

(2013) 04 MAD CK 0186
In the Madras High Court
Case No : C.P. No. 171 of 2012

Deutsche Trustee Company Ltd.

APPELLANT

Vs

Mascon Global Ltd.

RESPONDENT

Date of Decision : 23-04-2013

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 434, 434(1)(A), 438

Citation : (2013) 181 CompCas 223 : (2014) 1 CompLJ 375

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : Thriyambak J. Kannan, for the Appellant; T.K. Baskaran, for the Respondent

Final Decision : Dismissed

Judgement

Vinod K. Sharma, J.—Deutsche Trustee Company Ltd. has invoked the jurisdiction of this Court u/s 433(E), 434(1)(A) and 439 of the Companies Act, 1956, read with Rule 95 of the Company (Court) Rules, 1959, for winding up of the respondent company on account of its inability to discharge admitted liability. The petitioner is a Company incorporated under the laws of England, and is engaged in the business of providing corporate trustee services.

2. The respondent M/s. Mascon Global Ltd. is a public Limited company registered under the Companies Act, 1956 on March 22, 1991, and is listed on the Bombay Stock Exchange of India Ltd. The registered office of the respondent company is situated at 2nd Floor, RR Towers, IV, T.V.K. Industrial Estate, Guindy, Chennai, Tamil Nadu.

3. That the respondent company, is indebted to the petitioner for and on behalf of the Bondholders for a sum of USD. 64,036,036.29 (US Dollars sixty four million thirty six thousand and thirty six and twenty nine cents only) under the Bonds along with accrued interest and default interest.

4. That according to the balance sheet of the respondent company, the

authorised share capital of the respondent company is Rs. 7,000,000,000.00 (Rupees seven thousand Million only) divided into equity shares of Rs. 10/- each. The amount of capital issued is Rs. 3,721.270,450.00 (Rupees three thousand seven hundred twenty one Million, two hundred seventy thousand four hundred and fifty only) divided into equity shares of Rs. 10/- each.

5. That the petitioner has filed this petition in its capacity as a trustee on behalf of the Bondholders, on the ground that the petitioner is authorised to take recourse to any legal action, on behalf of all the holders of Bonds, if holders of atleast 25% of Bonds then outstanding, instruct it to do so.

6. That the petitioner has been duly instructed by holders of atleast 25% of the Bonds outstanding as on the date of this petition to file this present petition.

7. That on 20.12.2007, by way of an Offering Circular issued by the respondent company, the Company offered upto USD. 50,000,000 2.0% unsecured Foreign Currency Bonds due December 28, 2012 convertible into 21,505,434 global depository receipts each representing 4 shares of Rs. 10/- each. Under the 2007 Offering Circular, the Bonds were issued at 100% of the principal amount on 27.12.2007, the maturity date being 28.12.2012. Unless previously redeemed, converted, or purchased and cancelled, the Company had agreed to and is bound to redeem each of the Bonds at 129.35% of its principal amount on the Maturity date.

8. That the respondent company also entered into a trust agreement with the petitioner, dated 27.12.2007. Under the Trust deed, the petitioner was appointed as the trustee for the Bondholders.

9. That Clause 2.2 of the Trust deed stipulates that the respondent company shall unconditionally pay or procure to be paid to or to the order of the Trustee in US Dollars in immediately available funds the principal amount of the Bonds becoming due for redemption or repayment on the date when the Bonds or any of them become due to be redeemed in accordance with the terms and conditions of the Bonds, together with any applicable premium and interest in accordance with the Bond conditions. The liability of the company to pay the amounts due under the Trust deed is absolute and unconditional.

10. Condition 4.1 of the Bonds provides that the Bonds shall bear interest from and including the Issue date at the rate of 2% p.a. and which is payable in equal installments in arrears on 27th June and 27th December in each year commencing with the interest payment falling due on 27.6.2008.

11. Condition 13.5 of the Bonds provides that the Company shall be liable to pay default interest on the failure of the Company to pay any sum in respect of the Bonds becoming due and payable under the Bond conditions. Condition 13.5 of the Bond is reproduced herein for the ease of reference.

13.5 Default Interest:

If the Company fails to pay any sum in respect of the Bonds when the same becomes due and payable under these conditions, interest shall accrue on the overdue sum at the lower of (a) the rate of 5% p.a. From the due date; or b) the maximum permissible rate under applicable law (the "Default Interest"). Such default interest shall accrue on the basis of actual number of days lapsed and a 360 day year.

The Trustee, the Agents and the Lead Manager shall not be liable for (a) any such payments of Default Interest pursuant to this Condition 13.5 which shall be made directly by the Company to the relevant Bondholder (b) any failure by the Company to make payments of any such Default Interest to the Bondholders and (c) any calculations in respect of such interest, which calculations shall be done by the Company.

12. That the respondent company failed and neglected to pay the Bondholders the interest payable in terms of Condition 4.1 of the Bonds on the Interest Payment Dates falling on 27.6.2010, 27.12.2010, 27.6.2011 and 27.12.2011 or within ten days grace period as provided under Condition 17.1 of the Bonds. The petitioner is unsecured creditor and does not hold any security for the dues payable under the Bonds. The non payment to the Bondholders amounts to breach of Bond Conditions and constitutes an event of default under Condition 17.1 of the Bonds.

13. The relevant portion of the Condition 17 of the Bonds reads as under:

17 Events of Default:

In any of the following events (each an "Event of Default") occurs and is continuing, the Trustee at its discretion may, and if so requested in writing by the holders of atleast 25% in principal amount of the Bonds the outstanding or if so directed by the Trustee having been indemnified and/or provided with security to its satisfaction), give notice to the Company that the Bonds are, and they shall immediately become, due and payable at their Early Redemption amount together with the accrued and unpaid interest (if any).

17.1 Non-Payment:

The Company fails to pay the principal, premium or interest of any of the Bonds for more than 10 days when due, or...

14. That on 3.6.2010, Corporate Trust and Agency services, Deutsche Bank (the "Paying Agent") sent a facsimile to the Company intimating that the payment of the interest of USD. 500,000.00 (United States Dollars five hundred thousand only) falling due on 28.6.2010. The Company was asked to make payment on or before 8.7.2010. The Company failed to keep its commitments and thereafter vide letter, dated 5.7.2010 the company was directed to make payment within 10 days of the grace period i.e. 8.7.2010, otherwise, it would constitute event of default under Clause 17.1 of the Bonds.

15. The Company however failed to pay interest amount within grace period and the interest installments payable to the Bondholders under Condition 4.1 of the Bonds. The Company on the other hand, kept reassuring the petitioner time and again that it intended to pay the interest payment due to the Bondholders. But the Company has failed to make such payment. The Company thus, failed to pay the amount admittedly due to the Bondholders under the Bond.

16. That on 25.6.2010, Mr. Sivakumar Srinivasan, a representative of the Company, in response to petitioner's emails, dated 22.6.2010 and 25.6.2010 calling upon the Company to confirm the interest payment details with the US office assured to respond by 28.6.2010, but no response was received. Reminders to the Company by its emails, dated 1.7.2010, 5.7.2010 and 8.7.2010 for payment of interest were also sent. Assurance was given on 22.6.2010, 25.6.2010, 1.7.2010, 5.7.2010 and 8.7.2010, but no payment was made.

17. On 19.7.2010, the petitioner sent letter to Bondholders intimating them of the existence of event of default under Condition 7.1 of the Bonds due to the non-payment of the interest amount by the Company. This letter was also forwarded to the company on the same day in response to which Mr. Sivakumar Srinivasan by his email, dated 20.7.2010 stating that the Company was positive that the interest payment would be wired before the end of next week, i.e. 7.8.2010 and till then, no default notice be issued on the Company.

18. The Commitment was also made to make payment vide email, dated 28.7.2010, wherein again assurance was given that steps were being taken to make payment. This assurance was again not kept and therefore, the petitioner again called upon the respondent Company to confirm the payment. The petitioner on the other hand was being chased by the clearing systems regarding the payment which could result in enforcement of action against the company. The Company still did not honour its commitments.

19. That in response to email, dated 9.8.2010, the respondent Company sought time till 13.9.2010 to come back to the funding of interest payment. As no explanation was forthcoming from the Company, the petitioner sent another e-mail on 13.9.2010 stating that if explanation on the issues faced by the petitioner was not provided, the notice of information of the interest payment default would be sent to the international clearing systems for distribution to Bondholders.

20. In response, the Company by email dated 14.9.2010 stated that the company had an informal call with certain Bondholders who were briefed on the issues being faced by the Company.

21. The petitioner sent an e-mail dated 15.9.2010 to the Company intimating that the information notice was sent to the international clearing systems for distribution to Bondholders on 14.9.2010 and requested for the comments of the company which they would like the petitioner to consider before a further information notice was sent to the Bondholders. The Company replied to the

email on the same day i.e. 14.9.2010 expressing their purported willingness to resolve the matter. Once again, no payment was forthcoming.

22. That it is surprising that after constant assurances from the company, that it would meet its interest payment obligations for over three months since the interest fell due, the Company for the first time in September, 2010 attempted to renege from its obligation of paying the interest amount and default interest admittedly due on the basis of the liquidity crunch being faced by the Company without providing any explanation to this effect.

23. This indicates that for all this while the Company was postponing the interest payment to prevent any action by the Bondholders. The petitioner is of the view that such conduct of the Company is indicative of the fact the Company at no time intended to pay the Bondholders. However, it was due to this conduct of the Company, that the Petitioner, under the bona fide belief that the Company had the intention to pay the Bondholders, refrained from taking action against the Company.

24. That as a last attempt, the petitioner once again called upon the Company to pay the interest admittedly due to the Bondholders by their emails, dated 22.10.2010 and 24.10.2010. As usual, the Company kept reassuring the petitioner by their emails dated 23.10.2010 and 25.11.2010 that the Company is working for a fund closure and the payments will be made at the earliest.

25. Meanwhile, on 30.11.2010, the Paying Agent sent a facsimile to the Company intimating the Company of the interest payment of USD. 500,000.00 (U.S. Dollars five hundred thousand only) becoming due on 29.12.2010 and payable by 28.12.2010.

26. Further, on May 27, 2011, the Petitioner sent a facsimile to the Company reminding the Company of the interest payment of USD 500,000.00, (United States Dollars Five Hundred Thousand only) becoming due on June 27, 2011, payable by June 24, 2010.

27. That as the Company failed to pay the aforesaid interest installments, the Company also became liable to pay the Early Redemption Amount in terms of Condition 17 of the Bonds.

28. That it was due to negligence and failure of the Company to pay the interest installments inspite of repeated reminders by the petitioner, the petitioner served a statutory winding up notice dated November 18, 2011 ("Winding Up Notice") at the registered office of the respondent Company calling upon them to pay within 21 days of the receipt of the Winding Up Notice, a sum of USD 62,390,724.10 (United States Dollars Sixty Two Million Three Hundred Ninety Thousand Seven Hundred Twenty Four and Ten Cents only) plus default interest.

29. That on December 21, 2011, the advocates for the respondent company responded to the aforesaid Winding Up Notice inter alia stating that a detailed reply to the Winding Up Notice was being prepared and would be sent to the

petitioner within two weeks from the date of receipt of this letter. However, till date the Company did not sent the detailed reply to the Winding Up Notice.

30. That 21 days time stipulated in the Winding Up Notice has expired. The Company however, till date intentionally failed and neglected to pay the debt due to the Bondholders detailed as under:

31. That the Company has failed to compound or secure the payment of the said amounts to the satisfaction of the Petitioner and/or the Bondholders.

32. That the Company has been duly served with a statutory notice u/s 434 and 434 of the Companies Act, 1956 but has failed and neglected to pay the Petitioner or to secure to the Petitioner's satisfaction, the said amounts due and payable. The Company's liability to pay the same is absolute and unconditional. The Petitioner submits that the aforesaid facts and circumstances, establish that the respondent is commercially insolvent since it has failed to pay the debt due by it to the Petitioner within 21 days from the date of the Winding Up Notice.

33. The respondent Company therefore is deemed to be unable to pay its creditors the amounts owed to them when due and payable and consequently, the Petitioner submits that the respondent statutorily deserves to be wound up by this Court.

34. That the Petitioner submits that as set out hereinabove, the respondent has neither paid nor evinced any intention to pay the said monies or any part thereof which is legitimately due to the Petitioner, inspite of the service of the winding up notice.

35. That the Company thus is, deemed to be unable to pay its debts in terms of Section 434(1)(a) of the Companies Act, 1956, and consequently is liable to be wound up by the orders and directions of this Court in terms of Section 433(e) of the Companies Act, 1956.

36. The Company petition is opposed by raising Preliminary objection;

(i) That this Company Petition is not maintainable in law or on the facts and circumstances of the case. As the Company petition has been filed merely to put pressure on the respondent, by using it as a tool to recover money from the respondent Company.

(ii) That the respondent Company is a growing and running concern with its operations in India and abroad. Therefore, provisions of Sec. 433, 434 read with 438 of Companies Act, cannot be used merely to recover money, based on false allegations.

(iii) That the respondent Company was incorporated in the year 1991 as a public limited company and is engaged in the business of providing software solutions to various fortune 100 companies for the past 12 years. The respondent Company has development centers in Bangalore and Gurgaon. It has bagged more than 1500 projects in India and abroad and has grown over the years

organically and non-organically by way of acquisition of business and clients in the USA. The respondent Company has been recognized for its delivery into North American Market by Gartner, which is a prestigious research agency and also possess technical quality certificates like ISO 9001, BS 7799, CMI Level-5 (Capability Maturity Model) etc. The shares of the respondent Company are listed in the Bombay Stock Exchange, Chennai Stock Exchange and Luxembourg Stock Exchange and the public shareholding is to the extent of 93%. The respondent Company has around 30,000 shareholders and has around 50 employees in India as well as around 1000 abroad who depend on the Company.

(iv) That the respondent Company offered upto USD 50,000,000/- (U.S. Dollars fifty Million only) 2.0% Unsecured Foreign Currency Convertible Bonds due 28th December, 2012 convertible into 21,505,434 global depository receipts ("GDRs") each representing 4 shares of Rs. 10/- each of the respondent Company or 86,021,736 Shares on the 20th December 2007 vide offering circular. The respondent company at the time of offering the said bonds, had clearly mentioned in the risk factors that the Company's revenues depend to a large extent on a relatively small number of major clients and could decline if it loses such clients.

(v) That from August 2008, the financial markets crashed globally setting off a global recession in which the hardest hit was the United States of America, where more than 95% of the Company's clients are located. As a result, not only did several of the clients of the respondent's Company delay payments due to the Company but also several other Company's customers did not renew contracts on account of the prevailing economic situation.

(vi) That the respondent's wholly owned subsidiary's (WOS) banker, M/S. Laurus Master fund in the US filed for Voluntary Liquidation in the year 2008 whereby, the respondent Company's WOS from a position of total credit of \$30 million were reduced to a credit of \$5 Million. This resulted in a severe financial crunch for the respondent Company as they were primarily dependent on the cash flow for the services rendered to its WOS and all the cash flow due to the respondent company has been adjusted by the liquidators to reduce their credit exposure.

(vii) That the respondent is slowly recovering with the improving situation in the United States of America. The respondent Company's efforts to raise capital in the international markets have also not been successful due to such economic situation in USA and in the European capital markets. Merely it is denied that the respondent Company unable to pay the debts. It is stated that the respondent Company is a growing concern and several employees working in the Company. It is however submitted that at present the Company is facing a cash crunch and is trying it best to come out of this difficult situation. But it could not be construed as the respondent's inability to pay its dues.

(viii) That with regard to averments that holder of 25% of the Bond outstanding

as authorised, the Petitioner, it is stated that no information has been provided by the Petitioner. The Petitioner is only the trustee of the Bondholders and did not have the authority to file the petition in absence of any request in writing by the Bondholders holding 25% of the principal amount of the Bonds outstanding or on an Extraordinary resolution.

(ix) That no capital authorisation has been filed before this Court. On the other hand, the set of Bond holders are in active conversation with the management which have been fully briefed about the present operational and other issues affecting the ability of the company to make any payment for the last few years. Another set of bond holders have also clearly expressed their intent and desire to work with the company for a settlement and have not supported the process of any winding-up which shall affect their rights as an unsecured creditor.

(x) That it is denied that the respondent company has failed or neglected to pay the Bondholders the interest payable on the Bonds. The stand of the respondent is that the Company has paid all interest till the end of the year, 2009 and has tried to honor all the payments to the Petitioner. Even after that the Petitioner was informed about the efforts taken by the company to make the interest payments. The reason for non payment is stated to be severe financial crunch which the company faced.

(xi) That for the year ending March 2010, the value of receivables stood somewhere around 314 crores and it was due to the prevailing market conditions many of the customers of the company delayed payments. Further, many respondent's clients are declared liquidation.

(xii) That it was on the assurance of its customers that the company was making assurance that payment due on interest would be raised and therefore, the representative of the company sent e-mails and also spoke to the trustees on a regular basis giving assurance for payment.

(xiii) That respondent Company was trying to generate funds to make payments with respect to the interest.

(xiv) That assurances were given on the belief that it would recover huge amount of receivables from its customers and on account of non receipt of receivables, it became difficult for the respondent to pay interest.

(xv) That failure on the part of the respondent is neither willful nor wanton, but it is the reason beyond the control of the respondent company due to the financial crunch faced by the entire I.T. Industry.

(xvi) That there was no negligence on the part of the respondent company with regards to payment of interest or creation of any security of the said amounts and the respondent Company trying its level best to come out of the financial crunch.

(xvii) That the respondent company is commercially insolvent as the respondent

Company is still operating and has several employees working with the Company and it is due to the financial crisis faced by the entire IT industry, there had been a temporary delay in making payments towards the interest and components, but that does not in any way show that the respondent Company is insolvent or deserves to be wound up.

(xviii) That the Management of the respondent Company is taking all efforts to try and settle the amounts of various creditors, secured as well as unsecured. The respondent Company feels that there is a possibility for revival of the operations of the respondent Company. The respondent company has more than 30,000 shareholders. It is prayed that the petition be dismissed, as the respondent company is neither insolvent nor unable to pay debt.

37. From the pleadings of the parties, the question to be determined in this Company petition is.

Whether the Company petition as framed is competent, and as to whether the respondent Company deserves to be wound up on account of non payment of interest due to the Bondholders inspite of statutory demand notice.

38. The learned counsel for the petitioner vehemently contended;

(i) That it is proved that the respondent company has not paid interest due on the bonds after June 2009 and under the terms of the bond, it is an event of default which entitles the petitioner to seek recovery of the amount. The statutory notice was issued to the respondent to clear the payment, as the respondent has failed to clear admitted liability, petitioner is entitled to seek remedy under the Bond Trust deed.

(ii) That e-mails sent by the respondent company shows that the liability is admitted, as the respondent company informed the petitioner that it was arranging to make interest payment due on the bond and also assured payment of interest. In spite of assurance, the admitted liability is not cleared.

(iii) That the learned counsel for the petitioner also referred to the notices issued from time to time and replies received thereto as also to counter filed by the respondent company, to contend that liability is admitted. Therefore, the petitioner has successfully proved that the respondent company has failed to pay the admitted liability.

(iv) It was also contended that the petitioner was competent to maintain this petition as it was authorised on behalf of the holders of the bond and was instructed by the holders of 25% of bondholders to file the present petition for winding up.

39. The learned counsel for the respondent on the other hand, vehemently contended;

(i) That the petition as framed is not competent, as admittedly, the petitioner is not creditor of the company to file this winding up petition.

(ii) That the petitioner could file a petition or take legal action against the respondent company under specific authorisation of 25% of the Bond holders, but in this case, the petitioner has not placed on record any such authorisation. This fact was not even disputed, that the petitioner not place on record, the authorisation by 25% of the bond holders along, with the Company petition.

(iii) That the learned counsel for the respondent also referred to statutory notice issued by the petitioner to contend that even in the statutory notice, it was not stated that 25% of the Bond holders have authorised the petitioner to issue notice, nor list of 25% Bondholders is forthcoming which could entitle the petitioner to maintain the present petition.

(iv) That the Power of Attorney placed on record also cannot be a basis to file this petition, as it is neither stamped properly nor it is endorsed by the competent authority to be acceptable in Indian Court. It is thus, contended that the company petition deserves to be rejected.

(v) That mere non payment of admitted liability cannot be a ground to wind up the company, as winding up petition is not a legitimate means of recovery from a growing and running concern. The company petition cannot be said to be bonafide, but is only a attempt to pressurise the company for payment of interest to the Bondholders.

40. The learned counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in Malaysian Airlines Systems BHD Vs. M/s. Stic Travels (P) Ltd., to contend, that petition filed by the petitioner cannot be dismissed for want of stamp duty, as it is open to this court in case the Power of Attorney executed outside India and presented in India for use in proceedings to levy penalty. This Court therefore, can order imposition of penalty and thereafter permit use of Power of Attorney.

41. The ratio of the judgment in this case was that Power of Attorney was liable to pay stamp duty for proceeding in India under Indian Stamp Act though executed outside India.

42. After the judgment was reserved, a memo, dated 30.3.2012 has been filed in the garb of placing on record the judgment of the Hon'ble Supreme Court along with letters of the Bond holders showing authorisation to the petitioner to present company petition. No notice of this memo can be taken, as this cannot be permitted, no documents at the back of opposite party can be filed in the Court that too without liberty of this Court in writing. The liberty in this case was granted only to place on record, the judgments on which reliance was placed by the learned counsel for the petitioner. It can therefore be said that petitioner has not approached this Court with clean hands.

43. The learned counsel for the petitioner also placed reliance on the judgment of the Hon'ble Karnataka High Court in The Bank of New York Mellon, London vs. Cranes Software International Ltd. (C.P. No. 203 of 2010 decided on 19.3.2012)

wherein the Hon''ble Karnataka High Court was pleased to lay down as under:

17 The learned senior counsel for the respondents however sought to draw a distinction by contending that the decision of the Gujarat High Court was in a case where the note holders themselves were before the Court and not the Trustee as in the instant case. It is therefore, contended that clause 13 of the Bond and Clause 13.3 of the Trust Deed provides only for enforcement and for recovery and that too only if more than 25% of Bondholders determine such action and in any event, it is not for winding up. In my view, the said contention is unacceptable as it is no more *res integra*. In fact, the learned Single Judge in Gramerey's case had taken note of the similar clause No. 13 relating to enforcement by a minimum requisite number of Bondholders who should authorise such action and had held that in such circumstances the minority Bondholders cannot institute a petition but the Trustee is required to be made a party to the petition and such liberty was granted to implead the Trustee in the petition.

18. In fact, the Division Bench on the other hand was of the view that the requirement of consent by minimum number of note holders as contained in clause 13 which had arisen for consideration is only for the purpose of recovery proceedings. It is held that the same cannot bar a statutory remedy available u/s 439 of the Companies Act and that even the note holders can institute such proceedings. In the instant case, as evident, the Trustee themselves have filed the petition invoking the statutory provision contained in the Companies Act. It is no doubt true that the petitioner in their statutory notice as well as rejoinder filed in the instant petition have contended that there is written request from the Bondholders. The mere non-production of the same along with the petition would not defeat the right of the petitioner to proceed further in the matter in the capacity of Trustee whereunder the winding up petition by way of statutory remedy can be maintained. In any event, the letters have been placed on record along with a memo. In that view, the adverse inference canvassed by relying on the decision in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, also does not arise.

44. This judgment of the Hon''ble Karnataka High Court does not apply to the facts of the present case, as the question before the Hon''ble Karnataka High Court is not with regard to maintainability of the Company petition for want of letter of authorisation, nor case before the Karnataka High Court was one where no stamp duty has been paid. The memo filed after the judgment reserved without liberty of the Court cannot be taken on record or can be basis for the judgment.

45. It may be noticed here, that in the case before the Karnataka High Court, Power of Attorney was duly stamped, as per Article 54 to the schedule to the Karnataka Stamp Act. But in the present case, admittedly, no such stamp duty has been paid, though it is open to this Court to impose penalty for deficit stamp duty, still it is to be seen whether the petitioner is entitled to equitable relief u/s

433, 434 to wind up a running company on a company petition, when admittedly, petition as framed is defective.

46. Reliance was also placed by the learned counsel for the petitioner on the judgment of the Hon'ble High Court of Delhi in Resham Singh and Co. P. Ltd. Vs. Daewoo Motors India Ltd., wherein the Hon'ble Delhi High Court was pleased to lay down that when no reply to statutory notice, is received, a presumption of indebtedness can be drawn against the respondent company for admission of winding up petition at the threshold itself, but in case, bonafide dispute is raised, then admission of company petition cannot be automatic. This judgment therefore, does not lay down that non reply to notice results in automatic admission. It only lays down that it is one of the factor to be taken note of.

47. Reliance was also placed on the judgment of the Hon'ble Calcutta High Court in K.T.S. (Singapore) Plc. Ltd. Vs. Associated Forest Products (Pvt.) Ltd., wherein it was held that when the respondent did not set up any claim against the petitioner by disclosing any disputes or compounds the petitioner's claim and defence of the respondent is found untenable, that the petition for winding up can be admitted.

48. On consideration, I find that this company petition deserves to fail.

49. Admittedly, in the present case, under the trust deed authorised the petitioner can maintain the petition for recovery only if 25% of the bondholders authorised the filing of a petition. In spite of preliminary objection, the petitioner failed to place on record authorisation by the 25% of the bondholders to maintain the present petition.

50. The filing of memo after judgment reserved, is not permissible, as no permission was sought from the court to place additional document or record.

51. The judgment of Karnataka High Court on which reliance was placed also cannot advance the case of the petitioner, as admittedly, in that case, the memo was filed with notice to the respondent and opportunity was to the respondent to contest the authority so given and to place on record documents in defence.

52. The judgment in K.T.S. (Singapore) Plc. Ltd. vs. Associated Forest Products (Pvt.) Ltd. (supra) also cannot advance the case of the petitioner, as the dispute in that case was not the one which raised in this petition. The question to be determined in this case is as to whether the petition as framed is competent or not.

53. It may also be noticed here that it is now well settled law that winding up is not legitimate means to enforce the recovery by pressurizing the company to enter into a settlement.

54. The fact that the respondent is a running company is not controverted nor it is controverted that there is financial crunch on account of non receipt of dues from the customers. That being the case, it will be too harsh to order winding up

of a running company, merely on the petition by trustee, filed without proper authorisation.

55. Consequently, finding no merit, the company petition is ordered to be dismissed. The petitioner shall however be at liberty to enforce their rights in accordance with law to recover the amount due to bondholders, in terms of Trust deed.

No costs.