, interim order of attachment so far as Escrow Account is concerned, came to be vacated. The observations made in the order passed in I.A.No.1945 of 2009 in O.A.No.403 of 2009 are in no way effect the claim of the petitioner bank. The respondent-company with full knowledge of all the risks involved in Foreign exchange transactions entered into ISDA contract. The respondent-company categorically stated in Clause (n)(i)(A) at Part 4 (Miscellaneous) of ISDA that it has made its own independent decision to enter into the transaction. The respondent-company also entered into

derivative transactions with other banks like HSBC, Standard Chartered Bank.

(d) The respondent-company defrauded the petitioner by assigning bogus receivables and induced the petitioner to advance post-shipment credit facility. The respondent-company availed packing credits on 14-7-2008, 23-7-2008 and 03-7-2008 and accordingly, the petitioner credited the amounts to the account of the respondent as hereunder:-

Sr. No.

Invoices

Drawee

Amount (USD)

Date of Credit

Credit A/c details

1

797XCP0800181/

Starpoint

436,500.00

15.12.2008

797PFD0800005

GFE0900001

Solutions

LLC

2

797XCP0800182/GF E0900003

T.Mobile

2,778,521.40

15.12.2008

797PFD0800005 797PFD0800008

3

797XCPO800185/GF

Johns

503,532.00

22.12.2008

797PFF0800019

E0900007

Hopkins

Hospital

4

797XCP0800184/GF E0900006

T.Mobile

1,430,000.00

22.12.2008

797PFD080008 797PFF080019

5

797XCP0800186/GF

Johns

513,090.00

22.12.2008

797PFF0800019

E090002

Hopkins

Hospital

6

797XCP0800190/GF

Starpoint

379,876.80

29.12.2008

Current

E0900008

Solutions

Account

LLC

7

797XCP0800189/GF

Jons

195,123.20

29.12.2008

Current

E0900010

Hopkins

Account

Hospital

(e) The respondent is liable to pay the entire amount with interest consequent on failure of the Foreign Purchasers/Drawee to pay the amount to the petitioner. The allegation that receivables of the company under pre-shipment facility dated 20-11-2007 of Rs.25 Crores were adjusted unilaterally by the petitioner bank contra to the terms and conditions of the counter guarantee and indemnity agreement is denied. USD 1,075,000.00 under Packing Credit Number 797PFF0800019 were credited to the respondent's account with PNC bank, 5th Avenue, Oakland, Pittsburg, USA as per respondent's request. The post-shipment facility was given to the respondent only after due execution of all necessary documents and various representations by the respondent and its officials. The letter dated 14-05-2009 purportedly written by John Hopkins Medicine-School of Medicine and letter dated 15-05-2009 purportedly written by T.Mobile USA to the respondent company are fabricated. When the receivables are fraudulent, the question of initiating recovery proceedings against the so-called customers does not arise. The petitioner received Rs.1.95 Crores in the month of April, 2009 and adjusted the same towards FX dues. The respondent company addressed two letters to the petitioner on 14-05-2009. One letter was in response to the statutory notice issued under Sections 433 and 434 of the Act and the other was in response to notice declaring the respondent as a wilful defaulter. In both these letters, the respondent company categorically admitted the liability and requested time to clear the outstanding amounts. The petitioner bank before declaring the respondent company as a wilful defaulter issued notice on 15-6-2009 to the respondent to attend the hearing on 22nd June 2009. The petitioner again sent a reminder notice on 19th June, 2009 to the respondent company. On 22nd June, 2009 none appeared from the respondent company. On 24th June 2009, the petitioner bank informed the respondent company that as none appeared on its behalf on 22nd June, 2009, it shall proceed as per regulations. In response to this letter, the respondent company by its letter dated 24th June 2009 requested the petitioner bank to fix date of hearing after 26th June, 2009. As per the request of the respondent company, the petitioner bank

fixed the date of hearing on 6th July, 2009 and informed the same to the respondent company through its letter dated 26-6-2009. The respondent received the said letter but did not appear for hearing on 6th July, 2009. The respondent company filed O.S.4013 of 2009 on the file of the City Civil Judge, Bangalore against the petitioner bank for a declaration that it did not avail any export bill credit facility/bill discounting facility. The respondent company sought ex parte ad interim injunction against the petitioner restraining it from declaring the respondent as wilful defaulter. The petitioner failed to secure any interim orders in the said suit. The petitioner bank by letter dated 8-7-2009 declared the respondent company as wilful defaulter. On 17-07-2009, the respondent issued reply letter to the petitioner bank raising untenable and frivolous grounds questioning the declaration of respondent as wilful defaulter. The plea taken by the respondent that there are two transactions and they are with two different banks is totally misconceived. Both the transactions are with the petitioner and there are no two separate legal entities. There is no bona fide dispute as to payment of interest or the principal amount.

5. Heard Sri S.Ravi, learned senior counsel appearing for the petitioner and Sri C.Kodandaram, learned Senior counsel appearing for the respondent-company.

6. Sri S.Ravi, learned senior counsel submits that the respondent-company availed various credit facilities and subsequently, became a defaulter and thereupon, the petitioner issued notice to the respondent-company calling upon payment of the dues under various credit facilities for which the respondent company, issued reply admitting the liability and requesting three months time to clear the dues. A further submission has been made that the respondent company having admitted its liability neglected to pay the same and it amounts to prima facie commercial insolvency of the respondent company warranting admission of this company petition for winding up. Learned senior counsel took me to the reply notice dated 14-5-2009 issued by the respondent-company to the notice dated 29-4-2009 under Sections 433 and 434 of the Companies Act. Much stress has been laid on the admissions made by the respondent company with regard to outstanding dues. I deem it appropriate to extract the reply notice dated 14-5-2009, issued by the respondent-company, which reads as hereunder:-

We acknowledge receipt of your letter referred above. In this connection, we wish to inform you that the export bills referred to in your letter have been factored/discounted as per the facilities sanctioned by you. The customers on whom we have drawn these bills are well reputed companies. However, due to the slow-down in economy world wide, there is pressure on receivables on account non realizations in time. We are continuously pursuing with them for early realizations and we are confident that given a 3 months time till 30th June, 2009, these bills shall be honoured.

As these are export bills, the receivables should be received in USD. The above facts were brought to your kind notice on several occasions and also you have appreciated the same. Considering the present economic situation where the

receivables are not being received in time, we request you to kindly allow time up to 30th June, 2009 so that based on the cash flows and considering the ongoing operations, we shall clear the out standings.

Further, we would also like to mention that the derivative losses on the FX has been to the extent of Rs.47.35 Crores. Out of this Rs.10.09 crores is due as of date. This itself is a proof that the intentions of the Company is to clear the debt. In this case, you will observe that Rs.37.26 crores has been cleared. You are also aware that the various trading positions were taken on your advise. However, our intention is to see that any debt that is crystalised shall always have first preference in clearing the same. As the circumstances and changes that the entire world is undergoing on the economic front are beyond the control of the Company, you will appreciate that we are not an exception.

We once again reiterate that our intentions are clear and we would like to ensure that the outstandings to the Bank is cleared at the earliest. However, seeing the ground reality situation, we once again request you to give time of 3 months and shall be grateful for not proceeding under Sections 433 & 434 of Companies Act, 1956.

7. Learned senior counsel would submit that the petitioner has issued a notice u/s 433 read with Section 434 of the Act on 20-8-2009 calling upon the respondent company to pay the dues payable under post-shipment credit facility and Foreign Exchange derivative transactions within 21 days from the date of receipt of the notice. The respondent company having admitted the liability in the earlier notice dated 14-5-2009, issued reply dated 16th September 2009 taking all sorts of untenable pleas. In a way, his submission is that the defence pleaded by the respondent-company is neither a bona fide nor a substantial one. In support of his submissions, reliance has been placed on the decisions of Supreme Court in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, and *Vijay Industries Vs. NATL Technologies Limited*, In *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, , the Supreme Court held that 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.

8. In *Vijay Industries (2nd supra)*, the Supreme Court held that for invoking the relevant provisions i.e., Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956 in relation to winding up of a company on the ground of its inability to pay its debt, what is necessary is that despite service of notice by the creditor, the company which was indebted in a sum exceeding one lakh rupees then due, failed and/or neglected to pay the same within three weeks thereafter or to secure or compound for it to the reasonable satisfaction of the creditor. Failure of the company to pay the agreed interest or the statutory interest would come within the purview of the word "debt". Further, Section 433(e) of the Companies Act does not state that the debt must be precisely a definite sum. It is not a requirement of law that the entire debt must be a definite and certain.

9. Sri C.Kodandaram, learned senior counsel appearing for the respondent company contends that the company petition is not properly instituted and therefore, it is liable to be dismissed in limine. According to the learned senior counsel, there is no Board Resolution passed by the petitioner bank authorising the signatories to institute winding up proceedings against the respondent-company. Learned senior counsel refers Section 291 of the Act to convince me that it is the Board of Directors of the company to pass necessary resolution for initiating winding up proceedings against the respondent-company and as there being no such Board resolution, the company petition cannot be said to a validly instituted one. In support of his submissions, reliance has been placed on the decisions of this Court in Nagarjuna Constructions Company Ltd. v. Sharat Industries Ltd. 2001(104) Comp cas 602, Nayagam Lourd Prakash v. Standard Chartered Bank, Secunderabad 2000 (2) ALD (CrL.) 731 (AP) Ahmedabad Electricity Company Limited Vs. Sanghi Spinners (India) Ltd. and Another, and the decision of Patna High Court in BOC India Limited v. Zinc Products and Company Pvt. Ltd. 1996 86 Comp Cas 358, a decision of Delhi High Court in Nibro Ltd. Vs. National Insurance Co. Ltd., and the decision of Supreme Court in State Bank of Travancore v. M/s. Kingston Computers (I) P. Ltd. 2011 (3) SCALE In Ahmedabad Electricity Company Limited v. Sanghi Spinners (India) Ltd., R.R.District (5 supra), a learned Single Judge of this Court held that an individual director has no power to act on behalf of the company. He is only one of a body of directors called the Board, and alone has no power except such power as may be delegated to him by the Board or given to him by the articles. Para (33) of the cited judgment needs to be noted and it is thus:-

(33.) In view of the above legal position, it has to be considered whether the Company Secretary of the petitioner-Company was authorized to file the company petition as well as to give evidence by filing the verified affidavit and also to give evidence. Admittedly, no document, showing that there was any Board resolution of the petitioner-company authorizing the Company Secretary to file the company petition was filed. Except stating that he was having the authorization, the Company Secretary has stated nothing about the maintainability of the company petition. Even when it was suggested also when he was in the witness box, he did not produce any document showing that he had the authority to institute the company petition as well as to depose. In the absence of such evidence, there is no other option, except to take a view against the petitioner-Company that the company petition was instituted by a person, who is incompetent to institute the same. This issue is accordingly decided against the petitioner and in favour of the respondent-Company.

10. In reply, Sri S.Ravi, learned senior counsel submits that Section 291 of the Act is not applicable to the petitioner bank since the petitioner bank is not a company coming within the purview of Section (3) of the Act. Learned senior counsel took me to the definition of `company" as defined in Section 3; `company" means a company formed and registered under the Companies Act, 1956 or an existing company as defined in clause (2).

11. Indisputably, the petitioner bank is not registered under the Companies Act, 1956. Therefore, Section 291 cannot be made applicable to the petitioner bank. Learned senior counsel would contend that Atulya Sharma and Kaushik Chandrakant Shaparia are the power of attorney holders and they are authorised to initiate all legal proceedings including bankruptcy or insolvency of any person or firm on behalf of the petitioner and they authorised Mr. Sudarshan sreedharan and Damodaran Sreenivasan by duly executing power of attorney on 23-12-2008 to initiate necessary legal proceedings against the respondent company and therefore, the petition is validly presented. Learned senior counsel refers the power of attorney dated 20.3.2009 executed in favour of Kaushik Chandrakant Shaparia, Atulya Sharma and 13 others and the power of attorney dated 23-12-2008 executed by Kaushik Chandrakant Shaparia and Atulya Sharma in favour of Sudarshan Sridharan and Damodaran Sreenivasan and 63 others.

12. The basic issue that calls for adjudication in this company

petition is:

Whether Mr. Sudarshan Sridharan and Mr.Damodaran Sreenivasan are competent to initiate winding up proceedings on behalf of petitioner Bank against the respondent company on behalf of the petitioner ?

13. POINT: It is trite to refer verification affidavit filed along with the company petition, which reads as hereunder:-

We, Mr. Sudarsan Sridharan S/o S.Sridharan, aged about 30 yrs, Resident of Flat No.102, East Wing, V.S.Enclave, Kaggadasapura, 6th Cross, 6th Main Road, Bangalore and Mr.Damodaran Sreenivasan S/o Damodaran aged about 35 yrs, Resident of Site No.1095, 4th main 4th Cross D Block AECS layout Kundanhalli Bangalore-560 037 the authorised signatories of the petitioner having office at Raheta Topwner, Mezannine, Floor 26-27 MG Road, P.O Box 5002, Bangalore-560001, do hereby solemnly affirm and sincerely state as follows:

1. We are the authorised signatories of the Petitioner herein and as such aware of the facts of the case and competent to file the present application. A certified true copy of the Board Resolution authorizing me to sign on behalf of the Petitioner company is being as Annexure P...

2. The contents stated in the accompanying Company Petition are true to the best of my knowledge and are based on facts and legal advice.

3. The material filed in support of the Company Petition are the originals/true copies of the originals.

On 20th July, 2009, Deutsche Bank has given power of attorney in favour of Roger LEE Hoong Kwong and Soon-Heng LOW and 14 others to supervise, manage, carry on and do all and every business etcetera. Copy of the power of attorney has been placed on record at Page No.238 of the material papers filed along with the additional affidavit dated 3-9-2011. The power of attorney

includes initiation of winding up proceedings. Clause (17) of the power of attorney reads as hereunder:

17. To commence, prosecute, enforce, defend, answer or oppose all demands, actions and other legal proceedings (whether civil or criminal and including proceedings to procure or establish the bankruptcy or insolvency of any person or firm, or the liquidation or winding up of any company) relating to any matter in which any of the Specialised Offices is or may hereafter be interested or concerned and also if thought fit to compromise, refer to arbitration, discontinue, abandon, submit to judgment or become non-suited in any such action or proceeding as aforesaid.

14. Rager Lee Hoong Kwong and Low Soon Heng have executed power of attorney in favour of Kaushik Chandra Kant Shaparia and Atulya Sharma and 13 others to manage, carry out and do all and every business, matters and things requisite and necessary or in any manner connected with or having reference to the business, operations and affairs of the Said Branch Offices and for such purposes to conduct and sign all correspondence and communication appertaining to such purposes, operations and affairs of the Said Branch Offices and to do all things necessary or expedient to be done for properly and efficiently conducting the business, operations and affairs of DEUTSCHE BANK at the Said Branch Offices. The authorization given to Kaushik Chandra Kant Shaparia and Atulya Sharma and 13 others includes initiation of liquidation or winding up proceedings. Clause (18) of the power of attorney need to be noted and it is thus:

18. To commence, prosecute, enforce, defend, answer or oppose all demands, actions and other legal proceedings (whether civil or criminal and including proceedings to procure or establish the bankruptcy or insolvency of any person or firm, or the liquidation or winding up of any company) relating to any matter in which the Said Branch Offices are or may hereinafter be interested or concerned and also if thought fit to compromise, refer to arbitration, discontinue, abandon, submit to judgment or become non-suited in any such action or proceeding as aforesaid.

15. Along with the company petition, copy of the power of attorney executed by Kaushik Chandrakant Shaparia and Atulya Sharma in favour of Sudarsan Sridharan and Damodaran Sreenivasan and 63 others have been filed. It is not stated in the power of attorney that Mr.Sudarsan Sridharan and Mr. Damodaran Sreenivasan are competent to initiate winding up proceedings against the respondent company on behalf of the petitioner. The attorneys are authorised to verify the following acts on behalf of the petitioner:

1. To approve the discounting, negotiation and renewal by the said Branch Offices of bills of exchange, promissory notes with or without securities, the acceptance of deposits, the opening and keeping of deposit accounts, the drawing, acceptance, making and endorsement of bills of exchange, promissory notes, cheques, warrants, bills of lading, delivery orders and other negotiable

instruments.

2. To demand, enforce and sue for payment, securities, money and claims of all kinds, to receive and take goods, products and property of all kinds, whether belonging to the Said Branch Office or held by the Said Branch Offices, as security or in trust, or held by any person or company in trust for the Said Branch Offices.

3. To sign seal and execute all such deeds/agreements/instruments/writings as shall be requisite for or in relation to the affairs of the Said Branch Office.

4. To approve the opening and operation of accounts by the Said Branch Office with any Bank, including the Reserve Bank of India, the overdrawing of such accounts, the taking of loans and advances and similar facilities, the investment of funds in government and other securities and the receipt of interest on, the holding, sale disposition of, transfer, negotiation, hypothecation or otherwise dealing with such securities in India or elsewhere.

5. To negotiate, sign, renew, discount by the Said Branch Office of bills of exchange, promissory notes, with or without securities, the acceptance of deposits, the opening and keeping of deposit accounts, the drawing, acceptance, making and endorsement of bills of exchange, promissory notes, cheques, drafts, warrants, bills of lading, delivery orders, bank guarantees and other negotiable instruments.

6. To conduct and sign all correspondence and communication appertaining to such business, operations and affairs of the said Branch Office and to all things necessary or expedient to be done for properly and efficiently conducting the business operation of the Said Branch.

7. To sign all Pay Orders/Demand Drafts/Partner Bank Drafts on behalf of the said Branch Offices.

16. I have read and re-read the power of attorney basing on which the winding up proceedings have been initiated by Mr.Sudarsan Sridharan and Mr.Damodaran Sreenivasan on behalf of the petitioner Bank against the respondent company. It is nowhere indicated in the power of attorney that they are authorised to initiate winding up proceedings against the respondent-company. When the signatories to the petition had no proper authorisation to initiate winding up proceedings, it cannot be said that the petition has been validly instituted. The absence of authority to institute the winding up proceedings on behalf of the petitioner bank against the respondent company is not a technical matter. Winding up proceedings have far reaching consequences. Therefore, I am of the view that Mr. Sudarsan Sridharan and Mr.Damodaran Sreenivasan had no authority to institute winding up proceedings on behalf of the petitioner against the respondent company.

17. Accordingly, the Company Petition is dismissed. No order as to costs.