
(2014) 08 AP CK 0027

In the Andhra Pradesh High Court

Case No : Company Petition No. 235 of 2012

IHP-MEIL-KEEP-BRCPL-TAIPPL(JV)

APPELLANT

Vs

Andhra Pradesh Industrial Infrastructure Corp. Ltd.

RESPONDENT

Date of Decision : 26-08-2014

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 434, 434(1)(a), 439(1)(b)
Constitution of India, 1950 — Article 226

Citation : (2015) 189 CompCas 118

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : R. Raghunandan, Senior Counsel and Shireen Sethna Baria, Advocate for the Appellant; S. Ravi, Senior Counsel and P. Roy Reddy, Advocate for the Respondent

Judgement

C.V. Nagarjuna Reddy, J.—This Company Petition is filed under Section 439(1)(b) and 433(e) r/w. Section 434(1)(a) of the Companies Act, 1956 (for short "the Act") for an order to wind up the respondent for non-payment of the alleged debt due to the petitioner.

2. The averments, based on which the Company Petition is filed, briefly stated, are as under:

"That the petitioner which formed into a joint venture vide agreement dated 28-7-2008, nominated M/s. The Indian Hume Pipe Company Limited (IHPCL), as its lawful attorney on behalf of the joint venture to perform all acts and deeds as mentioned in the General Power of Attorney (GPA). That the IHPCL, partner in-charge of the petitioner, is a leading construction company engaged in the business of manufacturing, laying, jointing, testing, commissioning etc., of BWSC, MS, PCCP & PSC and other types of pipes in execution of water supply schemes in various states including the State of Andhra Pradesh. That the petitioner has successfully executed several prestigious projects in the State of Andhra Pradesh and in other States for the Central Government, State

Governments and Government Undertakings, Local Bodies, Co-operative Societies, Corporate and Private Sector.

3. That the respondent was incorporated on 26-9-1973 as a Joint Stock Company under the provisions of the Act and has been a nodal agency to the Government of Andhra Pradesh. That the registered office of the respondent is situated at 5-9-58/B, 6th floor, Parisrama Bhavan, Fateh Maidan Road, Hyderabad. That the main objects to be pursued by the respondent inter alia are to formulate, promote, finance, aid, assist, establish, manage and control schemes, projects or programmes, to provide and develop infrastructure facilities, including factory sites, factory sheds, godowns, marketing facilities, warehouse facilities of communications, power, water drainage, housing, hospitals and other medical and health and educational institutions and other services of any description in order to promote and assist the rapid and orderly establishment, growth and development of industries and commerce in the State of Andhra Pradesh. That the objects incidental and ancillary to the attainment of the main objects inter alia are to establish, construct, acquire by purchase, lease, exchange, transfer or otherwise, own, run, administer and maintain industrial estates and generally deal in or with the plots or buildings therein by way of sale, deferred payment, instalment or hire purchase basis, letting out, leasing or otherwise to individuals, entrepreneur/body of entrepreneurs, co-operatives, firms or other bodies corporate etc.

4. That the respondent invited tenders for Somasila Drinking Water Supply for Kadapa; that as the tender conditions permit a joint venture also to participate in the tenders, a joint venture agreement was entered into on 28-7-2008 among different agencies leading to creation of the petitioner; that the petitioner has submitted its bid and upon evaluation of the same it was found the lowest and accordingly the work was awarded in favour of the petitioner; that as per the records, the Estimated Contract Value (ECV) for the project was Rs. 254,82,43,380/- and the approximate value of the work to be done was Rs. 267,38,71,778/- and that the stipulated period for completion of project was 12 months as per the tender conditions. That an agreement was executed between the petitioner and the respondent vide agreement bond No. 25/ADV-I/APIIC/08-09 dated 24-9-2008 for Somasila Drinking Water Supply Scheme. Under the said scheme, the petitioner was to undertake manufacturing, supplying, lowering, laying, jointing, testing and commissioning of 2200 mm dia MS pumping main with cement mortar factory in-lining and out-coating and other appurtenance from the proposed intake well near old Madhavaram on the foreshore of Somasila Reservoir to the proposed sump at Kanumalonipalli on Kadapa-Rajampet Highway, including maintenance and operation for a period of 24 months (defect liability period) under Package-I. That the petitioner furnished five numbers of bank guarantees, equivalent to 2 1/2 percent of the contract price, valid till completion of the original defect liability period. That to avail mobilisation advance, the petitioner has submitted various bank guarantees for a total mobilisation advance of Rs. 26,75,03,538/-; that as the respondent failed to

pay the mobilisation advance, the same resulted in expiry of the bank guarantees; and that on the assurance given by the respondent that prompt payment of bills will be made, the petitioner was persuaded to commence the work without mobilisation advance and executed the work for a value of more than Rs. 15 crores against supply of pipes and of about Rs. 25 lakhs against execution of civil work. That as per clause 68 of the agreement, the Running Account (RA) bills raised by the petitioner for the work executed were to be paid within 14 days from the date from which the bills were raised; that the petitioner submitted two RA bills against manufacturing and supply of MS pipes for an amount of Rs. 15,43,03,122/- (including labour cess) - being LS I & Part bill for Rs. 13,71,58,330/- and LS II & Part bill for Rs. 1,71,44,792/-, for a net amount of Rs. 13,39,04,368/- on 27-2-2009 and 22-5-2009, respectively; that the said RA payments were certified by the Zonal Manager, APIIC, Kadapa on 27-2-2009 and 22-5-2009 respectively; and that after due efforts by the petitioner, the respondent made part payment and released two payments under RA Bill No. 1 for Rs. 3 crore on 18-4-2009 and for Rs. 2,20,67,784/- on 18-5-2009 totalling Rs. 5,20,67,784/- after deducting income tax, VAT, labour cess and NAC amounting to Rs. 89,32,087/- leaving a balance admitted amount of Rs. 8,18,36,584/- which is due and payable to the petitioner by the respondent. That the petitioner had been persistently requesting the respondent to clear the admitted dues since 21-1-2009; that various meetings were held in this regard and the petitioner has addressed letters dated 17-4-2009, 8-7-2009, 18-1-2010, 28-6-2010, 10-9-2010, 12-11-2010, 11-3-2011, 15-7-2011 and 25-7-2011 requesting for payment of outstanding amounts. That the respondent while admitting their liability to pay the outstanding amount, informed the petitioner that a decision was to be taken on the Somasila Drinking Water Supply Scheme at the earliest; that the Zonal Manager, Kadapa of the respondent clearly admitted the liability vide his letter No. ZM/APIIC/KDP/M(F)/AM(A)/2011/SDWSS/1274, dated nil-7-2011 and informed that upon receiving instructions from the Hyderabad head office, the outstanding payment will be made to the petitioner; and that as no further response was received from the respondent, the petitioner has sent reminder letters dated 1-8-2011, 22-8-2011, 2-9-2011, 20-12-2011 and 3-1-2012 demanding the respondent to release the outstanding dues to the petitioner.

5. That though the petitioner was maintaining good progress of execution of work, in the month of December 2009 the officials of the respondent asked the petitioner to abruptly stop and not to proceed with the further work in the project; and that due to the sudden stoppage of payments, the work was forced to be stopped, as a result of which the men and machinery of the respondent were left idle and therefore the petitioner was constrained to leave the work midway. That in response to letter dated 3-1-2012 of the petitioner, the Managing Director of the respondent addressed letter bearing No. CE/1/APIIC/SMS/WS/Package-1/2007, dated 18-1-2012 to the petitioner acknowledging and confirming the respondent's liability with regard to the outstanding amount and

further informed the petitioner that upon receipt of funds from the Government of Andhra Pradesh, the outstanding bills will be cleared and a decision will be taken on the subject scheme.

6. That apart from the admitted outstanding amount of Rs. 8,18,36,584/- under the duly certified RA bills as due and acknowledged as payable by the respondent to the petitioner, further sums are also payable by the respondent against the said project work. That as the subsequent meetings to resolve the impasse held between the officials concerned of the respondent and the petitioner's personnel failed to resolve the issue, a notice was issued on behalf of IHPCL to the respondent on 11-6-2012 which was replied to by the respondent on 17-9-2012 incorrectly denying its liability. That thereafter, the petitioner has caused statutory notice dated 11-9-2012 on the respondent under Section 434 of the Act calling upon the latter to pay a sum of Rs. 8,18,36,584/- within 21 days. That the respondent having received the said notice on 14-9-2012 has neither chosen to pay the outstanding amount nor has responded to the said notice. The petitioner has therefore filed this Company Petition.

7. On behalf of the respondent, its General Manager (Law) filed a counter-affidavit wherein she has admitted the averments relating to entrustment of the subject work to the petitioner and part execution of the same by it. However, the counter-affidavit denied the liability of the respondent to pay the amounts claimed by the petitioner and maintained that in view of the seriously disputed facts involved in the case, the proceedings under Section 434 of the Act cannot be resorted to. The respondent also pleaded that arbitration clause exists under clause 73 of the agreement and that the petitioner has to get the dispute resolved through the said forum. It is further averred that the petitioner did not complete the work within 12 months and failed to seek extension in terms of Clause 59 of the agreement and it has abandoned the site during the month of December 2009 by taking away the men and machinery leaving the work incomplete; and that the petitioner utterly failed to keep its obligations under the contract and having not adhered to the terms and conditions of the agreement between the parties, it is not entitled to payment of amount by the respondent. The respondent asserted that under clause 60, it is entitled to forfeit the EMD and withhold the amounts in the event of delays in commencement or progress or neglect of work; that under Clause 61 of the contract, the respondent is empowered to recover such amount from the contractor that would become necessary to be recovered by virtue of default of the contractor to complete the work as per the schedule and that the present petition has been filed by the petitioner to escape from its liability under the contract and to wriggle out of its obligations arising in relation thereto. That it is open to the respondent to invoke the terms of contract to recover from the petitioner the amounts which would be spent by it for completion of the work on account of abandonment and non-completion of the work by the petitioner. Referring to letter dated 18-1-2012 issued by the Chief Engineer-I of the respondent, it has averred that the said letter only refers to the stand of the petitioner on the cause for stoppage of work

as nonpayment of bills for the work done and that the said letter is neither admission of the alleged liability of the respondent nor would it act as a buffer to protect the petitioner for its failure to adhere to its commitments under the contract. Evidently, referring to the letter of the Managing Director of the respondent, the counter-affidavit stated that mere addressing of the Government for release of funds does not mean that the provisions of Sections 433 and 434 of the Act would get attracted though the petitioner has abandoned the work in December 2009, as a result of which much detriment has been caused to the APIIC. The counter-affidavit has denied the allegation that the officials of the respondent asked the petitioner to arbitrarily stop the work in December 2009, as wholly baseless. Referring to the statutory notice, the respondent has taken the stand that notice dated 11-6-2012 was itself a statutory notice and that the same having been replied to by the respondents on 17-9-2012, there was no need for the petitioner to send another notice dated 11-9-2012. The counter-affidavit has prayed for dismissal of the Company Petition.

8. Sri R. Raghunandan, learned Senior Counsel appearing for Ms. Shireen Sethna Baria, learned Counsel for the petitioner, submitted that the correspondence exchanged between the parties clearly shows that the debt is an undisputed one and that the stand taken by the respondent in its reply dated 17-9-2012 to the legal notice dated 11-6-2012 denying its liability and also the averments in the counter-affidavit denying the debt, are a pure after-thought intended to take the dispute raised in this petition out of the purview of the provisions of Sections 433 and 434 of the Act by making it appear as if the debt is a seriously disputed one. He has taken this Court through the correspondence to fortify his submission that the debt is not only an undisputed, but also an admitted one. While referring to the financial statements pertaining to the revenue and expenditure of the respondent, the learned Senior Counsel submitted that mere solvency of the respondent cannot be a ground to throw out the Company Petition and that as the respondent has failed to pay the admitted debt, it is liable for being wound up. In support of his submissions, the learned Senior counsel has relied upon the Judgments in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., , PL Shipping and Logistics Private Limited. Vs. A.G.A. Publication Ltd., , Indo Swiss Jewels Ltd. Vs. HMT Watches Ltd., , Maruti Udyog Ltd. Vs. Hindusthan Photo Film Mfg. Co. Ltd., and Intesa Sanpaolo S.P.A. Vs. Videocon Industries Limited, .

9. Opposing the above submissions, Sri S. Ravi, the learned Senior Counsel appearing for Sri P. Roy Reddy, mainly advanced four submissions, namely:

"(i) that though the respondent has entered into agreement with the petitioner, it is only a facilitator on behalf of the Andhra Pradesh Government and that it cannot be saddled with the consequences of non-payment of the alleged debt;

(ii) that the amount claimed by the petitioner is seriously disputed by the respondent and that as there is a bona fide dispute relating to the claim of the petitioner, no winding up of the respondent could be ordered; and

(iii) that ordering winding up of the respondent will seriously affect public interest.

(iv) that in case of NCC-IVRCL-SMS (JV), a learned single Judge dismissed a Writ Petition and the same was confirmed by a Division Bench."

10. In support of this submission, the learned Senior Counsel has placed reliance on the Judgments in NCC-IVRCL-SMS (JV) v. APIIC W.P. No. 31794 of 2010, Dt. 19-12-2011 and in Re NCC-IVRCL-SMS W.A. No. 121 of 2012, dated 13-8-2012.

11. I have carefully considered the submissions of the learned Senior Counsel for both the parties and perused the record.

12. The law relating to scope of winding up of a company for non-payment of debt under Section 433(e) r/w. Section 434(1)(a) of the Act is well crystallized. The main ingredients to be satisfied for ordering winding up of a company for inability to pay its debts are:

"(i) that the company is indebted in a sum exceeding Rs. 500/(The Companies Second (Amendment) Act, 2002, enhancing the amount from Rs. 500/- to Rs. 1 lakh has not been notified); and that despite service of notice on it by a creditor, by assignment or otherwise, the company has neglected to pay the same for more than three weeks after such service, or to secure or compound for it to the reasonable satisfaction of the creditor; and

(ii) that if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part."

13. The scope of these provisions is well explained in a catena of Judgments of the Apex Court (See: Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, , Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, ; Tweeds Garages Ltd., Re (1962) Ch. 406 : 1962 Comp. Cases 795 (Ch.D), Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, , Vijay Industries Vs. NATL Technologies Limited, and IBA Health (India) Pvt. Ltd. (supra). Having analysed the essence of the above Judgments, this Court in M/s. Indiabulls Housing Finance Limited v. South Asian Agro Industries Ltd. C.P. No. 264 of 2013, dated 17-6-2014, deduced the following legal principles:

"1. If the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. Conversely, if the plea of denial of debt is a moonshine or a cloak, spurious, speculative, illusory or misconceived, the Court can exercise the discretion to order the company to be wound up.

2. A petition presented ostensibly for winding up order, but in reality to exert pressure to pay the bona fide disputed debt is liable to be dismissed.

3. Solvency is not a stand alone ground. It is relevant to test whether denial of

debt is bonafide.

4. Where the debt is undisputed and the company does not choose to pay the particular debt, its defence that it has the ability to pay the debt will not be acted upon by the Court.

5. Where there is no dispute regarding the liability, but the dispute is confined only to the exact amount of the debt, the Court will make the winding up order.

6. An order to wind up a company is discretionary. Even in a case where the company's liability to pay the debt was proved, order to wind up the company is not automatic. The Court will consider the wishes of shareholders and creditors and it may attach greater weight to the views of the creditors.

7. A winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally and the grounds furnished by the creditors opposing winding up will have an impact on the reasonableness of the case."

14. From the respective pleadings of the parties and in the light of the settled legal principles referred to above, the following issues arise for consideration for the purpose of admission of the Company Petition:

"1. Whether the debt is a bona fide disputed debt?

2. Whether the respondent is not liable for the consequences under the Act for non-payment of the debt being a purported nodal agency of the State Government; and

3. Whether the professed ground of public interest should deter this Court from admitting the petition for winding up?

15. Re Point No. 1: Before undertaking discussion on this point, I would like to clarify that the reference proposed to be made to the various clauses of the agreement between the parties is for the limited purpose of knowing whether the debt claimed by the petitioner is a bona fide disputed debt and observations made and findings rendered in this order shall have no bearing on the future disputes between the parties arising in any form before any forum.

16. In order to know whether the debt is bona fide disputed, the contemporaneous correspondence present the true picture, for, majority of such correspondence ordinarily precedes the dispute and there are bound to be embellishments on both sides, once a dispute arises between the parties. Therefore, it is necessary to delve into the correspondence between the parties filed as Annexure-VII and Annexure-VIII by the petitioner. It is necessary to note in this context that the respondent has not denied any of this correspondence.

17. The exchange of correspondence between the parties available before the Court commences from 17-4-2009 (Annexure-VII). The said letter was addressed by the Project Manager of the IHPCL to the Zonal Manager of the

respondent wherein the latter was informed that the petitioner has supplied at site 2186.355 mts. of 2200 mm. Dia MS Pipes manufactured by them; that as per clause 93 of the terms of payment, the petitioner is entitled to get 10% of the agreement rate after in-lining and out-coating and conveyance to the site; and that the respondent was therefore requested to pay the bill amount while reminding it to release the sum of Rs. 13,59,01,243/- against R.A. Bill-I towards 80% of the agreement rate for manufacturing the pipes and hydro-static testing at the factory. On 8-7-2009, the Authorised Signatory of the petitioner addressed letter to the Chief Engineer-1 of the respondent wherein it was informed that the petitioner has started excavation of trenches for laying and jointing of 2200 mm Dia MS Pipes from 26-6-2009. The letter requested for blasting permission and also for fixing the rate of jungle clearance. A request was also made to release the outstanding net payment of Rs. 819.13 lakhs so as to start the manufacturing of balance quantity of MS Pipes. Vide letter dated 18-1-2010, the Authorised Signatory of the petitioner addressed Chief Engineer-I of the respondent wherein the latter was informed that the petitioner has fabricated and supplied 2186.5 mts. of 2200 mm Dia MS Pipe for which bills for Rs. 13,339.13 lakhs were submitted, out of which only a sum of Rs. 520/- lakhs was released. The respondent was therefore requested to arrange to release the balance payment of Rs. 18,879.13 lakhs at the earliest. While reminding Chief Engineer-I of the previous letters addressed by the petitioner, in letter dated 28-6-2010 the Authorised Signatory of the petitioner requested him to pay the balance amount of Rs. 8,18,34,678/-. As no payments were forthcoming, IHPCL addressed letter dated 10-9-2010 to the Principal Secretary, Chief Minister's office, Government of Andhra Pradesh, bringing to his notice that as against the completed work value of Rs. 15.30 crores, only a sum of Rs. 5.20 crores was received in April 2009 and that the balance payment of Rs. 10.10 crores is pending since May 2009 for want of funds with the respondent. Accordingly, the Principal Secretary was requested to arrange the funds for the subject works and release payment to improve cash flow to the project for achieving further progress of the work. Another request was made through letter dated 12-11-2010 addressed to the Chief Engineer-I wherein the Authorised Signatory of the petitioner has requested the Chief Engineer to release the balance payment of Rs. 8,18,34,678/-.

18. In another letter dated 11-3-2011 addressed to the Managing Director of the respondent while reiterating the request for releasing the balance due of Rs. 8,18,26,334/- (net amount), the petitioner further informed the Managing Director as under:

"We submit that when the work was in good progress, the officials of the APIIC Ltd. informed us verbally not to proceed with further work in the month of December 2009. Hence we have not proceeded with any further work from then onwards. All our men and machinery are still idle and we are paying huge idle charges."

19. The letter also quoted clause 68 of the agreement and asserted that RA bill payments should be released within 14 days of submission of the bills. The Managing Director has also informed that if payment is not made within 15 days with interest @ 24%, the petitioner will be compelled to proceed legally as per the contract agreement.

20. In yet another letter dated 15-7-2011 addressed to the Zonal Manager (E) of the respondent, the petitioner stated that despite several correspondences made to the addressee referred to in the reference column, no communication has been received from him regarding payment nor any instructions were issued in order to carry out the balance work and that in the absence of instructions from the Zonal Manager, the work is totally stopped for want of payments and necessary instructions. It was further stated in the said letter that though bank guarantees were furnished, mobilization advance was not released and on the assurance of the Zonal Manager, the petitioner continued the work assuming that payments will be made, hoping that the financial crisis suffered by the respondent was temporary and that on such assumption the petitioner also started the civil work and executed the same to the tune of Rs. 23,85,639.73 ps. by excavating trench of 840 mts. length and carting of 8296.03 cu.m. of earth. The Zonal Manager was informed that keeping silent or failure to reply shall be treated as acceptance. Another reminder letter was issued to the Zonal Manager (E) of the respondent on 25-7-2011 by the petitioner.

21. In the letter dated 1-8-2011 addressed to the Engineer-in-Chief of the respondent, the petitioner's Authorised Signatory had referred to the meeting held on 29-7-2011 between the Engineer-in-Chief and A.K. Johari, the petitioner's representative and stated that during the said meeting the said person informed the Engineer-in-Chief that in the absence of a decision from the respondent's side and due to the failure of release of payments by the respondent for the last 2 1/2 years, the work has come to a stand still and that a sum of Rs. 10,32,06,755/- is due for payment for the last more than 2 1/2 years. The Engineer-in-Chief was therefore requested to arrange payment of the overdue amount at an early date and communicate his decision regarding execution of the balance work. Reminders on similar lines were issued to the Zonal Manager (E) of the respondent by the petitioner's Authorised Signatory on 22-8-2011 and 2-9-2011. Separate letters dated 20-12-2011 and 3-1-2012 were also addressed to the Managing Director of the respondent with a copy marked to the Engineer-in-Chief.

22. While all the functionaries of the respondent, from the Managing Director to the Zonal Manager (E), were conspicuously silent to the maze of correspondence addressed by the petitioner, letter dated 3-1-2012 addressed to the Managing Director with a copy marked to the Engineer-in-Chief of the respondent, finally evoked response, by way of reply dated 18-1-2012 from the Chief Engineer (I/c), APIIC. This letter being crucial in deciding this Point, it is necessary to reproduce the same:

"With reference to the letter 2nd cited, it is to inform that APIIC is being addressed the Govt. of A.P. constantly for releasing the funds for clearing the outstanding bills pertaining to Somasila Drinking Water Supply scheme. But no funds are received from Govt. for this project after 04/2009. Whatever the funds released by Govt. of A.P. that was paid to the agencies of the subject Somasila Drinking Water Supply Scheme.

Further it is informed that the subject work was stopped by you with drawing the men and machinery from works site as no payments made for the work done by APIIC. APIIC is also not persuade with the agencies for resumption of work in the absence of funds from Govt. of A.P.

It is aware that APIIC is taken up the above Water Supply Scheme at the instance "of Govt. of A.P. and bills could be paid only after receipt of funds from Govt.

Hence, it is once again informed that soon after receipt of funds from Govt. of A.P., the outstanding bills will be cleared and a decision will be taken on the subject scheme."

(Emphasis is mine)

Ignoring the faulty English deployed in it, it is clear from the said letter that the only reason for the petitioner stopping and withdrawing the men and machinery from the work site was non-payment of bills by the respondent. In a way, the Chief Engineer has also revealed the guilty conscience of the respondent in not persuading the agencies (there is another agency called NCC-IVRCL-SMC (JV) which was entrusted with another reach under Package-II) for resumption of work in the absence of funds. The Chief Engineer has also assured the petitioner that soon after receipt of funds from the State Government, the outstanding bills will be cleared and a decision will be taken on the subject scheme.

23. Along with the reply affidavit, the petitioner has filed a copy of letter dated 2-4-2012 of the Vice Chairman and Managing Director of the respondent addressed to the Principal Secretary and CIP, Industries & Commerce Department, Government of A.P. wherein he has informed the latter, inter alia, that the works were granted in September 2008 without receipt of funds from the Government; that under Package-I, the petitioner has executed the work of the value of Rs. 15,43,03,122/- against which payment of Rs. 6 crores was made and the balance amount payable was Rs. 9,43,03,122/-. With regard to the quantum of work and the amounts payable, the Vice Chairman and Managing Director informed that the figures mentioned in the said letter are as per the measurement records maintained by the respondent and that the contractors are claiming more than the said amounts. He has further informed that as against the total work executed to the tune of Rs. 50 crores, the Government has so far released only Rs. 20 crores and that in the absence of funds from the Government as assured, the further work is held up since October 2009. The letter therefore requested the Principal Secretary to release Rs. 30 crores to clear

the outstanding payments of both the agencies to avoid breach of contractual obligations.

24. One wonders, can there be a better case of admission of debt than the one on hand? Any amount of pleadings cannot displace the evidentiary value of the correspondence exchanged between the parties before the action is initiated. When the chief of the respondent organization has himself in categorical terms admitted in his letter dated 2-4-2012 that as against the total value of the work of Rs. 15,43,03,122/- executed by the petitioner, only a sum of Rs. 6 crores was paid and that as per the measurements recorded by the respondent itself, a sum of Rs. 9,43,03,122/- is due to the petitioner, the General Manager (Law) of the respondent has displayed the audacity of disputing the debt in her counter affidavit. The averments in the counter-affidavit are not only vague and unconvincing but also uninspiring. The denial of debt in the counter-affidavit flies in the face of the admission of debt by as high a functionary as the Chief Engineer and also the highest functionary of the organization i.e., the Vice Chairman and Managing Director.

25. The slew of letters addressed on behalf of the petitioner was not even replied by the respondent-organization except on one instance when the Chief Engineer has addressed letter dated 18-1-2012 wherein he had candidly admitted that the reason for stoppage of work and withdrawal of the men and machinery by the petitioner is non-payment of bills and also the respondent's inability to persuade the agencies to continue execution of work in the absence of payment of the bills.

26. Clause 68 of the agreement provides for payments and certificates. This clause envisages that payment will be made to the contractor under the certificate to be issued at reasonably frequent intervals by the Zonal Manager and that within 14 days of the date of each certificate an intermediate payment will be made by the Zonal Manager of a sum equal to 92 1/2 percent of the value of the work as so certified and the balance of 7 1/2 will be withheld and retained as a security for the due fulfillment of the contractor. It is indubitable that in a commercial contract, payment of bills is a fundamental obligation on the part of the employer, in that, a contractor cannot be expected to execute the further works and maintain the progress of work as per the schedule without payment of the running bills. In realization of this stark reality, clause 68 provided for payment of a sum equal to 92 1/2 of the value of the work within 14 days of issue of certificate by the Zonal Manager. The fact that the RA bills raised by the petitioner were certified by the Zonal Manager of the respondent is not in dispute. On the contrary, no less a person than the Vice Chairman and Managing Director, in his letter referred to above, has himself admitted the execution of work and the payment dues. In the face of this fundamental breach, the respondent has come out with a belated stand that the petitioner has not sought extension of contract as envisaged under clause 59 of the contract. The said clause reads as under:

"Delays and extension of time: No claim for compensation on account of delays or hindrances to the work from any cause whatsoever shall lie, except, as hereinafter defined. Reasonable extension of time will be allowed by the Zonal Manager or by the officer competent to sanction the extension, for unavoidable delays, such as may result from causes, which, in the opinion of the Zonal Manager, are undoubtedly beyond the control of the contractor. The Zonal Manager shall assess the period of delay or hindrance caused by any written instructions issued by him, at twenty five per cent in excess of the actual working period so lost.

In the event of the Zonal Manager failing to issue necessary instructions and thereby causing delay and hindrance to the contractor, the latter shall have the right to claim an assessment of such delay by the ENC of the Circle whose decision will be final and binding. The contractor shall lodge in writing with the Zonal Manager a statement of claim for any delay or hindrance referred to above, within fourteen days from its commencement, otherwise no extension of time will be allowed."

A careful perusal of this clause would show that it protects the employer from payment of compensation on account of delays and hindrances to the work. This clause, in my prima facie opinion, does not compel the contractor to apply for extension and continue to execute the work despite the fundamental breach of non-payment of bills by the employer for the purpose of claiming payment for the value of the work done. It is not as if the petitioner sought for winding up of the respondent for nonpayment of compensation for delays or hindrances to the work. All that the petitioner wants is payment of the bills for the work done and in respect of which there is no dispute at all.

27. The respondent, in the counter affidavit, has emphasized on their right to take action under clauses 60 and 61 of the agreement. It is not their pleaded case that so far they have raised a whisper against the petitioner stopping the work and demobilizing its men and machinery. Indeed, their own admission from the two letters referred to above would show that they had lost face to ask the petitioner and another agency to resume the work as it was unable to pay for the bills for the works already executed. This is the obvious reason why no action was envisaged by the respondent under clauses 60 and 61 of the contract against the petitioner.

28. The respondent has referred to the arbitration clause (clause 73) and pleaded that in view of availability of this remedy, the Company Petition is not an appropriate remedy. This plea has no merit for two reasons, namely, (i) that as regards the payment of bills, there is no dispute to be resolved by way of arbitration; and (ii) that the jurisdiction of this Court under Section 433 r/w. Section 434 of the Act being a special jurisdiction, the availability of other remedies, is not a bar for seeking winding up of the respondent for non-payment of the undisputed debt.

29. In *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, the Supreme Court, while referring the Judgment of *Tube Investments of India Ltd. Vs. Rim and Accessories (P) Ltd.* with approval held at para-24 as under:

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

30. In *Indo Swiss Jewels Ltd. (3-supra)*, the Karnataka High Court referred to and followed the view of the Madras High Court in *Tube Investments of India Ltd. (16-supra)*.

31. On the analysis as above, this Court has no hesitation to hold that the debt claimed by the petitioner is an undisputed debt and the denial of debt by the respondent can be characterized as a moonshine or a cloak, spurious, speculative, illusory or misconceived. This Point is accordingly answered against the respondent.

32. Re Point No. 2; It is not in dispute that a concluded contract was entered into between the respondent-Corporation on the one side and the petitioner on the other side. In the first para of the articles of agreement, it is stated:

"Articles of Agreement made this twenty fourth day of September 2008 between the Andhra Pradesh Industrial Infrastructure Corporation Limited (Hereinafter called the Corporation on which expression shall where the context so admits include his successors in office and assignees)".

Though the background preceding the execution of the agreement between the parties shows that the execution of work was necessitated on account of a policy decision taken by the State Government for allocation of 4 TMC of water from the Somasila Reservoir for drinking water supply for Kadapa and Proddatur areas, Science City, Knowledge Hub etc., planned at Kadiri and Chillamattur of Anantapur District, the State Government is not a party to the agreement. The respondent has not raised any pleading either disowning its obligations under the contract or disclosing the understanding between itself and the State Government. The petitioner is not a privy to the alleged understanding between the respondent and the State Government. There is no whisper in the contract that the respondent is a mere name lender or a facilitator for the Government to get the work executed. The respondent alone being the party to the contract between itself and the petitioner, it cannot escape from the consequences of default in payments. If the respondent is unable to persuade its purported mentor, namely, the State Government concerned, it is bound to suffer the peril of the consequence of non-payment of the admitted debt. This Point is accordingly answered against the respondent.

33. Re Point No. 3; In the counter-affidavit, it is pleaded that the respondent is an undertaking wholly owned by the Government of Andhra Pradesh. But, clause (4) of the Articles of Association of the respondent-company describes it as a

Private Company under the provisions of the Act. Even assuming that the respondent is a fully owned Government Company, it falls under Section 617 of the Act. The Act does not distinguish between a Government company and a non-Government company on the aspect of winding up for non-payment of the admitted debts. The respondent cannot therefore claim any special privilege. Evidently, realizing this position in law well, Sri S. Ravi, learned Senior Counsel, has not advanced such contention. However, all that he has argued is that it will be a travesty of justice if the respondent, for no fault on its part, is proceeded against for its winding up for the default committed by the State Government. Under Point No. 2, *supra*, this aspect has already been dealt with and it needs no reiteration that it is the respondent which incurred the debt *de jure*.

34. As regards the argument that public interest will be defeated if the respondent is ordered to be wound up, it is too early to consider this submission at the stage of admission. As held by the Courts, an order to wind up a company is discretionary and even in a case where a company's inability to pay the debt is proved, order to wind up the company is not automatic and the Court will consider the wishes of the shareholders and creditors and it may attach greater weight to the views of the creditors. All these aspects will be germane for consideration after admission of the Company Petition. For the present, it will suffice if the Court is *prima facie* satisfied that there is an undisputed debt, the denial of which is not *bona fide* and the debt is not being paid as envisaged under Section 434(1)(a) of the Act.

35. Though the learned Senior Counsel appearing for the respondent emphasized that the respondent is a solvent company, as held by the Courts in the Judgments referred to *supra*, solvency is not a stand alone ground and where the debt is undisputed and the company does not choose to pay a particular debt, its defence that it has the ability to pay the same will not be acted upon by the Court.

36. The learned Senior Counsel appearing for the respondent has relied upon the Judgments in W.P. No. 31794/2010 (6-*supra*) and W.A. No. 121/2012 (7-*supra*). It is true that the unsuccessful petitioner/appellant in these cases is a contractor under Package-II pertaining to the same scheme. It has filed W.P. No. 31794/2010 for a declaration that the inaction of the respondents, namely, APIIC and others, in not passing orders on its representations is arbitrary and illegal. On behalf of the APIIC, a counter-affidavit was filed wherein it was stated that the petitioner has stopped the work on its own accord and that it has also removed the men and machinery from the site. The learned Single Judge has dismissed the said Writ Petition, *inter alia*, with the following observation:

"Coming to the case on hand, where as the petitioner claims that it was abruptly directed by APIIC to stop the work and no reasons were assigned for the same, it is contended by APIIC that the petitioner had abandoned the work on its own accord."

37. It was further observed:

"As noticed above, there is a serious dispute between the parties with regard to the circumstances under which the work was discontinued. Consequently, the entitlement of the petitioner for the outstanding amounts against the running account bills is also in dispute. Admittedly, the petitioner's representation dated 11-11-2010 is for release of payments against the bills submitted by it. Thus it is nothing but a money claim. Since the very entitlement of the petitioner for the amounts claimed is in dispute, no Mandamus can be issued as prayed for. The agreement entered into between the parties contained various provisions for settlement of disputes and therefore, if aggrieved, it is for the petitioner to avail the said remedies for redressal of its grievance."

38. This order was upheld by the Division Bench in the Judgment referred 7-supra, a perusal of which would show that the main emphasis was laid in dismissing the writ appeal on the settled legal position that a dispute arising under a concluded contract is not ordinarily entertained by the High Court under Article 226 of the Constitution of India. On a careful consideration of these two Judgments, I am of the opinion that the same would not be of any help to the respondent for the following reasons:

39. First, no discussion was undertaken by both the writ court as well as the appellate court whether there was any dispute regarding the claim of the petitioner therein. This was obviously so as the Court was exercising its extraordinary jurisdiction under Article 226 of the Constitution of India which was purely discretionary. Furthermore, both the Courts have taken the submission of the respondent on its face value that there is a serious dispute regarding the entitlement of the petitioner therein to receive payments as it has allegedly abandoned the work on its own volition and in violation of the contractual terms. Second, the more formidable reason for dismissing the Writ Petition and the Writ Appeal was that the dispute arose under a concluded non-statutory contract and that ordinarily a writ court will not entertain a dispute arising thereunder.

40. The jurisdiction under Section 433 r/w. Section 434 of the Act being special in nature, considerations which weigh with a writ Court under Article 226 of the Constitution of India need not necessarily weigh with this Court as this Court is governed by separate and distinct parameters from those governing the writ jurisdiction.

41. On a detailed analysis of the defence of the respondent, this Court is thoroughly convinced that the so-called dispute relating to payment of money claimed by the petitioner is a mere make-believe affair or a facade to evade payment to the petitioner and in fact there is no dispute at all with regard to the debt justifying withholding of payment to the petitioner. Merely because it is claimed to be a Government company, the respondent cannot be allowed to escape from its liability by taking shelter under a completely illusory ground of the debt being a disputed one. This Point is accordingly answered against the

respondent.

42. Finally, this Court needs to consider passing of a workable order. The admission of a Company Petition, it is trite, is fraught with serious consequences. Immediate admission of the Company Petition may throw the activities of the respondent out of gear besides giving a feeling of insecurity among its employees and third parties having contractual relationships with it. Faced with a similar situation, the Bombay High Court, in *Intesa Sanpaolo S.P.A.* (5-supra), while admitting the petition stipulated a condition that if the respondent therein deposits in the Court the admitted debt within a stipulated time, the Company Petition shall stand dismissed. I would like to follow the same method in this case also.

43. For the aforementioned reasons, the Company Petition is admitted. However, if the respondent deposits the sum of Rs. 8,18,36,584/- to the credit of the Company Petition before the Registrar (Judicial) of this Court within two months from today, the Company Petition will stand dismissed. In such event, the petitioner shall be entitled to withdraw the said amount by approaching the Registrar (Judicial). If the respondent fails to comply with this condition, the petitioner shall cause the advertisement published in *The Hindu* (English Daily) and *Sakshi* (Telugu Daily) newspapers having circulation in both the States of Andhra Pradesh and Telangana within one month from the expiry of the two months' time stipulated for depositing the amount. In such event, the Company Petition shall be posted on 8-12-2014 for filing proof of publication.