
(2005) 04 AP CK 0096

In the Andhra Pradesh High Court

Case No : Company Petition No. 199 of 2004

Enernorth Industries Inc.

APPELLANT

Vs

VBC Ferro Alloys Ltd.

RESPONDENT

Date of Decision : 29-04-2005

Acts Referred:

Companies Act, 1956 — Section 433, 434, 434(1)

Citation : (2006) 133 CompCas 130

Hon'ble Judges : S. Ananda Reddy, J

Bench : Single Bench

Advocate : S. Niranjan Reddy, for the Appellant; A. Sanjay Kishore, for the Respondent

Judgement

S. Ananda Reddy, J.—This company petition is filed by the petitioner?EnerNorth Industries Inc., Canada, u/s 433(e) and (f) read with Section 434(1)(a) of the Companies Act, 1956, (hereinafter referred to as "the Act") seeking to pass an order of winding up against the respondent-company?VBC Ferro Alloys Ltd., Hyderabad, as the respondent-company was unable to clear the amounts to the petitioner-company, along with the amounts payable to other various creditors.

2. It is stated that the petitioner is a company incorporated under the laws of Canada, having its registered office at 2, Adelaide Street West, Suite 301, Toronto, Ontario, M5H1L6, Canada. The petitioner-company was originally known as "Energy Power Systems Ltd.", and its name has been changed to EnerNorth Industries Inc., as per the amendment dated February 11, 2003, issued by the Ministry of Consumer and Business Services, Ontario, Canada. The respondent-company was incorporated under the Act on October 3, 1981, as a limited company and having its registered office at Progressive Towers, 3rd floor, 6-2-913/9/4, Khairatabad, Hyderabad. The authorized share capital of the respondent-company is Rs. 20,00,00,000 divided into two crores equity shares of Rs. 10 each. The issued, subscribed and paid up capital of the respondent-company is Rs. 4,04,43,000 divided into 40,44,300 equity shares of Rs. 10 each.

The respondent-company was incorporated mainly with an object to take over the registrations and licenses obtained and to be obtained by M/s. Vizag Bottling Co. Pvt. Ltd., for the establishment of Ferro Silicon Factory and doing all such other things as are incidental or conducive to the attainment of the above object. The other objects of the company are more specifically stated in para. 4 of the company petition. It is stated that in and around 1995, one Oakwell Engineering Ltd., No. 8, Aluunid Ave, 3, Oakwell Building, Singapore 389933, participated in the tenders floated by the Andhra Pradesh State Electricity Board (now known as and hereinafter referred to as "APTRANSCO") and being the successful bidder in those tenders, it secured two letters of intent to establish two barge mounted power projects of 100 MW each at Kakinada, Andhra Pradesh. Thereafter, the said Oakwell Engineering Ltd. incorporated a company, known as EPS Oakwell Power Ltd. with 100 per cent, foreign equity, to establish, control and manage the said two power projects. The petitioner herein and the above named Oakwell Engineering Ltd. had entered into a number of agreements, including a co-operation agreement, dated October 17, 1997, shareholders agreement dated October 17, 1997, and settlement agreement, dated December 29, 1998, whereunder the total control and management of the above referred EPS Oakwell Power Ltd. (now known as Konaseema EPS Oakwell Power Ltd.?KEOPL) was acquired by the petitioner herein.

3. Subsequent to the above, the respondent had entered into various agreements with the petitioner herein, whereby the respondent and its group companies have acquired and are continuing to hold controlling interests in KEOPL. In view of non-performance of obligations by the respondent-company under various agreements entered into with the petitioner, a number of disputes including transfer of shares and payment of various amounts to the petitioner had arisen between the parties. The said disputes were referred to arbitral tribunal comprising of three arbitrators. The disputes relating to the purchase/transfer of the shares were duly resolved between the parties as per the agreement dated September 16, 2003, and thereupon a request was made by the parties to the arbitral tribunal for passing a consent award, with regard to the sale/purchase of the shares of KEOPL, and accordingly, the arbitral tribunal gave its award on October 11, 2003. In terms of the said award, the respondent was required to buy 1,13,48,200 shares of KEOPL from the petitioner on or before the earlier event of 60 days after the first disbursement on financial closure (as per PPA) and March 31, 2004, and pay the petitioner the purchase consideration of INR 113,482,000 by bank transfer in equivalent US dollars on or before March 31, 2004. The said award further directed that in the event of the respondent's failure to pay the value of the said shares to the petitioner, the respondent shall be liable to pay interest on the said amount at the rate of 12 per cent, per annum. According to the petitioner, after the said arbitral award, a letter dated February 28, 2004, had addressed to the respondent intimating the fast approaching of deadline and that the petitioner is ready and willing to lodge the shares referred to in the arbitral award, which are to be purchased by the

respondent and Mrs. Rita Mukerji, has been authorised by the petitioner to take all and or any such actions as may be needed for the purpose, and the petitioner was asked to contact the said person for the purpose of getting the shares transferred while effecting the payment for the shares as per the award. However, it is stated that the respondent did not fulfil the terms of the arbitral award. Therefore, the petitioner issued a legal notice dated August 17, 2004, demanding the payment. But the respondent though received the said notice neglected and failed to pay the amount due to the petitioner, within the period of three weeks from the date of the receipt of the said notice. Therefore, it is stated that the respondent is unable to pay the amount due to the petitioner. Hence, the respondent-company is liable to be wound up in accordance with the provisions of the Act. It is also further stated that the petitioner came to know that the respondent has failed to pay the amounts that it legally owes to various creditors and created various charges of its properties and assets for the loans and other advances taken by the respondent, and as such the respondent is not in a position to discharge the debts. Hence, the present petition.

4. In response to the notice served on the respondent, a counter is filed by the respondent, disputing and denying the allegations made by the petitioner. In the counter it is stated that the petitioner is required to transfer 1,13,48,200 equity shares of KEOPL to the respondent at the face value of Rs. 10. The petitioner can claim the amounts as per the award only if it can conclusively show to this Court that it is ready and willing to transfer the shares and that the said shares are unencumbered and not under any threat of attachment or other legal proceedings. The petitioner has neither deposited the shares along with duly executed transfer deeds in this Court nor handed them to the respondent, and has also not expressed any willingness to transfer the same in the E.P. proceedings. Hence, the petitioner is seeking one sided implementation of the award without it being in a position to perform its reciprocal obligation to transfer the shares to the respondent. It is further submitted that prior to filing the company petition, the petitioner has filed E.P. No. 46 of 2004 before the Chief Judge, City Civil Court, Hyderabad, for execution of the arbitration award, dated October 11, 2003. The respondent reliably understands that the shares held by the petitioner are under the process of being attached by a Canadian court in execution of judgment and decree of the High Court of Singapore. It is stated that M/s. Oakwell Engineering Ltd., which was the founder of KEOPL, as a gas based power project at Devarapalli Village, East Godavari District, had entered into an agreement with the petitioner to jointly implement the said power projects. Thereafter, certain disputes arose between the parties, which were later settled by Oakwell, by settlement agreement dated December 29, 1998, pursuant to which the petitioner was required to pay certain amounts to Oakwell, which the petitioner had defaulted. Therefore, the said Oakwell initiated legal proceedings in the Singapore High Court, which resulted in judgment and decree against the petitioner for a sum in excess of US\$ five million. The petitioner challenged the same in the appellate court, unsuccessfully. Therefore, Oakwell

initiated proceedings in the Superior Court of Ontario, Canada, to enforce the judgment of the Singapore court against the petitioner, which is pending. The respondent apprehends that the Oakwell is still seeking attachment of the properties of the petitioner in execution of the decree, in which case the petitioner would not be in a position to satisfy the condition imposed under the award. It is also stated that Oakwell has filed an execution petition before the Delhi High Court vide E.P. No. 22 of 2005, for enforcing the judgment dated October 16, 2003 passed by the High Court of Singapore, along with an application for attachment of the shares of the petitioner, which are to be transferred to the respondent, and also for a direction to the respondent herein to pay a sum of Rs. 11.85 crores to Oakwell, instead of the petitioner. Therefore, the property, i.e., the shares required to be transferred by the petitioner in order to claim the amount under the E.P. are also liable for attachment and sale in the execution proceedings. In view of the legal proceedings pending in Canada and in the Delhi High Court, any disposal of properties by the petitioner may be invalid. Hence, the petitioner cannot validly and legally transfer the said shares to the respondent free of any encumbrances and legal fetter. Thus, the petitioner is not in a position to comply with and perform its obligations as per the terms of the award. When the petitioner itself is not in a position to perform its obligation in terms of the award, the petitioner cannot be permitted to seek payment from the respondent for the shares, the transfer of which is subject to the orders of the competent Canadian court and the Delhi High Court.

5. It is also stated that the petitioner has filed E.P. No. 46 of 2004 before the Chief Judge, City Civil Court, Hyderabad, for execution of the arbitration award dated October 11, 2003, in which the respondent filed E.A., for stay of the proceedings, which is pending. Further, Oakwell has also filed an application to implead themselves in the said EP, along with another application for stay of the proceedings, pending disposal of the proceedings on the file of the Delhi High Court. In view of all these proceedings before various courts, the petitioner cannot claim any right to enforce the arbitration award, without being in a position to transfer the shares. Therefore, according to the respondent, there is no admitted debt, and the question of inability of the respondent to clear its debts does not arise. The respondent also denied that it had failed to honour its obligation under the arbitral award and it is only the petitioner, which is not in a position to fulfil its obligation in view of various legal proceedings that are instituted against the petitioner by Oakwell Engineering Ltd. It is stated that the amounts claimed by the petitioner will become due only upon the satisfactory compliance of the reciprocal obligation of the petitioner as per the terms of the arbitral award. As the petitioner is facing the attachment proceedings against all of its properties in various courts, the petitioner is not in a position to comply with the terms of the award and transfer the shares. Therefore, the petitioner is not entitled to any relief. The respondent also denied the claims of the petitioner that the respondent has become insolvent or owed number of debts to other parties, and filed a copy of the balance-sheet for the year ended by March 31,

2004, and also the profit and loss account showing that the company has been earning profits and is in a sound financial position and the allegations made by the petitioner are incorrect and intended only for the purpose of the present petition.

6. A reply is filed on behalf of the petitioner reiterating that the petitioner is, and has always been ready and willing to transfer 1,13,48,200 equity shares of KEOPL to the respondent, on the purchase price being fully paid. It is stated that the shares are unencumbered and are not the subject-matter of any attachment order or order of stay or injunction, thereby imposing-restrictions on the petitioner's rights to transfer the said shares. The petitioner has repeatedly offered to lodge the shares with the transfer deeds with the respondent on payment of the debt due from the respondent. The petitioner had, by letter dated February 28, 2004, notified the respondent that it was ready and willing to lodge the said shares for the purpose of transfer. Therefore, there is no merit in the contention of the respondent that the petitioner was not ready and willing to perform its obligation. It is stated that the shares are kept in a dematerialized form (demat) with Karvy Depository Services, and the petitioner is in a position to sell and transfer the shares to the respondent immediately against payment. It is further stated that the disputes between the petitioner and Oakwell Engineering Ltd. are not the subject-matters of disputes before this Court and the disputes that are pending before other courts are nothing to do with the present dispute. It is also stated that an affidavit of Mr. David Robertson Wingfield, Canadian solicitors is being filed showing that there are no legal proceedings currently pending in Ontario to attach or execute the shares of KEOPL or any other of the petitioner's assets. It is also stated that the arbitral award was passed on October 11, 2003, and the stipulated date for effecting the transfer and payment was March 31, 2004, (the deadline for effecting), and even after March 31, 2004, till date the shares are not encumbered either by way of attachment or by any other legal proceedings. Therefore, the petitioner is perfectly within its rights to offer the transfer of the said shares to the respondent, and it is only the respondent, which is not coming forward for effecting the payment in terms of the arbitral award. In fact, it is stated that as per the additional material papers filed by the petitioner, it is clear that the respondent in fact paid interest in terms of the arbitral award, and the said accrued interest for two quarters have been remitted-one for the first quarter ending by June 30, 2004, and the second quarter ending by September 30, 2004, by remitting an amount of US\$ 62,800 and US\$ 64,000 respectively. Therefore, there is no merit in the contention of the respondent.

7. Learned Counsel for the petitioner, Mr. Prem Kumar, reiterating the contentions that are stated in the petition as well as in the reply, contended that as per the agreements entered into between the petitioner and the respondent a consent award was passed by the arbitral tribunal on October 11, 2003, as per which the petitioner was to transfer 1,13,48,200 equity shares of KEOPL to the respondent, and the respondent has to pay Rs. 11,34,82,000. The deadline for the payment

was fixed as March 31, 2004, and if the payment was not affected on or before the said date, the respondent was also obligated to pay interest at the rate of 12 per cent, per annum on the entire sale consideration. In fact, the respondent has even paid interest on the unpaid consideration for the two quarters ending with June 31, 2004, and September 30, 2004, which clearly shows that there was no ambiguity or doubt in the mind of the respondent that the shares that are being held by the petitioner are not in a transferable form or is there any hindrance or obstruction to the petitioner for the transfer of the above said shares. In fact, according to learned Counsel a letter was sent on February 28, 2004, before the deadline fixed in the award intimating the respondent of the fast approaching deadline for effecting the payment, and also expressing the readiness and willingness of the petitioner for effecting the transfer as per the award, and in fact specified the name of the representative of the petitioner, i.e., Mrs. Rita Mukerji, along with her address even to contact for effecting the transfer of the shares. It is also stated by learned Counsel that as the shares are in demat form, they could be transferred immediately by execution of the required forms or by way of communication to the depositors of the shares. Learned Counsel also contended that, in fact, the respondent sent a letter dated June 14, 2004, to the petitioner explaining the delay for the failure to effect payment and also seeking time till July 1, 2004, and assured the petitioner that from the month of July 2004, the respondent would make the required arrangement to effect the buy-back of the said shares and complete the purchase of entire stock of 1,18,48,200 shares within a period of three months commencing from July 1, 2004. But, even after completion of the entire period of three months, however, as the respondent did not commence any payment, as assured, in the month of July or even in the month of August, the petitioner issued statutory notice on August 17, 2004, but even after the receipt of the notice also, the respondent did not respond positively. Hence, the present petition.

8. Learned Counsel for the petitioner also contended that mere filing of execution petition in terms of the arbitral award before the Chief Judge, City Civil Court, Hyderabad would not come in the way of the petitioner to seek remedy under the provisions of the Companies Act, 1956. The nonpayment of the amounts, as stipulated in the arbitral award clearly shows the inability of the respondent-company to discharge its obligation by paying the amount, and therefore, the petitioner is perfectly within its rights in presenting the company petition seeking for an order of winding up of the respondent-company. As the respondent-company failed to pay the amounts as stipulated in the terms of the award, according to learned Counsel, it is a fit case for admission of the company petition.

9. In support of his contentions, learned Counsel for the petitioner relied upon the following decisions:

Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., ;
Eurometal Limited Vs. Aluminium Cables and Conductors (U.P.) P. Ltd., ; UCO

Bank Vs. Achal Alloys Pvt. Ltd., ; Som Nath Jain Vs. Oswal Agro Mills Limited and Another, ; Trafalgar House Const. India Ltd. Vs. Western India Shipyard Ltd., Anand Cotton Co. v. Lakshmi Shanmugha Spinning Mills [1990] 3 Comp LJ 216 (Mad) TDICI Ltd. v. Neptune Inflatables Ltd. [1999] 1 Comp LJ 240 (Mad) and Bank of Nova Scotia v. RPG Transmission Ltd. [2005] 1 Apex Decisions 5 : [2006] 133 Comp Cas 172 (inf).

10. Learned Counsel for the respondent Sri A. Sanjay Kishore, on the other hand, reiterated the stand of the respondent as pleaded in the counter. According to learned Counsel, as per the terms of the award, there is no unilateral liability on the respondent to pay any amount. On the other hand, the obligations are bilateral. The petitioner has to transfer the shares upon which the respondent is liable to pay the amounts as stipulated. According to learned Counsel, the petitioner did not transfer the shares or at least offered even before this Court the shares along with the transfer deeds for effecting transfer, and the petitioner failed to perform or discharge its obligation. Therefore, it cannot make a claim against the respondent that the respondent failed to discharge its obligation. Learned Counsel also contended that there is no relationship of debtor and creditor between the petitioner and the respondent in view of the bilateral obligations provided under the terms of the award. Therefore, the company petition itself is not maintainable. In fact, according to learned Counsel, the petitioner seeks to enforce or execute the award by creating pressure tactics under the guise of the company petition seeking an order of winding up against the respondent-company. When once an award is passed, which stipulates certain obligations for both the parties, such award could not create a creditor and debtor relationship between the parties. Learned Counsel also contended that in view of the disputes that had arisen between the petitioner and Oakwell Engineering Ltd. a number of proceedings were initiated by Oakwell Engineering Ltd. against the petitioner, and in fact, obtained a decree against the petitioner for a sum of US\$ 5 million and in the course of realization of the said decrivals amount, they have initiated proceedings not only in the Superior Court of Canada, but also filed the E.P., before the Delhi High Court and also sought to attach the shares in question held by the petitioner. In view of the disputes that had arisen between the petitioner and Oakwell Engineering Ltd. it would be difficult for the petitioner to get the transfer of the shares, which are likely to be attached. Therefore, it is contended that unless the pending litigation is cleared by the petitioner, and it is made clear that the shares are not liable for attachment, it would be difficult for the respondent-company to accept such shares even if the petitioner would come forward for effecting the transfer. Therefore, the respondent could not be considered as a debtor or as a defaulter in payment of any such debt. Therefore, learned Counsel sought for dismissal of the company petition.

11. In support of his contentions learned Counsel for the respondent relied upon the following decisions:

Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, ; B. Viswanathan Vs. Seshasayee Paper and Boards Ltd., ; American Express Bank Ltd. Vs. Core Health Care Ltd., ; Tata Iron and Steel Co. Vs. Micro Forge (India) Ltd., and Manipal Finance Corporation Ltd. Vs. CRC Carrier Ltd.,

12. From the rival contentions, the issue to be considered is whether the company petition filed by the petitioner is liable to be admitted or not.

13. The facts, which are not in dispute, are that one Oakwell Engineering Ltd. was the successful tenderer to establish two barge mounted power projects of 100 mw each at Kakinada in Andhra Pradesh. The said successful tenderer incorporated a company-EPS Oakwell Power Ltd. with 100 per cent, foreign equity to establish, control and manage the said two power projects. Thereafter, the said Oakwell Engineering Ltd. entered into a number of agreements with the petitioner and as per the agreement the total control and management of EPS Oakwell Power Ltd. was acquired by the petitioner. Later the petitioner entered into agreements with the respondent and its group companies, which have acquired controlling interests in KEOPL. However, certain disputes arose between the petitioner and the respondent-company with reference to the transfer of shares and payment of the amounts, which were referred to an arbitral tribunal, which passed an award on October 11, 2003. The relevant portion of the said award is as under:

D. Other than the fulfilment of all the terms of this award, EnerNorth/EPS unconditionally confirms that there are no known or current disputes between EnerNorth/EPS and KEOPL or with the VBC group as promoter group of KEOPL and that all the issues between the parties are settled amicably and there are no disputes/claims by EnerNorth/EPS against KEOPL or VBC group. EnerNorth/EPS irrevocably confirms that it has no claims whatsoever against VBC group or KEOPL except its shareholding in KEOPL equity of 11,348,200 equity shares referred to in Sub-clause B above and the 500,000 shares referred to in Sub-clause C above in KEOPL and that referred to in Sub-clause C above and its rights to sell the aforesaid equity shares to VBC group at par value. VBC group shall be required to buy the 1,13,48,200 shares on or before the earlier event of 60 days after the first disbursement of financial closure (as defined under the PPA) and March 31, 2004, (the "due date"). For the sake of clarity, it is hereby confirmed that VBC will purchase 11,348,200 equity shares in KEOPL from EnerNorth/EPS and remit the purchase consideration of INR 113,482,000 (Indian rupees one hundred thirteen million four hundred eighty two thousand only) by tele transfer in equivalent US dollars to EnerNorth/EPS, on or before March 31, 2004, but in any event not later than March 31, 2004.

E. EnerNorth/EPS shall sell at its option upon written notice to the VBC group and the VBC group shall be required to buy the 500,000 shares of KEOPL referred to in Sub-clause C above, at the par value of Rs. 50,00,000 which are to be transferred into the name and beneficial ownership of EnerNorth, also on or before the "due date" in the same manner as the 11,348,200 shares referred to

in sub-clause D above.

F. VBC agrees to purchase the 11,348,200 shares of KEOPL held by EnerNorth/EPS and remit the purchase consideration of INR 113,482,000 (Indian rupees one hundred thirteen million four hundred eighty-two thousand only) by tele transfer in equivalent US dollars to EnerNorth/EPS on or before the due date to Canadian Imperial Bank of Commerce, Main Branch, Commerce Court, Toronto, Ontario, Canada MSL 1G9 Transit # 00002, account # 02-50007, Swift Code CIBCCATT, account name EnerNorth Industries Inc. or such another banking co-ordinates as EnerNorth may as its sole discretion, elect.

G. If VBC does not buy back and pay for the shares by the due date as referred to in Clause D and E above, VBC shall be liable to pay the EnerNorth, interest at 12 per cent, per annum on the value of the unredeemed shares for the period from the "due date", till the date of actual payment thereof. Except for the right to obtain payment for the shares on buy back by VBC and any interest that may become due in terms hereof, EnerNorth/EPS shall have no other right to take any action against VBC/KEOPL. VBC hereby undertakes to abide by the terms of this arbitral award and shall meet the payment obligations hereunder.

H. The entire purchase consideration or INR 118,482,000 (Indian rupees one hundred eighteen million four hundred eighty-two thousand only) for 11,848,200 shares of KEOPL presently held by EnerNorth/EPS, and those required to be transferred with reference to sub-clause C above, together with any interest due thereon in terms hereof shall, after deduction of taxes, if any, and subject to applicable laws and consents/permissions from Government and statutory authorities.

I. VBC shall have the sole responsibility to obtain necessary permissions/consents/clearances from Government, Reserve Bank of India, Income Tax Department, etc., as may be required under law for VBC to remit the money to EnerNorth/EPS.

14. Thereafter, in pursuance of the award as the deadline or cut-off date was fixed as March 31, 2004, for effecting payment in respect of the transfer of the shares, the petitioner wrote a letter dated February 28, 2004, conveying to the respondent that the cut off date for payment was fast approaching and sought for making arrangement for effecting the payment and also intimated that the petitioner-company was ready and willing to lodge the shares for the purpose of purchase by the respondent. It was also intimated that Mrs. Rita Mukerji has been authorized by EnerNorth to take all and/or any such actions, as may be needed for this purpose and her address was also communicated to the respondent. Thereafter, the respondent wrote a letter dated June 14, 2004, to the chairman of the petitioner-company explaining the difficulty and the delay in effecting the payment and assured the petitioner-company, that the respondent-company would start effecting payment from July 1, and complete the purchase of the entire stock within a period of three months from that date. But, as there

was no positive action on the part of the respondent-company, a statutory notice dated August 17, 2004 was issued. Though the said notice was received by the respondent, even for that notice/not even a reply was sent by the respondent. However, it is stated that the respondent-company remitted the interest as per the terms of the award for non-payment of the purchase consideration by March 31, 2004, by paying an amount of 62,800 US dollars for the first quarter ending by June 30, 2004, and 64,000 US dollars for the second quarter ending by September 30, 2004. But, thereafter, it appears that there was no remittance of either interest or the sale consideration. Therefore, the petitioner has come up with the present petition.

15. Before considering the rival contentions on merits, it would be appropriate to refer to the case law relied upon by either side. Learned Counsel for the petitioner relied upon the following decisions in support of his contentions:

16. In *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, the appellants claim that they have entered into certain agreements with the respondent-company for the supply as well as erection of the machinery to set up a wool plant. In the process there were disputes between the parties and the appellants filed a company petition u/s 433(e) seeking for a winding up order. The claim of the appellants was disputed by the respondent-company. The company court directed the respondent-company to deposit an amount of Rs. 72,556.01 being the admitted amount into the court while directing the appellants to file a civil suit for recovery of its claim, and if no suit is filed by the appellant the amount was ordered to be withdrawn by the respondent-company. On the other hand, if a suit is filed the amount was ordered to be transferred to the credit of the said suit. The said order was upheld on appeal. Hence, further appeal to the apex court. The apex court while dismissing the appeal laid down the following (page 131):

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 *In re A Co.* [1894] 2 Ch. 349 . 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 *In re Tweeds Garages Ltd.* [1962] 32 Comp Cas 795 (Ch. D). 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.

17. In *Eurometal Limited Vs. Aluminium Cables and Conductors (U.P.) P. Ltd.*, the claim of the petitioner creditor arises out of an export contract for the supply of various qualities and quantities of ACSR conductors by the company to a foreign buyer in Pakistan. The said transaction for the supply to the foreign buyer by the respondent-company was routed through the petitioning creditor. As an agent,

the petitioning creditor is entitled for commission at the rate of 4 per cent, on F.O.B. value, out of which 2 per cent, will be paid in Indian rupees and balance 2 per cent, will be remitted to the agents/correspondents in Pakistan after the approval from the Reserve Bank of India. The respondent-company committed default to obtain permission from Reserve Bank of India to remit the commission. Therefore, the foreign agent, who is entitled for commission, filed the petition, after issuing a notice u/s 434 of the Companies Act, 1956. The apex court while admitting the company petition, held that the company had passed credit notes in foreign currency and admitted, by giving a time schedule for the remittance of its debt, but had failed to prove that it had applied for any permission, which had been refused, wherefore the debt was presently payable due to the default of the company itself and the defences raised on grounds of objection under the FERA were not only frivolous and fallacious but lacked in commercial morality and involved a question of international commercial transaction, having an impact on the public interest which the court should always zealously safeguard for upholding the national prestige in the international commercial transaction. The court also observed (page 761): Therefore, the present winding up petition being a statutory right for the winding up of an insolvent company which is unable to pay its debt in spite of statutory notice being served for public interest, there is no bar in entertaining the winding up petition.

18. In UCO Bank Vs. Achal Alloys Pvt. Ltd., the bank has filed the petition for winding up of the respondent-company, as the respondent-company did not pay the amount due in response to a statutory notice u/s 434 of the Act. According to the petitioner-bank, some of the bills (cheques) of the respondent in the bills purchase account were dishonoured on presentation. The bills purchase account of the company shows a debit of Rs. 10,50,000 plus interest at the rate of 20 per cent, per annum from January 25, 1990. Likewise, the company's current account shows a debit balance of Rs. 13,17,550 (inclusive of interest). Thus, the company is indebted to the petitioner in the sum of Rs. 23,67,550 plus interest thereon. The said petition was opposed by the company on the ground that it is not tenable under law because there is a bona fide dispute as to the liability to pay the dues as mentioned in the petition under reply. Since there is a dispute, it cannot be said that there is any negligence to pay the same under the relevant provisions of the Companies Act, 1956. Negating the said contention of the respondent-company, the Madhya Pradesh High Court observed (page 548):

After going through the documents and considering the arguments advanced by the parties, I am of the opinion that prima facie it is a fit case in favour of the bank because it is not that the amount has not been acknowledged by the company and a statutory notice is in existence. It is also not disputed that the company has failed to pay the outstanding amount of debt after the receipt of the statutory notice. The respective contentions raised by the parties based on various judgments of the High Courts and the Supreme Court are about the question of winding up which shall be considered when the matter of winding up is taken up by this Court. However, at this stage it is a fit case, which deserves

admission.

19. In *Som Nath Jain Vs. Oswal Agro Mills Limited and Another*, the petitioner entered into an agreement with the respondent-company for the purchase of shares and made the payment in the month of May, 1991, which was admitted by the respondent. In a meeting between the petitioner and the respondent and it was agreed that the petitioner would purchase two lakhs equity shares in the company at the rate of Rs. 25 per share. The amount representing the value of two lakhs shares in the sum of Rs. 50 lakhs was to be paid through a demand draft in the name of the company and the shares were to be delivered within one week thereafter. The said amount was paid by way of draft in favour of respondent No. 1 company along with a list of nominees, in whose favour the shares were to be issued. The respondent delivered one lakh equity shares in August, 1992, i.e., after more than a year. Therefore, the company was liable to refund the money with reference to the balance. As the company did not return the money, the petitioner, therefore, became a creditor and claimed refund of the amount with interest. The respondent did not pay the amount. Therefore, this petition. The respondent-company claimed that the respondent is a solvent and going concern, and therefore, in the facts and circumstances of the case the petition deserves to be dismissed. The court negating the claims of the respondent-company, admitted the company petition recording its finding as under (page 116):

In the facts and circumstances of this case, I am clearly of the opinion that respondent No. 1 has defaulted in the payment of the amount claimed by the petitioner along with interest. At no stage prior to the filing of the written statement did the company dispute its liability to pay the amount. Even in the written statement, liability to pay the amount is admitted but the only defence, as already noticed, is that it is liable to pay after the lapse of ten years and that too, without interest, which plea has not been accepted being not supported by any material at all. Nothing has been shown, even prima facie to suggest that the amount was paid to respondent No. 1 as interest free loan for a period of ten years. Notice u/s 434 of the Act was not even replied to. Thus it can safely be presumed that the plea sought to be raised by the company is only an afterthought and a convenient way to wriggle out of its liability to pay the admitted amount. It appears that the company has no intention to pay the huge amount due to the petitioner and the present pleas have been taken in the written statement only with a view to avoid its liability to pay the amount. The defence raised by the company cannot, therefore, be said to be bona fide and for these reasons I hold that the respondent-company is unable to pay its admitted debts. The amount advanced by the petitioner has not been disputed. According to the respondent-company, a sum of Rs. 55 lakhs is due to the petitioner and it was paid to it on May 16, 1991. The amount due to the petitioner from respondent No. 1 is admittedly more than Rs. 500 which the company has neglected to pay the petitioner even after the receipt of a notice dated April 19, 1994, and has also neglected to compound for the same to the satisfaction of

the petitioner. In the situation it is held that the company is unable to pay its admitted debts.

20. In *Trafalgar House Const. India Ltd. Vs. Western India Shipyard Ltd.*, the respondent-company admitted its liability to the petitioner in a sum of Rs. 357.94 lakhs. Despite a number of assurances in various letters, the respondent-company defaulted on every occasion resulting in financial hardship and substantial costs to the petitioners. The Delhi High Court, while admitting the company petition, observed (page 923):

In the instant case only on the basis of unequivocal admissions of the petition, from 1996 till 1998, the claim of the petitioners is abundantly established. This is one of those unusual cases, where even during the pendency of the winding up petition in this Court, the respondent-company admitted the liability of the petitioners in categorical terms. The defence as set up by the respondent is totally devoid of any merit and has not been taken in good faith.

21. In *Anand Cotton Co. v. Lakshmi Shanmugha Spinning Mills Ltd.* [1990] 3 Comp LJ 216 (Mad) the petitioner sold and delivered to the respondent cotton on credit basis to a tune of Rs. 4,93,075.86 against which only a sum of Rs. 60,000 was paid by the respondent in part payment by a cheque dated November 3, 1982, and for the balance amount due it had issued cheques and all of them were dishonoured by the bank on presentation. The petitioner had issued a notice to the respondent as to the dishonouring of the cheques. The respondent acknowledged its liability to pay the amounts on many occasions, and despite assurances given, failed and neglected to pay the amount. The Madras High Court, in the above facts, while ordering winding up of the petition observed (page 218):

On the face of the stand taken by the respondent and the unchallenged testimony of PW. 1, the sordid fact remains that the respondent not only accepted its liability to pay the amount due to the petitioner, but neglected to pay the same within the period prescribed in the statutory notice exhibit PI. Subsequently, after a lapse of one year, though compromise was entered, the respondent did not honour its commitment in making the installment payments, except making a nominal payment of Rs. 50,000 and thereby, the matter was successfully dragged for a period of six years without any reasonable excuse. In such circumstances, the respondent must be deemed to be unable to pay its debts u/s 434(1) of the Act and consequently liable to be wound up.

22. In *TDICI Ltd. v. Neptune Inflatables Ltd.* [1999] 1 Comp LJ 240 (Mad) the Madras High Court while admitting the company petition approved the observations of the Bombay High Court in *United Western Bank Ltd. In re* [1978] 48 Comp Cas 378 and the relevant portion of the said decision is as under (page 241):

In *United Western Bank Ltd. In re* [1978] 48 Comp Cas 378 the Bombay High Court held that where the debt is disputed, the court has to see, first, whether

the dispute on the face of it is genuine or merely a cloak for the company's real inability to pay the just debts. Here, the correspondence shown above would go to show that the dispute regarding the payment of debt is nothing but a cloak for the respondent-company's inability to pay. Therefore, it is a fit case wherein there is ample document to show that the respondent-company is unable to pay its debt.

23. In *The Bank of Nova Scotia Vs. RPG Transmission Limited*, (infra) a Division Bench of the Delhi High Court while considering the proceedings under the Companies Act, 1956 vis-a-vis the proceedings by a bank or financial institution under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act) held that the proceedings are different, and the relevant portion of the observations is as under (page 188):

So far as the procedure for recovery of the dues is concerned, the same is provided for under the RDB Act, which covers the entire field. Therefore, there could be no dispute with the proposition of law laid down in the decisions of the Supreme Court in *Custodian of Evacuee Property Punjab and Others Vs. Jafran Begum*, , *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, , *Kamala Mills Ltd. Vs. State of Bombay*, on which strong reliance was placed by Mr. Tripathi. However, the aforesaid decisions have no application to the facts of the present case as we are of the opinion that the winding up proceeding is initiated with the intention of declaring a particular company as commercially insolvent and to see that such insolvent company is wound up in the interest of the general public whereas the very intention of filing a proceeding under the RDB Act is to recover money. Neither the RDB Act nor any other legislation has vested the power and jurisdiction on the Tribunal to declare a company as insolvent and also to wind up such a company. The said jurisdiction is exclusively vested on the company court whereas the exclusive jurisdiction to ascertain the liability and to recover the said amount through a certificate is vested with the Tribunal when such liability is more than the amount stipulated in the said Act.

Therefore, it cannot be said that the RDB Act covers the field for winding up an insolvent company and, therefore, the contentions of Mr. Tripathi are misconceived and are accordingly rejected. The contention that the petitioner could choose one of the remedies available in case where two or more than two remedies are available is applicable when the remedy provided for is one and the same but when two different remedies are provided for two different reliefs, in that event the plea of election of remedies is not applicable. We, therefore, hold that the winding up court is concerned with the issue as to whether or not a company could be declared as commercially insolvent and, therefore, comes within the ambit of the provisions of Section 433 of the Companies Act. The Debts Recovery Tribunal does not have any jurisdiction to entertain any such application for winding up of a company whether the same is by any bank and/or other financial institution. We also hold that both the remedies and jurisdictions

are mutually exclusive of each other and, therefore, there cannot be any inconsistency between the two different remedies provided for in two different legislations.

24. Coming to the decisions relied upon by the respondent, in *Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another*, the shareholders filed the company petition for winding up of the company on the ground of non-payment of dividend declared. The apex court, after considering the various contentions elaborately, held (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. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order".

25. In *B. Viswanathan Vs. Seshasayee Paper and Boards Ltd.*, the petitioner filed the petition alleging that the respondent is due in a sum of Rs. 1,36,525 being the amount due on account of the failure in supply of seven tonnes of paper in spite of receiving money in advance for ten tonnes, compensation for loss due to breach of contract and expenditure caused by the respondent to the petitioner. The respondent disputed the claim contending that the amount of advance of Rs. 1,78,200 paid on June 21, 1989, by way of demand draft was received by the respondent from its indenter, Efficient Enterprises, which has given specific instructions to appropriate the amount covered by the said demand draft towards the dues of the petitioner and supply of three tonnes of poster paper. Accordingly, the respondent carried out the instructions given to it, The court, after considering the factual matrix, dismissing the petition on the facts, held, that (headnote):

There was no privity of contract between the petitioner and the respondent-company, orders for goods being placed by the petitioner with an indenter who in turn obtained the goods from the respondent-company ; that the indenter having filed a suit against the petitioner for recovery of dues and the respondent-company having raised a genuine dispute as to its liability to pay the petitioner, a detailed investigation was required before the dispute could be settled; that the petitioner had not established that the respondent-company was unable to pay its debts; and that finally, the respondent-company having a monthly turnover of about Rs. 6.5 crores and having over 2,000 employees, it was not in public interest to wind up the respondent-company.

26. In *American Express Bank Ltd. Vs. Core Health Care Ltd.*, when the petitioner

bank filed the petition for winding up of the respondent-company, the Gujarat High Court while dismissing the company petition observed (headnote):

As against the creditor's right to get an order of winding up ex debits justified, where, from the materials it appears that the company is commercially solvent and the present state of affairs is the result of a temporary set back in business, or where the court is satisfied that the petitioner holds security for his debt and that security is sufficient to pay the debt by realization of security, and he has a right even after the winding up order is made to remain outside the winding up and realize his dues directly, the court may be satisfied that a winding up order is not envisaged in a situation, where, on principle the order would not benefit the petitioner, nor the company's creditors generally.

When grounds on which a winding up order can be refused while considering the petition after admission appear to exist from the material already before the court it would be a sound exercise of discretion not to admit the petition.

27. In *Tata Iron and Steel Co. v. Micro Forge (India) Ltd.* [2001] 104 Comp Cas 533 a Division Bench of the Gujarat High Court, while setting aside the order of admission of winding up petition made the following observations (headnote):

It is a settled proposition of law that in a case of disputed debt or a disputed question of fact, the company court would stay its hands and it would be for the parties to get the dispute adjudicated in a competent civil court as it would require leading of evidence, documentary as well as oral, and appreciation of the same, which is the domain of the original civil court. A bona fide dispute over a debt is a question depending upon the factual scenario of a given case. Where there is a bona fide dispute, the company cannot be said to have neglected to pay on a statutory demand.

To fall within the general principle, the controversy, must be bona fide in both the subjective and objective senses. This means that it must be honestly believed to exist and must be based on substantial or reasonable grounds. "Substantial" means having substance and not frivolous or vexatious and which the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. It must also be remembered that the onus is on the company to bring forward a prima facie case, which satisfies the court that there is something which ought to be tried either before the court itself or in an action or by some other proceedings.

Once a winding up order is passed against a company the entire managerial functioning and decision-making authority is shifted and, ordinarily, entrusted to the official liquidator or an administrator. It cannot be gainsaid that an order admitting a winding up petition and the resultant order for the publication of an advertisement inviting claims from respective parties by a public notice is, in many cases, from the commercial point of view, the business point of view, from the marketability point of view, no less injurious than winding up.

A petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the court and should be dismissed with costs. When the petitioner is forcing payment of a debt, which it knows to be in substantial dispute the evidence may support an action by the company against the petitioner for the tort of malicious prosecution. No monetary loss or special damage to the company need be proved, for the presentation of the petition is, from its very nature, calculated to injure the credit of the company.

28. In *Manipal Finance Corporation Ltd. Vs. CRC Carrier Ltd.*, the petitioner was a finance company, which entered into a hire purchase agreement with the respondent-company for the supply of certain machinery on hire. As the respondent-company failed to pay the sum of Rs. 1,77,43,273 in addition to the compensation towards value of the machinery to the petitioner, a notice u/s 434(1) was issued and filed the company petition. The company in its defence stated that the petitioner had also referred the dispute to arbitration claiming a sum of Rs. 2,37,45,378 that the petitioner had neglected to take possession of the machinery in question and in any case the petitioner was fully secured. The Bombay High Court, while dismissing the petition, held that:

Admittedly, there was a dispute and difference between the parties in respect of implementation of the hire-purchase agreement. The petitioners had therefore, resorted to the arbitration clause and referred the disputes to arbitration which was pending.

29. Therefore, it was held that the winding up petition, which was intended to pressurize the company to pay, in spite of being fully secured under three personal guarantees, is not maintainable and accordingly dismissed the same. While doing so, the Bombay High Court relied upon a decision of the apex court in *Amalgamated Commercial Traders P. Ltd. v. A.C.K. Krishnaswami* [1965] 35 Comp Cas 456.

30. From the above decisions referred to, it is clear 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. The court would pass an order of winding up even if there is a dispute as to the quantum of the debt. It is also made clear that where the defence raised is not only frivolous and fallacious, but lacked in commercial morality and involved a question of international commercial transaction, having an impact on the public interest, the courts should always zealously safeguard for upholding the national prestige in the international commercial transactions. It is also clear that the court has to see first whether the dispute, on the face of it, is genuine or merely a cloak for the company's real inability to pay the just debts, and if the defence is only a cloak, then the order of winding up would be passed. The courts have also held that a winding up petition is not a legitimate means of seeking to enforce payment of the debt, which is a bona fide dispute by the company. A petition presented ostensibly for a winding up order, but really to exercise pressure will be dismissed, treating the same as a scandalous abuse of the

process of the court. The courts have also held where the commercial solvency of the company is not in dispute, and the court is satisfied that the petitioner holds security for his debt, which is sufficient to pay off the debt by realization of the security, and where the winding up order is not in the interest of the petitioner as well as the company, the winding up order can be refused. It was also held that it is a settled proposition of law that in a case of disputed debt or disputed question of fact, the company court would stay its hands and it would be for the parties to get the dispute adjudicated in a competent civil court, as it would require leading of evidence, documentary as well as oral and appreciation of the same, which is the domain of the original civil court. It was also held that where there was a dispute and difference between the parties, and the matter was referred to arbitration for adjudication, and in such case, the winding up order would not be passed.

31. In the light of the above principles laid down in various decisions, the facts of the present case have to be considered. Admittedly, there were certain agreements between the petitioner and the respondent, and there were also disputes between the parties and ultimately the disputes were in fact referred to arbitration, and the arbitral tribunal passed a consent award as early as on October 11, 2003, as per which the respondent-company has to purchase 1,13,48,200 shares of Rs. 10 each, and pay its face value, and the deadline for the payment of the sale consideration was fixed as March 31, 2004. The petitioner-company by a communication dated February 28, 2004, reminded the respondent-company that the deadline of March 31, 2004, as fixed in the award, was fast approaching, and therefore, notified that the petitioner is ready and willing to lodge the shares in question for the purchase and the remittance of the proceeds by the respondent-company. It was also specifically informed the name of the nominee of the petitioner-company, who was authorized by the company to take all and or any such actions, as may be heeded for the purpose of transferring the shares. But, however, there was no response from the respondent-company. It is only on June 14, 2004, the respondent-company addressed a letter to the chairman of the petitioner-company, explaining the delay that had occurred in effecting the payment, as fixed in the award, and it was explained that the reasons for the said delay was, the delay in the processing of financial closure and the draw down. In the said letter, the respondent-company has assured and confirmed the chairman of the petitioner-company that it would commence the payment from July, 2004, and complete the same within a period of three months from July 1, 2004. But, even as per the said letter also, the respondent-company did not implement its commitment by paying the consideration of the shares. Therefore, a statutory notice, contemplated u/s 434(1) of the Act, was issued on August 17, 2004. In spite of receipt of the said statutory notice, the respondent did not even give its reply. But, however, the respondent-company admitting the liability of a sum of Rs. 11,34,82,000 payable to the petitioner-company, in terms of the award, remitted the interest payable for the quarter ending with June 30, 2004, in a sum of

62,800 US\$ through UCO Bank, Banjara Hills branch, Hyderabad. Similarly, for the quarter ending with September 30, 2004, an amount of 64,000 US\$ were remitted, which clearly shows that the respondent-company had admitted its liability in terms of its agreement as well as the award. The petitioner also had communicated its readiness and willingness to execute necessary documents for the transfer of the shares in favour of the respondent-company. In fact, it was brought to the notice of the court that the shares are in demat form, and the petitioner had even communicated the fact of the petitioner's readiness for transfer of the shares. The respondent never disputed or communicated to the petitioner about the petitioner's unwillingness to transfer the shares. In fact, such a doubt or objection was never raised, except for the first time in the counter filed in the present company petition.

32. However, on behalf of the respondent, one of the contentions advanced is that the shares held by the petitioner are not free and unencumbered and they are liable for attachment in the proceedings that were initiated by one Oakwell Engineering Ltd., and the respondent has cited the instance of filing proceedings by the Oakwell Engineering Ltd. in the Superior Court of Canada, and also filing of E.P. No. 22 of 2004 before the Delhi High Court, and in the said execution petition filed by the Oakwell Engineering Ltd. the shares are sought to be attached, and there is apprehension of litigation, and therefore, the respondent-company declines to get involved in a disputed transfer, and therefore, the petitioner is not in a position to transfer the unencumbered shares. Therefore, there is no obligation on the part of the respondent-company to pay the sale consideration. But the material on record clearly shows that the filing of E.P. No. 22 of 2005 before the Delhi High Court by a third party, is a subsequent development that had taken place in the year 2005, i.e., nearly an year after the deadline date fixed for completion of the transaction, i.e., for the payment of the sale consideration by the respondent to the petitioner. In fact, it is the contention of the petitioner that even as on date, there was no attachment of any of the assets of the company as is evident by an affidavit filed by the Barrister Solicitor, Toronto, Canada, confirming that none of the assets of the petitioner-company were attached or even any steps have been taken by the Oakwell Engineering Ltd. for attaching the assets of the petitioner-company including the shares in question. When once the shares are not attached, the contention advanced on behalf of the respondents that the shares are not unencumbered is clearly devoid of merit. The said contention was advanced by the respondent, as a lame excuse to explain away the delay and default committed by the respondent in affecting the payment in terms of the award. Therefore, the allegation that the shares held by the petitioner are not unencumbered is devoid of merit.

33. Another contention advanced on behalf of the respondent is that there is no debtor and creditor relationship between the petitioner and respondent-company and, in fact, under the terms of the award, there are bilateral obligations imposed, and therefore, a contract containing bilateral obligations which cannot be enforced by filing a company petition. With reference to this, the stand of the

petitioner from the beginning is that it is ready and willing to transfer the shares, and in fact, as early as on February 28, 2004, the respondent was intimated that the petitioner has even nominated Mrs. Rita Mukerji as its authorized representative for performing the necessary acts for affecting the transfer of the shares in favour of the respondent-company and the said communication and the proposal forwarded to the respondent was never disputed. In fact, it was never the complaint of the respondent that the petitioner is unwilling to transfer the shares. In the light of the above material on record, when there was absolutely no objection raised at any point of time till the filing of the counter, the objection raised, would at best be considered as an oblique excuse for compliance with the obligation for effecting the payment. Further, under the terms of the award, it is mandatory for the respondent to pay the amount and purchase the shares, there is no provision either to the petitioner or to the respondent to go back on the transaction of transfer of shares, and paying/receiving the consideration. Therefore, there is no question of any enforcement of bilateral contract under the present company petition. Apart from that the payment of interest, as stipulated in the award, for the quarter ending with June 30, 2004, and for the second quarter ending with September 30, 2004, clearly shows that the respondent admitted its liability to pay the sale consideration of Rs. 11,34,82,000.

34. Another contention advanced by the respondent was that the petitioner filed an execution petition for execution of the award, and when he has resorted to the alternative remedy that is available under law, the present company petition is not maintainable, and is liable to be dismissed. This contention is also devoid of merit. In fact, in *Bank of Nova Scotia v. RPG Transmission Ltd.* [2005] 1 Apex Decisions (Delhi) 5; [2006] 133 Comp Cas 172 (infra) a Division Bench of the Delhi High Court held that even pendency of the proceedings by a bank or financial institution under the provisions of the RDB Act, would not come in the way of filing a company petition, as both the proceedings are different. It was held that both the remedies and jurisdictions are mutually exclusive of each other, and therefore, there cannot be any inconsistency between the two different remedies provided for in two different legislations. Similarly, even if an execution petition has been filed, the purpose of such execution petition is different from that of a petition filed under the provisions of the Companies Act, 1956.

35. At the time of hearing, learned Counsel for the respondent filed the balance-sheet and profit and loss account claiming that the company is a going concern profitably, and therefore, there is no justification for admitting of a winding up petition, as the company could not be treated as an insolvent company. But the said claim of the respondent is contrary to the statutory provisions of Section 434(1) of the Act, which provides that when the respondent-company fails to pay the debt due, which is not disputed, as held in various decisions the respondent-company is deemed to be an insolvent and unable to pay of its debts. Therefore, in the light of the said deeming provision, the claim of the respondent-company is clearly devoid of merit.

36. Under the above circumstances, a prima facie case has been made out by the petitioner for admission of the company petition. Accordingly, the company petition is admitted. However, the respondent-company is granted five weeks time for effecting the payment of the amount in terms of the award and if the respondent-company fails to pay the same within the stipulated time, the petitioner is at liberty to take out publication of the admission of the company petition by publishing the same in Eanadu Telegu daily, and Times of India English daily, both of Hyderabad edition.