
(2013) 12 BOM CK 0007

In the Bombay High Court

Case No : Company Petition No. 528 of 2012

Intesa Sanpaolo S.P.A.

APPELLANT

Vs

Videocon Industries Limited

RESPONDENT

Date of Decision : 05-12-2013

Acts Referred:

Citation : (2014) 120 CLA 389 : (2014) 183 CompCas 395

Hon'ble Judges : N.M. Jamdar, J

Bench : Single Bench

Advocate : Haresh Jagtiani, assisted with ith Ms. Vandana Mehta, Ms. Kathleen Lobo, Ms. Olga Lume-Pereira, Ms. Nausheen Rayani instructed by Siddhesh Bhole, for the Appellant; Dinyar Madon a/with Mr. R.D. Soni and Mr. M.A. Saiyed instructed by y M/s. Ram and Co., for the Respondent

Judgement

N.M. Jamdar, J.—By this petition, the Petitioner viz. Intesa Sanpaolo S.P.A., an Italian Bank incorporated under the laws of Italy, seeks winding up of the Respondent-Videocon Industries Limited, a Company incorporated under the Companies Act, 1956. The authorized share capital of the Respondent Company is Rs. 600,00,00,000/- divided into Rs. 50,00,00,000/- of equity shares of Rs. 10/- each and 1,00,00,000 redeemable preference shares of Rs. 10/- each.

2. The main object of the Respondent Company is to carry on business of trading, manufacturing, fabrication, alteration etc. in India and abroad, dealing in electronic and consumer durables and home appliance, all kinds of electrical and electronic goods, conductors, capacitors, micro processors, computers, software, household items, television sets and other allied products and activities.

3. Grievance of the Petitioner is that the Respondent Company has not paid the Petitioner a sum of Euros 38,000,000 (Euros Thirty Eight Million) approximately equivalent to Rs. 259,73,00,000/- (Rupees Two Hundred Fifty Nine Crores Seventy Three Lakhs only), due under a letter of guarantee-Patronage Letter dated 5 June 2007.

4. Before the facts are adverted to, various companies that involved need to be specified: first is the Petitioner: Intesa Sanpaolo S.P.A., an Italian Bank incorporated under the laws of Italy, Second is the Respondent-Videocon Industries Ltd., third: VDC Technologies S.P.A. (VDC), having registered office at Localita Fratta Rotonda, 03012 Anagni (FR), Italy and the fourth: EAGLE Corporation Limited (EAGLE) is a Company incorporated under the laws of Cayman Islands with registered office in Cayman Islands. At the relevant time VDC was a wholly owned subsidiary of EAGLE. EAGLE was in turn a wholly owned subsidiary of the Respondent Company. Thus VDC was a step down subsidiary of the Respondent Company.

5. In or about September/October, 2006, the Respondent Company approached the Petitioner for a financial assistance for its step down subsidiary-VDC. The Respondent Company sought financial assistance to the tune of Euros 35,000,000 (Euros Thirty Five Million), for the purpose of financing an investment program in the plant located in Italy where VDC had its registered office. The financial assistance was to be provided by a consortium of two banks, one was the Petitioner and the other was Intesa Mediocredito S.P.A. Both the banks had their registered offices in Italy. It was agreed that the Petitioner would lend Euros 20,000,000 (Euros twenty million) and Mediocredito would lend Euros 15,000,000 (Euros fifteen million) to the VDC. The Petitioner was to act as an agent of the lenders and was to be treated as an agent for the financial transaction of Euros 35,000,000 (Euros Thirty Five Million) to VDC.

6. On 5 June 2007, a guarantee was executed by the Respondent Company in favour of the Petitioner, giving guarantee for the financial assistance to be provided to VDC. This guarantee was termed as a "Patronage Letter". The Patronage Letter was issued by the Respondent Company and it was signed by the Chairman and Managing Director of the Respondent Company-Mr. Venugopal N. Dhoot who was authorized by the Respondent Company vide its board resolution dated 27 April 2006 to execute the Patronage Letter. By this Patronage Letter the Respondent Company undertook to pay a maximum amount of Euros 38,000,000 (Euros thirty eight million) inclusive of cost, expenses etc. to the Petitioner as per the terms set out in the Patronage Letter. The Patronage Letter referred to the board resolution passed by the Respondent Company and the request of VDC to the Petitioner to extend credit line up to the capital amount of Euros 35,000,000 (Euros thirty five million). The Patronage Letter specified that Respondent Company owned 100% of the capital of the EAGLE which in turn owned 100% of the VDC's capital. The Patronage Letter specified that the Respondent Company undertakes not to dispose of its direct shareholding in EAGLE and that the EAGLE would not dispose of its shareholding in the VDC, without giving a prior notice to the Petitioner.

7. Since the Patronage Letter is an important document in this matter, it will be useful to reproduce the same in entirety as under:

VIDEOCON INDUSTRIES LIMITED Patronage Letter

Dated: 5th June 2007 To: Intesa Sanpaolo Spa Centro Corporate Roma Val del Corso, 226, 00186-ROMA (RM), ITALIA Place and date

We the undersigned Videocon Industries Ltd., a company incorporated under the Companies Act, 1956 with registered office at Auto Cars Compound, Adalat Road, Aurangabad, Maharashtra, India having an Authorized share capital of Rs. Six Thousand Million registered with the Registrar of Companies at Mumbai, under number 11-103624 listed at the regulated stock market of BSE, Mumbai, National Stock Exchange of India Limited, Luxembourg Stock Exchange (GDRs) and Singapore Stock Exchange (Bonds), represented by Mr. Venugopal N. Dhoot born in India on 30th September 1951 pursuant to a resolution passed in the meeting of Board of Directors of the Company held on 27th April 2006 as evidenced by a copy of the authorization deed enclosed herewith certified by Mr. V.K. Bohra, Company Secretary of the Company, are informed that VDC TECHNOLOGIES SPA, with registered office in Anagni (FR) Localita Fratta Rotonda, Italy, registered at the Companies Registrar of Frosinone, Italy, registration number and tax code: 00100740604 (hereinafter the "Borrowing Company"), has requested from your Bank the following credit line, the terms and conditions of which are fully known and accepted by us:

? Facility Agreement up to the capital amount of 35,000,000.00 (Euro thirty five million)

hereinafter the "Secured Credit Line",

and that your Bank has granted the above mentioned Secured Credit Line expiring on 30th April 2013 in consideration of the fact that we own 100% (one hundred percent) of the capital of EAGLE CORPORATION Ltd., a company incorporated under the laws of Cayman Islands, with registered office in PO Box 309GT, Ugland House, South Church Street, George Town, Grand Cayman, Cayman Islands registered at the Companies Register of Cayman Islands under number 130930 which, in turn, owns 100% (one hundred per cent) of the Borrowing Company's capital.

All this being premised, we the undersigned hereby undertakes not to dispose of our direct shareholding in EAGLE CORPORATION Ltd. and promise, pursuant to article 1381 of the Italian civil code, that EAGLE Corporation Ltd. will not dispose of its shareholding in VDC TECHNOLOGIES SPA, without having given your Bank prior written notice of such intention.

We further undertake to cause in all cases VDC TECHNOLOGIES SPA to meet its obligations towards you so that your claims arising from the Secured Credit Line is fully and punctually repaid to you, as and when the same becomes due.

In the event:

(i) of a total or partial divestment of our shareholding in EAGLE CORPORATION Ltd. for any reason whatsoever;

(ii) of a total or partial divestment of EAGLE CORPORATION Ltd.'s shareholding in the Borrowing Company for any reason whatsoever;

(iii) the Borrowing Company undergoes any bankruptcy proceedings, including temporary receivership, or is put into liquidation, or in case of actions or measures which may jeopardize the Borrowing Company's ability to honour the obligations undertaken towards your Bank or in case of the Borrowing Company's default, for any reason whatsoever, with regard to the obligations arising from the Secured Credit Line,

We the undersigned undertake to pay you forthwith, upon your first written demand and without raising any exception any amount due to your Bank by the Borrowing Company for principal, interest, expenses, taxes and ancillary costs in connection with the Secured Credit Line made available to the same up to the maximum amount of 38,000,000.00 (Euro Thirty Eight Million).

Any notice or communication hereunder, including any claim for repayment, shall be made in writing to the following address:

Mr. Venugopal N. Dhoot Chairman & Managing Director, Videocon Industries Limited, Fort House, 2nd Floor, Dr. D.N. Road, Fort, Mumbai 400 001. Fax: 91 22-66550580

It is understood that this letter shall be governed by and construed in accordance with the Italian law and shall be subject to the Italian jurisdiction. In particular, any dispute arising out of or in connection with this patronage letter shall be referred to the exclusive jurisdiction of the Courts of Turin. For the service of any deed or summons we the undersigned elect our domicile at the registered office of the Borrowing Company in Anagni (FR), Localita Fratta Rotonda, Italy.

Sincerely yours, Company name VIDEOCON INDUSTRIES Ltd.

Place and date Mumbai, 5th JUNE 2007

Signature

Pursuant to article 1341, second paragraph, of the Italian civil code, we specifically approve the clause concerning the Italian jurisdiction, the executive jurisdiction of the Courts of Turin as well as the election of domicile.

Company name VIDEOCON INDUSTRIES Ltd.

Place and date Mumbai, 5th JUNE 2007

Signature

Enclosure: certified copy of the deeds concerning VIDEOCON INDUSTRIES Ltd. and the powers of its legal representative.

8. In the Patronage Letter the Respondent Company undertook that VDC will meet its obligations towards the Petitioner. It was specified that in the event of

total or partial disinvestment of Respondent Company in EAGLE and a total or partial disinvestment of EAGLE's shareholding in the VDC or VDC undergoing any bankruptcy proceedings or in case of VDC committing any default, the Respondent Company will pay, upon first written demand, without raising any exception to the amount due towards principal, interest and expenses up to the maximum amount of Euros 38,000,000/- (Euros thirty eight million). The patronage letter was to be governed and construed in accordance with the Italian laws. The Patronage Letter specified the address for correspondence for Respondent Company for service of any notice of any court proceedings or service of summons and decree etc. as the registered office of the VDC at Anagni (FR) Localita Fratta, Rotonda, Italy.

9. A loan agreement was executed between the Petitioner (lenders), VDC and Respondent Company on 6 June 2007. It was agreed that the Petitioner will extend long term credit facility to VDC for maximum amount of Euros 35,000,000/- (Euros thirty five million) for a duration of six years on terms and conditions specified therein. The loan agreement was to be governed by Italian laws and the parties agreed to submit themselves to the exclusive jurisdiction of the Turin Court. The loan agreement included a precondition that the Respondent Company will be issuing the Patronage Letter. Under clause 7 of the loan agreement, it was agreed that VDC will repay the amount of loan in eight consecutive equal semi-annual installments of principal in arrears on 6 December and 6 June in each year beginning on 6 December 2009 and ending on 6 June 2013. Under clause 10 of the loan agreement it was agreed that interest would be paid at the expiration of each interest period of six month. Under clause 14 of the loan agreement it was agreed that amongst other events, VDC's complete failure to perform any one of the obligations, would constitute a cause for loss of the benefit of any term, as per the Article 1353 of the Italian Civil Code, without waiting a decision of the court. Clause 14.3 (g) of the loan agreement provided that in case of Respondent Company's direct and/or indirect investment in VDC is reduced below a 51% without the prior approval of the Petitioner-lenders, Petitioner would be entitled to terminate or to withdraw from the agreement.

10. On 6 June 2007, VDC addressed a letter to the Petitioner, accepting agency fees of Euros 10,000 (Euros ten thousand) to be paid on the draw down date in respect of the first year and thereafter each year. The amount of Agency Fees was to be debited from the current account of the VDC. As per clause 5.1(d) of the loan agreement, VDC sent a notice dated 2 August, 2007 to the Petitioner, indicating its irrevocable willingness to utilize the loan amount. On 6 August 2007 an amount of Euros 35,000,000/- (Euros Thirty Five Million) was credited to the current account of VDC by the Petitioner. The first equal semi annual installment of the principal was due on 7 December 2009. VDC failed to maintain sufficient balance in its account to repay the same. Upon the Petitioner contacting VDC for this purpose, VDC replied by letter dated 14 December, 2009, requesting the Petitioner to grant moratorium until 6 December 2010 to repay the outstanding loan. On 17 December, 2009 the Petitioner informed VDC that it was not willing to

accede to the request of VDC for getting additional period for repayment. The Petitioner informed VDC that if it fails to honour the terms of the loan agreement, then the Petitioner would enforce the advance termination clause.

11. On 19 January 2010, VDC wrote a letter to the Petitioner, giving its proposal for a "business plan". VDC made a request to the Petitioner not to enforce the securities given by the Respondent Company to guarantee the repayment of loan. The Petitioner replied on 19 April, 2010 to VDC with a copy thereof to Respondent Company, stating that since VDC has not paid amount due under the loan agreement, default has occurred with effect from 07 December 2009. The Petitioner informed VDC and Respondent Company that the Petitioner would consider negotiations only after VDC and Respondent Company sends representatives who were empowered to take immediate decisions. On 22 April 2010, VDC gave a fresh proposal for restructuring the pending loan. The Petitioner replied on 26 April 2010 and informed VDC and Respondent Company that the proposal was contrary to the Italian Bankruptcy Law and was not acceptable to the Petitioner.

12. Between April 2010 to December 2010 several meetings took place between the parties to discuss the pending dues of VDC. The Respondent Company and VDC gave various restructuring proposals to the Petitioner and requested the Petitioner not to invoke the patronage letter.

13. On 9 December 2010, the Respondent Company wrote to the Petitioner in respect of the rescheduling and restructuring the loan of VDC and a term sheet was attached to the letter. In the recitals of the said communication, the Respondent Company reiterated that the loan facility agreement was secured by the Patronage Letter dated 5 June 2007. In the said communication the Respondent Company stated that on 9 April 2009, the VDC had formally communicated to the Petitioner that it was no more subsidiary of Respondent Company. The Respondent Company proposed the terms and conditions of restructuring. In the term sheet also the Patronage Letter was mentioned and outstanding indebtedness of VDC of 39,349,187/- Euros was acknowledged. Under the Patronage Letter, an obligation of EAGLE, including undertaking of the Respondent Company was reintroduced. It was also stated that EAGLE's shareholding in VDC had changed to 83.8% and Respondent Company's shareholders holding in EAGLE was changed to 10%.

14. In the meanwhile, the VDC defaulted in repayment of loan installments due on 7 December 2009, 7 June 2010 and 7 December 2010. On 11 February 2011 the Petitioner addressed a letter to VDC and the Respondent Company in respect of the defaults committed by VDC and drew attention of the Respondent Company to the terms of the Patronage Letter. The Petitioner withdrew the credit facilities given under the loan agreement with effect from 11 February 2011 and called upon VDC and Respondent Company, as guarantors, to clear the outstanding amount. Again an e-mail was sent by Respondent Company on 3 March 2011, forwarding another proposal for restructuring of indebtedness of

VDC and a meeting was held between the representative of the Respondent Company and the Petitioner on 6 April and on 7 April 2011. The parties could not arrive at any decision in the meetings.

15. On 7 April 2011, the Petitioner invoked the Patronage Letter and called upon the Respondent Company to pay an amount of 36,665,760/- Euros within five business days. The letter was addressed to the Chairman and Managing Director of the Respondent Company at its address in Mumbai. Another letter was addressed by the Petitioner on 11 February 2011. The Petitioner filed proceedings seeking payment injunction against the Respondent Company in the Turin Court, Italy. The claim was filed by the Petitioners as per Article 636 of the Italian Civil Procedure Code. In the Turin Court, the Petitioner produced documents along with the various communications. The Turin Court issued a payment injunction No. 7067 of 2011 against the Respondent Company on 8 July 2011. The payment injunction directed the Respondent Company to pay an amount of Rs. 36,222,483.56/- Euros along with interest from that date till the payment. The payment injunction put the Respondent Company to notice that it can file objections against the order within 60 days from the notification, in absence thereof, the order will become final. The payment injunction was sent to the Respondent Company at the address of VDC, as mentioned in the Patronage Letter. The same was served on that address on 28 July 2011. Sixty days period expired on 11 November 2011, excluding the period of court's vacation.

16. A suit came to be filed in Civil court at Calcutta bearing No. 319 of 2012 by one Vellatuthodi Krishnakumar through his constituted attorney-Sanjib Chakraborty, claiming to be shareholder of the Respondent Company, seeking various reliefs and seeking a declaration that the Patronage Letter is null and void and contrary to the Foreign Exchange Management Act (FEMA). The Respondent Company was made party Respondent in the said suit. The Petitioner intervened in the suit. The Petitioner also filed a suit bearing (stamp) no. 2434 of 2012 in this court for enforcing the judgment and decree passed by the Turin Court. The Petitioner took out a notice of motion bearing no. 2340 of 2012 in the suit, which is pending.

17. The Petitioner issued a statutory notice on 3 July 2012 under the Companies Act, 1956, claiming an amount of 38,000,000 Euros (Euros Thirty Eight Million), approximately equivalent to Rs. 259, 73,00,000/- (Rupees Two hundred fifty nine crores seventy three lakhs only), as due and payable. The notice was served on the Respondent Company. Respondent Company replied on 28 July 2012. Reply inter alia stated that since a payment injunction was issued by the Turin Court, till the Petitioners complies with the provisions of Indian Law and independently obtains a decree from the competent court, the Respondent Company is not legally liable to pay. The Respondent Company also raised several other defences. Thereafter, the Petitioner filed the present petition for winding up. A reply affidavit has been filed and also a rejoinder by the Petitioner.

18. I have heard Mr. Haresh Jagtiani, learned Senior Advocate for the Petitioner

and Mr. Dinyar Madon, learned Senior Advocate with Mr. R.D. Soni, learned Advocate for the Respondent.

19. Mr. Jagtiani, learned Senior Advocate for the Petitioner contended as under:

a) The petition is based on the Patronage Letter dated 5 June 2007. The loan given to VDC by the Petitioner was in consideration of the fact that the Respondent Company held 100% share holding in EAGLE and EAGLE held 100% shareholdings in VDC. All eventualities contemplated for invocation of the Patronage Letter have occurred.

b) VDC failed to comply with its obligation under the loan agreement. Default by the VDC is an admitted fact. The Respondent Company is aware of the correspondence entered into by VDC with the Petitioner. The Respondent Company has acknowledged its liability and has signed the correspondence for itself, EAGLE, VDC Group of TTD and TDP, all the Videocon group companies. This fact is admitted by the Respondent Company even in reply to the statutory notice dated 28 July 2012.

c) The Turin Court had issued a payment injunction, providing 60 days period to the Respondent Company to contest the same. In spite of order being served on the Respondent Company, it did not contest and the order passed by the Turin Court dated 8 July 2011 has become final and enforceable on 11 November 2011. The Respondent Company was aware of the order dated 8 July 2011 as can be seen from the record the Suit pending on the file of the Civil Court, Calcutta.

d) The affidavit in reply on behalf of the Respondent Company has been filed by the deponent who does not have authority to file the same and he has not even stated that he is aware of the facts and circumstances of the case. The deponent has sought to raise various disputes which are not in his personal knowledge, as regards admissions made by its Chairman and Managing Director. The deponent has gone to the extent of denying the meetings. On this ground alone, the affidavit in reply ought not be taken into consideration.

e) The dilution of equity of the Respondent Company in VDC does not discharge the Respondent Company and does not in any manner affect the validity or enforceability of the Patronage Letter. The stand taken by the Respondent Company is an after thought as despite the dilution of equity in 2008, as late as on 7 April 2011, the Respondent Company has acknowledged the subsistence of the patronage letter. Furthermore any dilution of equity was itself was event entitling invocation of the Patronage Letter. Admittedly no notice was given before diluting the equity. Despite dilution, the Respondent Company continues to hold 10% in EAGLE and EAGLE holds about 83% in the VDC.

f) Nothing is shown as to how the Patronage Letter is in violation of FEMA, except a stand taken in the reply to the winding up notice and in a affidavit in reply. In any event, violation of any provisions of FEMA would entail penalties on the

Respondent Company and in no manner affect the liability under the provisions of the Patronage Letter.

g) There is no substance in the contention that the Petitioner has filed a suit for enforcement of the order of the Turin Court and that the Patronage Letter has merged into the said order and therefore the petition is not maintainable. The doctrine of merger of the original cause of action does not apply in case of a foreign judgment.

h) The suit for enforcement of a foreign decree and the winding up proceedings can be maintained simultaneously. The court seized of the suit for enforcement cannot pass an order for winding up, which only this court is competent to do.

i) The suit filed in Calcutta is a collusive suit. The plaintiff therein has admitted that he has no privity of contract with the petitioner and is not concerned with the inter se disputes between the Petitioner and the Respondent Company. No orders are passed in the Calcutta suit affecting the validity or enforceability of the Patronage Letter.

j) The contention that the Patronage Letter is not a letter of guarantee but a letter of comfort is baseless as the plain language of the Patronage Letter shows otherwise. If it was merely a letter of comfort, there was no question if violating the provisions of FEMAs as contended by the Respondent Company.

k) There is no term in the Patronage Letter that the Petitioner has to first proceed against the VDC. Even as per the section 128 of the Indian Contract Act, the liability of the surety is co-extensive with a principal debtor.

l) The petition is based on the Patronage Letter and the court has jurisdiction to look into the claim of the Petitioner even though the Patronage Letter is governed by the Italian Laws and is subject to the exclusive jurisdiction of Turin Court, Italy, as the question of winding up is concerned, only this court has jurisdiction. The fact of debt is admitted one and governing law is not relevant as to the status of the Petitioner as a creditor. The exclusion clause applies only when a suit is brought for enforcing any contractual rights and has no relevance in winding up proceedings.

m) Not only the Patronage Letter does not violate any provisions of Italian Law but the Respondent Company has admitted its liability under the Patronage Letter. The presumption in India is that in the absence of evidence to the contrary a provision of foreign law touching upon the dispute to be same as the Indian Law. The burden to prove foreign law is different from burden regarding Indian Law.

n) The order dated 8 July 2011 was duly served on the Respondent Company at the address of VDC, as at no point of time the Respondent Company informed the Petitioner that it wishes to change the address specified in the Patronage Letter and the proceedings in the civil suit in Calcutta show that the Respondent was aware of the Turin proceedings.

o) The Company petition filed on 17 October 2012 is within limitation. The Patronage Letter as well as the default committed on 7 December 2009 by VDC and invocation is admitted on 9 December 2010, 3 March 2011 and 7 April 2011.

p) There is no need for the Petitioner to first obtain a decree from competent court in India, put the same in execution and if it is returned unsatisfied then file a winding up petition, as the petition is filed on the basis of the Patronage Letter.

q) Solvency of the Company cannot be a standalone ground to reject the winding up petition.

20. On the other hand, Mr. Madon, the learned Senior Advocate and Mr. Soni, learned Advocate appearing for the Respondent contended as under:

(a) The Petitioner is not a creditor of the Respondent within the meaning of section 439 of the Companies Act, and therefore, the petition is not maintainable.

(b) The Petitioner has based its claim in the petition on the decree passed by the Turin Court. That the petition is founded upon the decree of Turin Court is clear from the perusal of the petition and the statutory notice.

(c) All foreign judgments and decrees are subject to the rules of Private International Law of the State in which they are presented for enforcement. The Petitioner has sought to enforce the decree by way of Suit in this court, therefore, conclusiveness of the decree dated 8 July 2011 is being scrutinized by the Indian Courts.

(d) The question of Respondent Company being unable to pay the debts, will arise only if the execution or other process issued in favour of a creditor of the Company is returned unsatisfied. Unless the decree is granted to the Petitioner, the petition for winding up will not be maintainable, as the Petitioner cannot be termed as a creditor and there would be no debt.

(e) Claim of the Petitioner based on the Patronage Letter is time barred and the Petitioner is not a creditor within the meaning of section 439 of the Companies Act.

(f) The Patronage Letter is dated 5 June 2007 and Respondent has divested its partial shareholdings in EAGLE and VDC on 15 March 2008 and therefore, the petition ought to have been filed by 14 March 2011, while the petition has been filed on 17 October 2012 and therefore, the claim of the Petitioner is time barred.

(g) An exclusive jurisdiction to construe the terms of the Patronage Letter was conferred upon the Court in Turin in accordance with the Italian Law. The parties have agreed that the court at Turin will have exclusive jurisdiction with respect to the dispute in connection with the Patronage Letter. The Petitioner cannot resile from the ouster clause contained in the Patronage Letter and must await the decision of the suit filed by it.

(h) The decree dated 8 July 2011 is not conclusive and the Respondent has

raised bonafide dispute regarding the same. The decree of Turin Court is not given on merits of the case and is opposed to natural justice. The payment injunction was served on the address which to the knowledge of the Petitioner, no longer the domicile of the Respondent. The decree was obtained by fraud by serving the summons on the address of VDC. The decree is in breach of the laws in force in India and is in violation of the provisions of the Foreign Exchange Management Act and the regulations issued by the Reserve Bank of India.

(i) The claim of the Petitioner in Patronage Letter is not a debt. This fact will have to be proved by the Petitioner by leading evidence under the foreign law is the question of fact which will require full-fledged evidence.

(j) The proceedings filed in the City Civil Court Calcutta are not collusive. The guarantee given by the Respondent Company is found to be contrary to the Foreign Exchange Management Act, 1999 and ad-interim order has been granted by the City Civil Court, Calcutta, restraining the parties from giving effect to the letter dated 16 December 2001 and 20 January 2012 for consideration of events of default committed. The Petitioner has made an application for vacating the said and the Petitioners are parties to the suit. The issue of validity and enforceability of the Patronage Letter is the subject matter of the suit where the Petitioner is a party.

(k) The Respondent Company is commercially solvent. The net profit of the Respondent Company from 1 January 2012 to 30 June 2012 is Rs. 100.43 crores. The revenue for the last six months ended on 30 June 2012 is Rs. 5,294.324/- crores, whereas from the crude oil and natural gas the same is Rs. 718.39 crores. The profit before tax from consumer electronic and home appliances is Rs. 544.89/- crores. The Respondent Company has various branches and large work force is employed, therefore, the Respondent Company is not liable to be wound up.

(l) The Petition is filed only to extract money from the Respondent Company and in view of the bonafide dispute raised by the Respondent Company, the present Company petition is liable to be dismissed.

21. Both the learned counsel have cited various decisions in support of their contentions which will be referred to along with the discussion at the relevant place.

22. Before the rival contentions are considered, certain admitted facts need to be noted. The Patronage Letter is executed by the Respondent Company. Clauses of the Patronage Letter are not in dispute. The correspondence placed on record between the parties, especially the letters issued by the VDC and the Respondent Company have not been denied. The default committed by the VDC is admitted by the Respondent Company in the correspondence. Fact that the VDC has defaulted in payment has not been denied. The letters issued by the Respondent wherein restructuring proposals has been given, are admitted. Dilution of share holding in EAGLE and in VDC is admitted. The service of statutory notice is

admitted and that there no payment as per the demand, is admitted.

23. The first point that arises is whether the petition for winding up is based on the decree passed by the Turin Court or it is based on the Patronage Letter. This issue will have a bearing on most of the arguments advanced by the parties. According to the Petitioner, the petition is based on the Patronage Letter and the admissions of the Respondent Company. According to the Respondent Company, the petition is based on the decree of the Turin Court. For this purpose, the petition as well as a statutory notice needs to be examined. In the petition, after narrating the facts the Petitioner has referred to the statutory notice dated 3 July 2012. In the statutory notice, the Petitioner has referred to the Patronage Letter and the loan agreement dated 6 June 2007 and other facility documents. The Petitioner has narrated the facts preceding the issuance of the statutory notice and has stated that that the Respondent Company is attempting to renege from its undertaking in the Patronage Letter and that the Respondent, as a guarantor, was liable to pay amounts due from VDC under the loan agreement and the guarantee contained in the Patronage Letter. A reference was made about the E-mail dated 3 March 2011 in which the Respondent sought restructuring of the indebtedness of the VDC. It was stated that the Petitioner was left with no alternative but to invoke the Patronage Letter. It was also stated that the Respondent was liable to pay the sum Euros 36,665,760/- plus interest along with the other expenses and the Respondent was called upon to pay an amount under the patronage letter, otherwise an action for winding up of the Respondent Company under the provisions of the Companies Act will have to be resorted to. In addition, it was stated that the Respondent was aware of the indebtedness under the Patronage Letter having been adjudicated and upheld by the Turin Court. Thereafter, the Petitioner specified in the statutory notice that the Respondent Company is called upon to pay the Petitioner a sum of Euros 38,000,000/- under the Patronage Letter.

24. A contention sought to be raised by the Respondent Company that when the Petitioner invoked Patronage Letter on 7 April 2011 an amount of Euros 36,665,760/- was stated to be due and payable, however, the Petitioner has claimed Euros 38,000,000/- which shows that the claim is not based on the Patronage Letter. The learned counsel for the Petitioner submitted that at the time of statutory notice, the Petitioner had incurred expenses and costs, provision for which was made under the Patronage Letter itself. He submitted that the claim under the order dated 8 July 2011 of Turin Court was in excess of Euros 38,000,000/- however the claim in the petition is restricted to Euros 38,000,000/- as per the limit in the Patronage Letter. There is merit in this submission. Patronage letter does provide for a limit. All these averments in the statutory notice clearly indicate that the claim made by the Petitioner is based on the Patronage Letter. Grounds taken in the petition also indicate that the Petitioner has based its petition on the liability of the Respondent Company under the Patronage Letter and the admissions contained in the correspondence. Even though the decree of the Turin Court is in excess of Euros 38,000,000/, the

statutory notice has confined itself to the limit provided under the Patronage Letter. It will have to be held from the perusal of the petition that the petition is based on the Patronage Letter.

25. The petition is also based on the admissions of the Respondent Company in the correspondence. There are series of admissions in the correspondence exchanged between the parties which has been placed on record. The correspondence has not been denied. Even the letters issued by VDC to the Petitioner are under the logo of Videocon and some letters are marked to the Respondent Company.

26. The first reference of the Respondent's liability is under the Patronage Letter itself. The Patronage Letter was admittedly issued by the Respondent Company. It was executed by the Respondent Company, wherein it was stated that the VDC has a credit line of Euros 35,000,000,00 million from the Petitioner. The Patronage Letter stated that the credit line was given in consideration of the fact that the Respondent Company owns 100% of capital of EAGLE and EAGLE in turn holds 100% of the capital of the borrower i.e. VDC. Under the Patronage Letter the Respondent Company had unequivocally undertaken not to dispose of its direct shareholding in EAGLE and that the EAGLE will not dispose of its shareholding in the VDC, without giving the Petitioner a prior written notice. The Patronage Letter listed the following events, which would give rise to the claim against the Respondent Company.

i) A total or partial disinvestment of Respondent Company's shareholding in EAGLE for any reason whatsoever.

ii) Total or partial disinvestment of EAGLE's shareholdings in VDC.

iii) The VDC undergoing any bankruptcy proceedings, including temporary receivership, or is put into liquidation or in case of actions or measures which may jeopardize the VDC's ability to honour the obligations towards the Petitioner for any reason whatsoever.

iv) Default by VDC in repayment.

In the Patronage Letter the Respondent has undertaken to pay to the Petitioner forthwith upon first demand and without raising any exception, to the Petitioner for principal, interest, expenses, taxes and ancillary costs. There is no dispute about this Patronage Letter. This is the first reference of the Respondent Company's liability to pay the Petitioner.

27. On 14 December 2009, the VDC had written a letter to the Petitioner, seeking an extension on deferred repayment till 6 December 2010. The letter head of this letter show that the VDC is a part of the Videocon Group. This letter was rejected by the Petitioner and VDC was called upon to make the payment. The VDC by letter dated 19 January 2010 requested the Petitioner not to invoke the bank guarantee. The letter head of this letter shows the logo of the "Videocon group". In this letter the VDC had drawn attention of the Petitioner to the commercial

viability of the Respondent Company. It was pointed out that the Respondent Company is one of the oldest and most well known Company in India, having network of a group of companies around US\$ 2,000,000/- million. After pointing out towards the commercial viability of the Respondent Company, the VDC requested the Petitioner for absorption of the debt by special purpose vehicle. Thus the VDC itself relied upon the Videocon and its solvency, considering itself a part of the group.

28. On 9 December 2010, the Respondent Company wrote to the Petitioner for restructuring the indebtedness of the VDC and its subsidiary, the VDC group. In the said letter, the Respondent Company stated that the shareholding of the Respondent Company in EAGLE was 10% and EAGLE owned 83.8 % share capital of VDC. It was mentioned that the share capital of the Respondent Company in EAGLE was brought down from 100% to 10% and the shareholding of EAGLE in the VDC was brought down from 100% to 83.8 %. The Respondent in this letter reiterated the fact that the facility agreement is acquired by the Patronage Letter dated 5 June 2007 and it also stated that on 9 April 2009, VDC had communicated to the Petitioner that it was no more subsidiary of the Videocon. The correspondence entered into by the VDC with the Petitioner was referred to. After giving this background, the Respondent Company proposed restructuring in the light of the term sheets which was annexed. In the term sheet, the Patronage Letters dated 5 June 2007 was mentioned as finance document. The outstanding indebtedness of VDC of Euros 39,349.187 was reiterated. The term sheets contemplated a fresh Patronage Letter to guarantee obligation of EAGLE. Under the new Patronage Letter the guarantee obligation of EAGLE was proposed to include undertaking of the Respondent Company. Thus this letter dated 9 December 2010 addressed by the Respondent to the Petitioner asserted four things. Firstly, the dilution of the shareholding of the Petitioner in EAGLE and EAGLE's shareholding in the VDC. Secondly, the assertion that the loans are secured by the Patronage Letter and thirdly, that the VDC was indebted to the Petitioner, and that Respondent Company was committed to honour its obligation.

29. An e-mail was sent by the attorney of the Respondent Company to the Petitioner on 3 March 2011. In this e-mail, the Respondent Company requested for signing of the new term sheets similar to the one which was annexed to the letter dated 9 December 2012. In the said e-mail, the Respondent confirmed that the Respondent was willing to fully comply with its obligations and wished that the proposal would permit the Respondent to achieve the decisive action in the matter. On 7 April 2011, the Respondent sought enforcement of the Patronage Letters dated 01 June and 5 June 2007. Thereafter, in the reply to the statutory notice, the Respondent admitted the fact there has been a default on the part of VDC, however, it was stated that the Patronage Letter was only an accommodation letter apart from taking other defences.

30. Thus the above mentioned correspondence clearly shows that the fact that the VDC had defaulted in payment to the Petitioner has been clearly admitted by

the Respondent Company. Even the execution of the Patronage Letter is not denied.

31. The other event leading to breach of Patronage Letter is the dilution of the shareholding of the respondent in EAGLE and dilution of EAGLE's shareholding in VDC. In letter dated 9 December 2010, the Respondent indicated that as on that date the Respondent owned 10% share capital of EAGLE and EAGLE owned 83.8% in VDC. Thus the shareholding of the Respondent and the EAGLE was diluted. Under the Patronage Letter it is considered as one of the triggers for invocation of the guarantee contained therein. The basic premise on which the Patronage Letter was issued was that the Respondent owned 100% shareholding in EAGLE and EAGLE owned 100% shareholding in VDC, making it step down subsidiary of the Respondent. In short loan was advanced to VDC primarily because Respondent Company stood guarantee. The events contemplated under the Patronage Letter are clear i.e. total or partial disinvestment of the Respondent shareholdings in EAGLE and total or partial disinvestment of the EAGLE in VDC, irrespective of the fact whether notice was given to the Petitioner nor not. In the letter dated 7 April 2011, the respondent addressed to one Mr. Kharwa as a liquidator appointed on VDC. It has been urged by the Petitioner that this indicates bankruptcy on the part of VDC. There has been no comment by the Respondent neither there is any specific denial of this assertion. Thus even the this event i.e. bankruptcy of VDC has come into effect.

32. That all the events contemplated under the Patronage Letter have come into effect is a fact which can be seen from the admitted correspondence. The dilution of the shareholding and default by the VDC which is the factual foundation for invocation of this Patronage Letter, are not in dispute. Default by VDC and bankruptcy of VDC has not been denied. Thus the Petitioner has come to this court, seeking winding up of the Respondent Company on the basis of the Patronage Letter, stating that the Respondent had given a solemn guarantee under the Patronage Letter and that events for invocation of the guarantee have admittedly occurred and there is a clear liability on the Respondent to pay and that in spite of the notice the Respondent has not paid thus presumption be drawn against the respondent u/s 434(1)(a) of the Act.

33. Thus the factual position from the documents on record emerges that the petition is based on the Patronage Letter and the admissions of the Respondent Company and that facts on record show that grounds for invoking the guarantee have occurred and the Respondent Company has not honored its obligation. The argument of the Respondent Company however is that these facts cannot be gone into in this petition. According to Respondent Company since the Patronage Letter is subject to Italian Laws, and a decree is obtained by the Petitioner in the Italian (Turin) Court and that Patronage Letter has merged in the decree, all these question can now only be gone into in the suit filed by the Petitioner for enforcement of the decree of the Turin Court, which is under consideration. Various angles of this proposition have been advanced by Respondent Company.

Those will be considered one by one in detail. Before I proceed to do so, it must be clarified that I am examining the question on the foundation of two basic facts. First that the petition is filed by the petitioner on the patronage letter and second on admissions of liabilities. The Petitioner has chosen to base its case on these two aspects. The Petition is not based on the right of the petitioner under a decree. There may be cases of petitions are presented purely on a foreign decree. There could be cases that there are no admissions of liabilities and the entire liability is seriously disputed or at least a semblance of defence as regards the liability is placed on record.

34. The first submission of the Respondent Company is that the petition is based on a decree of the Turin court dated 8 July 201 and not on a Patronage Letter and since the claim is based on the decree of the Turin court it is subject to the Rules of Private International Laws as all the Foreign Judgment and Decrees are. Reliance is place on section 13 and Section 44A of the Code of Civil Procedure. It is submitted by the Respondent that the validity of the decree of Turin Court must be determined in terms of Section 13 of the Civil Procedure Code. If the judgment falls in any of the clauses 1(a) to (e) of Section 13, it will cease to be conclusive. It is submitted that the decree passed by the Turin Court dated 8 July 2011 is sought to be enforced by the Petitioner by filing a suit no. 2434 of 2012. The conclusiveness of this decree of Turin Court is being scrutinized as per the Rules of Indian Law. It is submitted that unless the decree is granted to the Petitioner, the Petitioner cannot be called as a "creditor". Reliance is placed on the decision of the Apex Court in the case of Smt. Satya Vs. Shri Teja Singh, more particularly paragraphs 49 and 50 thereof.

35. I have already observed that the perusal of the statutory notice and the petition shows that the petition is not based on the decree of Turin Court but on the Patronage Letter and various admissions given by the Respondent Company. It is the case of the Petitioner that there is a clear admission of liability by the Respondent Company and that the guarantee given by the Respondent Company has come into effect on certain events having been occurred. and that the Respondent Company has not paid the amount in spite of the demand, the petition needs to be admitted. Once, the tenor of the petition show that the petition is filed on the basis of the Patronage Letter and the admissions in several correspondence then the question as regards the applicability of the Private International Law in order to examine the correctness of the decree of Turin Court does not arise.

36. Reliance is also placed by the Respondent Company on the decision of the Punjab and Haryana High Court in the case of Talwar Brothers (P) Ltd. Vs. Punjab State Industrial Development Corporation Ltd. to contend that that ratio of the decision is applicable as in that case an award which was the basis of the Company petition was under challenge and on that ground the court refused to entertain the winding up petition. The perusal of facts in Talwar Brothers (P) Ltd. Vs. Punjab State Industrial Development Corporation Ltd. case would show that

the award therein was stayed by the order of the Apex court in the litigation between the parties. The present petition is not based on the decree of the court, to equate it to an award. In the decision of Punjab and Haryana High Court in Punjab Recorders Ltd. Vs. M/s. Magnetic Information Technology Ltd., relied upon by the Respondent Company, the petition therein was solely based on the award which is not the present case. Further more there is a distinction between suit and winding up petition and in the following discussion I have dealt with this distinction.

37. Next question is whether patronage letter has merged into the decree of the Turin Court. According to the Respondent, since Patronage Letter has merged with the decree of Turin Court and the suit has been filed in this Court for executing the decree, the Petitioner must await the decision of the suit where conclusiveness of the foreign decree will be determined. According to the Petitioner, there is no merger in respect of foreign judgment. A view is taken in the decisions cited by the Petitioner referred below that doctrine of merger of the original cause of action in the judgment, does not apply in a case of a foreign judgment. It is held that the original cause of action does not merge in a foreign judgment and the judgment debtor can maintain action in either in original cause of action or foreign judgment or in both. Even otherwise as stated earlier what we are concerned with in the present case is a petition for winding up and not a suit.

38. In the case of Popat Virji Vs. Damodar Jairam, the learned Single Judge of this Court held that a person may sue in a Indian Court upon a judgment of foreign Court or upon original cause of action or upon both unless the foreign judgment is satisfied. In the case of Northern Sales Co. Ltd. Vs. Reliable Extraction Industries Pvt. Ltd., , issue arose before the learned Single Judge of this Court whether arbitration award obtained by the Petitioner would stand merged in the judgment of the English Court. The Petitioner Company therein was a Company incorporated under laws of Canada. It had agreed to sell certain quantity of goods to the Respondent Company therein. Disputes arose between the parties as regards the amount payable in respect of demurrage claim and the Petitioner resorted to arbitration in terms of the contract. The arbitrators gave their award in London and directed the Respondent to pay the amount. The Petitioner approached English Court for a judgment in terms of the award and the English Court gave a judgment accordingly. It was urged on behalf of the Respondent that once there was a judgment of the English Court the award merged in the judgment and it was not open for the petitioner therein to rely on the award. The learned Single Judge held that as far as this Court is concerned, foreign judgment will not have effect of effacing the original cause of action, and there was no merger.

39. In this regard the decision of the Apex Court in the case of Badat and Co. Vs. East India Trading Co., needs to be noticed. The Apex Court observed as under:-

65. Bearing in mind these principles let us consider whether the judgment of the

Supreme Court could be enforced against the defendants by instituting a suit on the original side of the High Court. The appeal court has, as already stated taken the view that the original cause of action having arisen wholly or in part within the limits of the original jurisdiction of the High Court, the suit was maintainable. If the plaintiffs were suing upon the original cause of action, there would have been no difficulty and the High Court could have granted leave under clause 12 to the plaintiffs to institute the suit. But here, we are concerned not with the original cause of action but with the judgment of the New York Supreme Court and the award. The judgment furnishes an independent cause of action. The question would be whether the cause of action furnished by it arose within the limits of the original jurisdiction of the High Court. The judgment was rendered in New York and, therefore, the cause of action furnished by it arose at that place and not anywhere else. This cause of action is really independent of the cause of action afforded by the contract and, therefore, if advantage was sought to be taken of it, the suit would not lie at Bombay. This point does not appear to have come up for a direct decision in any case.

66. We may, however, refer to the decision in *East India Trading Co., v. Carmel Exporters & Importers Ltd.* There, an action was brought in England to enforce a foreign judgment awarding damages for breach of contract and the question for consideration was the relevant date for converting the amount of damages into sterling. After considering the relevant decisions on the point Sellers J., held that the relevant date would be the date of the foreign judgment. The ground given by him was that the plaintiff's cause of action was the foreign judgment and it is that judgment which creates the debt which was enforceable by action in England. The principle underlying this case should also apply to the present one because in both cases the cause of action is founded on foreign judgments, though in the case before us it is founded alternatively, upon foreign awards also. The only difference is that while in our case the question is where it arose, in the case cited the question was as to when it arose.

67. The reason why a foreign judgment should be deemed to create a new obligation has not been stated in this case. But it is to be found in the judgment of Blackburn J. in *Schibsby v. Westenholz* where at p. 159 he has stated:

The true principle on which judgments of tribunals are enforced in England is that stated by Parke B. in *Russel v. Smyth*, and again repeated by him in *Williams v. Jones* that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce;.....

68. As James L.J., has said in *Re Davidson's Settlement Trusts*

It would be impossible to carry on the business of the world if courts refused to act upon what has been done by other courts of competent jurisdiction.

69. Schmitthoff in *The English Conflict of Laws*, 3rd edn. has stated at p. 459:

The English courts recognise that a foreign judgment give rise to private rights which, on principle, should be protected by them. Consequently, when referring to the recognition of a foreign judgment, what is actually meant is the recognition of the private right that is created by the judgment and not the enforcement of a foreign judicial act of State. In the words of Professor Read ("Recognition and enforcement of foreign judgments (1938)" by Prof. Read. Quoted by Schmitthoff in "The English Conflict of Laws" p. 459.)-"The true basis upon which the Anglo-Dominion authorities..... place the recognition of a foreign judgment is that it proves the fact that a vested right has been created through the judicial process by the law of a foreign law district."..... The view that the recognition of a foreign judgment in the English jurisdiction is based on the assumption that the foreign judgment creates a new legal obligation is firmly established by numerous decisions.

70. No divergent views have been expressed upon this question. No doubt, the English doctrine of merger has been consistently held in English not in England not to apply to a foreign judgment with the result that despite the fact that a plaintiff has obtained a foreign judgment he may nevertheless sue in an English court upon the original cause of action instead upon the judgment. When he sues upon the original cause of action, no doubt, the court within whose jurisdiction the cause of action arose would be entitled to entertain the suit. But, if on the other hand, he chooses to sue upon the judgment, he cannot found jurisdiction for the institution of the suit on the basis of the original cause of action because once he chooses to rest himself on the judgment obtained by him in a foreign court, the original cause of action will have no relevance whatsoever even though it may not have merged in that judgment.

40. The Apex court in *Badat and Co. Vs. East India Trading Co.*, case referred to the English doctrine of merger and made a distinction on a suit based on a decree and the original cause of action. The Apex court held that once a party sues upon the original cause of action, the court within whose jurisdiction the cause of action arose would be entitled to entertain the suit, however if it chooses to sue upon the decree, it cannot proceed on the basis of the original cause of action.

41. Here some aspects need to be kept in mind. Firstly the nature of present proceeding. It is not a suit. The decision of the Apex court in the case of *Smt. Satya Vs. Shri Teja Singh*, was rendered in the context of matrimonial proceedings. A petition for winding up stands on completely different footing. Secondly the petition is not founded on a decree but the guarantee and the admissions of the Respondent Company. Thirdly a petition for winding can be filed only in this court. If the contention of the Respondent Company is to be accepted it would mean that inspite of clear admissions of liability by the Respondent Company, the Petitioner has to file a proceeding for recovery of money in Turin and obtain a decree in Turin and then file a suit for enforcement of the decree in India and await its decision and only after the execution process

is returned, a petition for winding can be filed. This would place a creditors such as the Petitioner who has advanced money to the Respondent company outside India in seriously disadvantageous position inspite of the admission of liabilities, than a creditor who has advanced loan in India and/or has obtained decree from Indian Courts. Whether such a distinction needs to be drawn will have to be considered. For that purpose the law relating to winding up proceedings needs to be examined.

42. It is trite to say that winding-up proceedings and a suit for recovery of money are not one and the same. It is also established that the right to move a petition for winding-up is a statutory right of a creditor. *Eurometal Limited Vs. Aluminium Cables and Conductors (U.P.) P. Ltd.*, . The position that when a suit is filed for recovery of the amount a petition for winding-up is also simultaneously maintainable is well settled. In *Seethai Mills Ltd. Vs. N. Perumalsamy and Another*, . the division bench of Madras High Court held as under:

The question for consideration, therefore, is whether, simply because a creditor has instituted a suit against a Company and obtained a decree, he has no remedy u/s 434(1)(a) and he has to confine his remedy only u/s 434(1)(b) of the Act. We are of the opinion that there is no such mutually exclusive dichotomy between Section 434(1)(a) and Section 434(1)(b) of the Act. From the very language of Section 434(1)(b), it may be stated that it does not even contemplate a money decree or order for payment of money and it generally uses the expression "if execution or other process issued on a decree or order of any court in favour of a creditor of the Company". Therefore, the decree or order that is contemplated by Section 434(1)(b) is not confined only to a money decree or an order for payment of money. On the other hand, it is general in nature. However, what we have to concentrate on is, whether a person who had obtained a decree for money against a Company will cease to be a creditor because of that fact, so as to take his case out of Section 434(1)(a) of the Act. We are of the opinion that there is no warrant for such a contention, A creditor, who has instituted a suit and obtained a decree against the Company, will still be a creditor of the Company to whom money is due by the Company. It may be that the original debt had merged in the decree and the person who was originally a creditor had become a decree-holder afterwards, but that does not in any way destroy his character as a creditor or the character of the money due to him from the Company as a debt.

Thus the position is that merely because a decree is obtained the creditor it does not cease to be creditor of a Company.

43. Two decisions recorded in identical facts need to be noticed. First is the decision of the learned Single Judge of this court in case of *China Shipping Development Co. Ltd. Vs. Lanyard Foods Ltd.*, . In this case the respondent had, pursuant to the contract of affreightment had executed four letters of indemnity. The indemnity bonds executed by the Respondent indemnified the Petitioner in respect of loss, damages, expenses that the Petitioner would suffer. The

Petitioner delivered the cargo in compliance with the request made by the Respondent. The Petitioner therein gave a notice u/s 433 and 434 of the Companies Act calling upon the Respondent to pay the amount due under the judgment of the Court in England and thereafter the petition for winding-up was filed. A defence was sought to be urged that the notice is based on a decree of English Court and not on indemnity and the decision of the English Court does not fulfill requirement of Section 13 of the CPC and that the petition for winding-up is not moved for execution of decree. The learned Single Judge accepted the locus of the Petitioner as a creditor of the Company. The learned Single Judge did not refuse to entertain the petition on the ground that the Petitioner therein was a holder of a foreign decree.

44. Second is the decision of the learned Single Judge of Gujarat High Court in the case of Vanguard Textiles Limited Vs GHCL Ltd., 10. In this case deed of guarantee was executed by Respondent Company in United Kingdom. The Petitioner had also filed a suit based on the guarantee before the Court at UK and since the Respondent did not appear, there was an ex-parte default Judgment. An argument was advanced by the Respondent Company that the deed of guarantee was executed in UK and therefore, cause of action arose outside the Indian territory and the deed of guarantee is not enforceable in Indian Courts. It was also urged on behalf of the Respondent Company that the deed of guarantee was without prior approval of the RBI under the provisions of Foreign Exchange Regulation Act (FERA). The learned Single Judge negated these contentions. The learned Judge held that obligation to obtain permission of the RBI, if it was required to be obtained, was upon the company and the company cannot take this as a ground to avoid to discharge its obligation. The learned Single Judge also held that non-executability of the decree of the Court in UK would be at the most considered in the execution proceedings and it cannot be a ground to refuse to entertain a petition for winding up. The learned Single Judge held that in view of clear liability the defences taken were not genuine. The relevant passages from the judgment are reproduced below:

9. It was lastly contended by Mr. Sanjanwala, learned counsel appearing for the Respondent Company that the decree of Court of England is non-enforceable in India as per the provisions of Section 13B and 13D of CPC and it was submitted that the remedy for enforcement for execution of such decree of the Courts of UK is as per Section 44A of CPC since the UK being a country of reciprocating territory, but in view of the fact that such decree is non-executable as per Section 13 of CPC, and if such decree is non-enforceable, there is no valid claim which can be made as the basis for invoking the power of this Court for winding up of the Respondent Company.

10. It deserves to be recorded that as per the Decree of the Court of UK, the process is served, but the Respondent Company has not defended. It may be that the decree is not on merit after dealing with each and every contention of the plaintiff, but thereby, it cannot be said that there is no foreign judgment

against the Respondent Company. After having being served the statutory notice by the Petitioner, nothing prevented the Respondent Company for filing the suit for a declaration that the decree is not binding, but such option available has not been exercised. Further, when there is a decree/judgment of a foreign Court for fastening the liability, it cannot be prima facie said that there would not be any liability at all of the Respondent. In any case, the aspects of non-enforceability may be required to be considered in execution proceeding, if resorted to, but such cannot be a sole ground to deny the entertainment of the petition for winding up of the Company on the basis of such liability. The reference may be made to the decision of the Andhra Pradesh High Court in the case of Enernorth Industries Inc. Vs. VBC Ferro Alloys Ltd., , more particularly the observations made at para 34 and 35 that merely because the other modes are available, it cannot be said that the petition for winding up is not maintainable.

The learned Single Judge accordingly proceeded to pass a conditional order of deposit of the amount and the petition was admitted. The facts in this case closely correspond to the facts in the present case.

45. In the above two decisions there was a decree of the foreign court in favour of the petitioner and the Courts still considered the petition for winding up. The law is that any creditor has a right to approach the Company court pointing out that its admitted debt is not paid. The Company Court then considers whether the company needs to continue, or be wound up and the assets be distributed. The considerations for entertaining a petition for winding up are thus different from entertaining a suit. The jurisdiction is also different. Merely because of the creditor is a decree holder it does not change the character of it as a creditor for the purpose of maintaining petition for winding-up. There is no warrant to make a distinction between creditors on the basis of decree of which Court they hold. The Apex court in the case of The Rajah of Vizianagaram Vs. Official Receiver, Vizianagaram, observed as under:

11. Section 166 provides for an application to the court for the winding up of a Company. Any creditor or contributory is entitled to apply for the winding up of the Company. No distinction is made between the creditors resident in India or outside India. Section 167 specifically states that an order for winding up of a Company shall operate in favour of all the creditors and of all the contributories of the Company as if made on the joint petition of a creditor and of a contributory. It is not possible therefore, to urge successfully, that the order of winding up of an unregistered Company does not operate in favour of all the creditors and of all the contributories of the Company. All the creditors of the Company can take advantage of the winding up of the Company as operating in India when it has ceased to carry on business there. There is no reasonable basis for depriving them from participating in the distribution of the assets collected by the Official Liquidator in the winding up proceedings. All the creditors including the foreign creditors will get rateably out of the assets of the Company which have been collected. When that Company itself is wound up, all of them would be

entitled to similar rateable share in the assets collected during the winding up proceedings of the Company in the country where it is incorporated.

Though these observations were made interpreting the Companies Act 1913, there is no change in the position under the 1956 Act, that any creditor is entitled to bring a petition for winding up. What this decision indicates is that irrespective of status of the creditor a distinction amongst them is not warranted.

46. If a creditor with or without a decree of an Indian Court can file a petition for winding up based upon a original cause of action, pending the suit and after decree, there is no warrant to deprive a creditor with a decree of foreign Court to present a petition for winding up, independently of the decree, in the Company court having jurisdiction. The Companies Act does not contemplate such exclusion. To deprive a creditor with a decree of foreign court of this statutory right, will also not be in larger public interest. If a foreign creditor with decree of foreign Court is barred from presenting a petition for winding up on the original course of action and till the decree by Indian Court is passed in it's favour, it will make a distinction between two classes of creditors. This will lead to the Indian companies adopting unhealthy practices of borrowing capital abroad and then refuse to repay admitted debts and resist winding up. This will have negative effect on the cross border flow of capital and international commerce. Thus there is no warrant to read such an exclusion of the statutory right by way of interpretation.

47. Therefore there is no impediment in the way of the Petitioner to proceed on the basis of the Patronage Letter as a creditor of the Company for presenting this petition for winding-up. There is no question of merger of the Patronage Letter into the decree. The admissions as regards the liability given in the correspondence is sufficient to form basis of the petition for winding-up. Even assuming that there is a suit filed for enforcement of a foreign decree it cannot be said that the Petitioner has ceased to become a creditor of the Company.

48. It was further contended by the Respondent in the Patronage Letter that the decree of Turin Court was an ex-parte decree and obtained by fraud and is opposed to principles of natural justice. In view above discussion this point does not have much relevance. Even other wise there is no substance in this grievance. It was submitted that the notice was not given to the Respondent at its registered address but at the address of VDC even after knowing that VDC had ceased to be a step down subsidiary. The Patronage Letter clearly provides that the address for summons to be served on the Respondent was the address of VDC. The Respondent selected this address for court summons. The Respondent Company never informed the Petitioner that this address is changed. If that be so, the Petitioner cannot be faulted for serving the Respondent with the summons at the said address. If the summons would have been served on any other address opposite grievance would have been made by the respondent Company. The Turin Court issued a payment injunction on 8 July 2011. The order provided a 60 days period to the Respondent Company to contest the payment

injunction. It was open for the Respondent Company to challenge the order. The order was duly served upon the address chosen by the Respondent Company on VDC on 28 July 2011. VDC has all along corresponded with the Petitioner with the logo of Videocon indicating it's close ties. It is too naive to suggest that the Respondent Company was completely unaware of the summons served on the address chosen by itself at VDC. The correspondence entered into between the Respondent and the debenture trustees which is part of the record of the suit no. 319 of 2012 at Calcutta shows that a letter was written by the debenture trustees on 22 August 2011, refusing to the order of 8 July 2011. Since there was no contest despite service of the order dated 8 July 2011, excluding the court vacations, it became enforceable on 11 November 2011. Respondent Company appears to be fully aware of the proceedings. I do not find that there was any fraud committed by the Petitioner, as alleged, neither there is any breach of the principles of natural justice. If in spite of service of the summons, if the Respondent Company did not bother to appear and contest the same then it cannot be a complaint of breach of principles of natural justice. Thus even otherwise, the defence taken by the Respondent that the decree is fraudulently obtained and therefore, the petition should not proceed, has no merit.

49. It was then submitted on behalf of the Respondent Company that the claim based on the Patronage Letter is time barred on the date of the presentation of the petition. There is no merit in this submission. The acceptance of the Patronage Letter has not been denied by the Respondent Company. In fact the Respondent Company has, as late as on 9 December 2010, reiterated the fact that the facility agreement is secured by the Patronage Letter. The petition filed on 17 October 2012 is thus presented within time.

50. It was then contended on behalf of the Respondent Company that under the terms of the patronage letter, the exclusive jurisdiction to construe or consider the Patronage letter is with the Turin Court and the intention of the parties to oust the jurisdiction of the court was clear from the language employed in the Patronage Letter. It was contended that the words used in the Patronage Letter were that any dispute arising out of or in connection with the Patronage Letter "shall be" referred to the exclusive jurisdiction of the court of Turin. It was submitted that the Petitioner has in fact accepted this position and has filed proceedings before the Turin Court which passed a decree in favour of the Petitioner. Reliance is placed on the decision of the Apex Court in the case of Swastik Gases P. Ltd. Vs. Indian Oil Corporation Ltd., which lays down that the intention of the parties is determinant in reading exclusion clauses regarding jurisdiction of the courts.

51. Though the Patronage letter does make a reference to jurisdiction of the Turin court, reliance on the decision in Swastik Gases is misplaced. The decision in Swastik Gases was not rendered in the context of a winding up petition. The petition for winding can be filed by the Petitioner only in this court. For the purpose of entertaining a petition for winding up only this court will have

jurisdiction. It will be absurd to suggest that the petition for winding up can be filed in the Turin Court. From the correspondence which is referred to above, the existence of the Patronage Letter is not disputed. The fact that there has been default on the part of the VDC, which is a ground for invocation of the guarantee is also not disputed. The Petitioner is a creditor of the Respondent Company and if it seeks to file a petition for winding up, it can only file the same in this court. The argument based on exclusion clause has no merit.

52. It is sought to be contended that the Italian Law being the question of fact, which will have bearing on the issue regarding invocation of the Patronage Letter, can only be considered in a suit and therefore in view of this disputed question, the petition need not be entertained. Reliance is placed by the learned counsel for the Respondent on the decision of the Apex court in *Hari Shankar Jain Vs. Sonia Gandhi*, . The Respondent Company has not indicated what are the disputes under the Patronage Letter. The Respondent Company has not contended that the patronage letter violates any provisions of the Italian Law. The Respondent Company has in fact acknowledged its liability under the Patronage Letter in the correspondence. Defence is taken that the Patronage Letter violates the Indian Law i.e. FEMA. The Respondent in the reply to the notice of winding up and also in the affidavit in reply, has stated that the Patronage Letter violates the provisions of FEMA. During the course of the argument, the learned counsel for the Respondent abandoned this ground. In fact nothing was pointed out as to which provision of the Indian or Italian law the Patronage Letter violates.

53. Even if the argument regarding violation of FEMA was to be taken, it has no substance. In the case of *Eurometal Limited Vs. Aluminium Cables and Conductors (U.P.) P. Ltd.*, ; question came up before learned Single Judge of Calcutta High Court as to whether permission of the Reserve Bank under the Foreign Exchange Regulation Act could be a ground for disputing the claim. In the said case the petitioning creditor was acting as a foreign agent of the Company in respect of the contract and was entitled to payment. The Company took an objection in view of the provisions of the FERA. The learned Single Judge held that the right of the creditor to move a petition for winding up to have the assets of the debt administered in insolvency and distributed for the benefit of a creditor as a body is a right conferred by a statute. The learned Single Judge held that the right to maintain petition for winding up being a right under a statute it cannot be affected by question of permission of the RBI. It was also held that if the permission of RBI was necessary then if the Company made no application and it cannot take this up as a defence. The learned Single Judge held that the defences raised by the Respondent Company therein was lacking in commercial morality and involved a question of international commercial transactions and upholding the national prestige in the international commercial transactions. In the present case even though a contention was taken in the reply that the patronage letter is in violation of Foreign Exchange Management Act, this point was abandoned during the arguments. As stated earlier there is no

ground raised whatsoever that the patronage letter was in violation of any law much less Italian law. The Respondent cannot raise academic questions, it must indicate which are the questions of fact the court of Turin had an exclusive jurisdiction to decide. Even assuming the question of service of summons was a question of fact, the knowledge of service of summons has been established in the pending suit in Calcutta, which will be referred to later on.

54. One defence that has been raised by the Respondent Company is that the Patronage Letter was not a guarantee deed but a comfort letter. Bare perusal of the Patronage Letter shows that the Respondent had in unequivocal terms guaranteed to pay the amount upon default. The Patronage Letter lists events that will trigger the enforcement of guarantee. Nowhere in the correspondence the Patronage Letter is referred to as a comfort letter. The loan agreement executed between the parties is conditional upon execution of the Patronage Letter cum guarantee. Thus the loan agreement is based on the guarantee given by the Respondent and makes it clear that if there was to be no guarantee by the respondent, the loan agreement would not have been executed. In the reply a stand is taken by the respondent that the Patronage letter violates provisions of FEMA. If it was a mere letter of comfort there was no question of violation of FEMA. The respondent has sought to take contradictory stand in respect of the Patronage Letter in a desperate attempt to wriggle out of the guarantee given under the Patronage Letter. The argument advanced by the Respondent that it was a comfort letter has to be rejected.

55. Next defence taken by the Respondent, based on section 434(1)(b) of the Companies Act, to contend that if execution or other process issued on a decree or order in favour of a creditor of the Company is returned unsatisfied in whole or in part; then only the Company shall be deemed to be unable to pay its debts. It is contended that only if the suit, which is filed for enforcing the decree of the court of Turin, is decreed and the execution is returned unpaid then only the Petitioner can be termed as a creditor and the Company shall be deemed to be unable to pay its debts. At the cost of repetition it is emphasized that the petition is based on the Patronage Letter and not on the decree of the Turin Court. It is permissible for the Petitioner to file a petition for winding up in this court based on the Patronage Letter and the admissions of the Respondent. If that be so, this right cannot be defeated merely because the suit for enforcement of the decree of the court of Turin is also filed. Since the petition is based on the Patronage Letter and admissions of the Respondent, there is no question of resorting to section 434(1)(b) and the case is covered section 431(1)(a) of the Companies Act.

56. Next ground was urged on behalf of the Respondent that in the suit bearing no. 319 of 2012 the Civil Court at Calcutta has passed an interim order of temporary injunction, restraining the parties therein from giving effect to the letters of 16 December 2011 and 20 January 2012 for consideration of event of default. It is contended that the default mentioned under condition 10.1.5 (iii) of

the Bond Term relates to the claim made on the basis of the Patronage Letter which is subject matter of this petition. It is argued on behalf of the Respondent that the Petitioner has made an application for impleadment and also for vacating the ex-parte ad-interim order. Since the question as regards validity or otherwise of the Patronage Letter is sub-judice, the petition should not be proceeded with. The Petitioner has countered this submission by stating that the suit filed in Calcutta is collusive suit. It is urged that one more suit bearing number 3972 of 2012 has been filed in Calcutta and both these suits having filed through same Advocate, with similar pleadings. It is submitted that both the proceedings are unconnected with the subject matter of this petition.

57. The copy of the plaint and other documents relating to the suits filed in Civil Court at Calcutta are placed on record. The suit has been instituted by the plaintiff, therein claiming to be the holder of convertible bonds. In this suit, the plaintiff has narrated the facts as regards the loan transaction between the Petitioner and VDC. It is averred in the plaint that the defendant no. 2 therein, DB Trustees (Hong Kong Limited) by declaring an event of default, would be presenting the bondholders with a fait accompli. In paragraph 26 of the plaint, the plaintiff therein specifically stated that he is not concerned with the interse dispute between the Petitioner and the Respondent. A submission is made in the plaint that the guarantee being void, there can be no default. Thus essentially the suit has been filed, seeking to restrain the debenture trustees from treating the breach of the VDC as an event of default and ad-interim injunction has been granted.

58. From the averments made in the suit itself by the plaintiff, the suit is not about a dispute between the Petitioner and Respondent. The present petition is based on the Patronage Letter. The liability by the Respondent is acknowledged and the Petitioner is presenting the petition for winding up on the basis of this liability which every creditor is entitled to do. The interim order, seeking to restrain the debenture trustees from treating the breach as an event of default does not in any manner affect the right of the Petitioner to proceed with the petition. The manner in which the litigation is instituted, I find credence in the submission of the petitioner that the suit is collusive. There seems to be a clear attempt on the part of the Respondent to create as many hurdles in the way of the Petitioner from recovering it's money. The Petitioner has appeared in the suit without prejudice and merely because it has appeared in the suit, does not mean that it has treated the subject matter of the petition as sub-judice in the suit. The defence taken by the Respondent based on the suit, therefore, has no merit.

59. It is urged on behalf of the Respondent that the petition raises several disputed questions of facts, including of foreign law, and thus winding petition should not be entertained. Reliance is placed on the decisions in ICICI Lombard General Insurance Co. Vs. AFL P. Ltd., , N.N. Valechha Vs. I.G. Petrochemicals Ltd., and Osnar Paints and Contractors Pvt. Ltd. Vs. Western India Shipyard Limited, . There is no dispute about the legal proposition that if seriously

disputed questions of fact exist, a winding petition need not be entertained. It is to be noted however that a spacious stand is taken that arguments on merits will be tested in the suit. When a petition for winding is presented the respondent was under obligation to indicate what is its" so called stand on merits. Throughout the correspondence there is no denial of liability. Restructuring has been proposed. Before the parties commenced litigation what was the stand of the respondent is most material. After the litigation has commenced all types of stands are taken. This itself raises doubts about the veracity of the defence

60. In this context case of *Bangasri Ice and Cold Storage Ltd. Vs. Kali Charan Banerjee*, is illustrative. Division bench of the Calcutta High Court cited with approval observations from Palmer's "Companies Precedence" 17th Edn. Part II at page 27 that the conduct of the Company after again and again requesting for time of payment of debts springs on Petitioners at the last moment an assertion that the debt is disputed, has to be considered with great suspicion and meets with no favour from the Court. The court observed thus:

5)... It is not always easy to establish to the satisfaction of the court about the insolvency of a Company, although in this instant case, as I shall presently show, the position is rather obvious. It is for this reason that Section 434 provides that where notice is given and the Company after the requisite period neglects to pay a debt, then there arises a presumption of inability to pay. But here again, the words used are "Neglects to pay". In either case, that is to say, u/s 433 or Section 434, if the debt is disputed bona fide, then in that case there is neither inability nor negligence to pay. The meaning is quite clear. It will not do for a creditor merely to put forward a claim. The Company may not accept it or may dispute either its factum or validity. Where there is a genuine dispute of this description, it cannot be resolved by having recourse to winding up proceedings. But, just as it will not do for a creditor merely to put forward a claim, it will not do for the Company to deny a claim recklessly. If the denial of the dispute is neither bona fide nor reasonable, then the Court does not lose its power of granting relief by passing a winding up order. The position in law With regard to disputed debts is, by no means, an easy one. It has however been admirably summed up in Palmer's "Companies Precedence" 17th Edn. Part II at page 27. It is stated as follows:

The mere omission of a Company to comply with a notice requiring payment of a debt, served pursuant to the above para, is not "neglect" within the meaning of that paragraph if there is reasonable cause for the omission, and the fact that the debt in question is bona fide disputed is a reasonable cause. It is now well settled that 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.

But, of course, if it is shown that the alleged dispute is not a bona fide one, the objection to the petition fails. Thus, it is not uncommon for a Company, after again and again begging for time for payment of a debt, to spring on the

Petitioner, at the last moment, the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion, and meets with no favour from the court

61. The observations from Palmer's "Companies Precedence" above aptly applies to the Respondent's conduct. After repeatedly requesting for restructuring and time for repayment, once notice for winding up was received respondent has conjured up all sorts of defences. Before the notice for winding-up, the response of the Respondent Company was only of acknowledging the debts, acknowledging the default, seeking time giving fresh proposals. The learned counsel for the Petitioner has rightly made a grievance about the deponent of the affidavit in reply. While denying all the admissions in the correspondence, the deponent has not disclosed the source of his knowledge. The Respondent Company has put forward an officer, who has no personal knowledge, to deny the facts and the person who is aware of the discussions and meetings, has avoided to take a stand on oath. This factor is crucial while considering the bonafides of the defence. The conduct of the Respondent in denying even the meetings and admissions which are part of the correspondence by putting forward an officer with no knowledge is to say the least is, reckless.

62. Lastly it is sought to be argued that the Respondent Company is commercially solvent and on that ground the court should not exercise its jurisdiction for winding up and also larger public interest be kept in mind. It is submitted that the net profit of the Respondent Company for the period from 1 January 2012 to 30 June 2012 is Rs. 100.43 crores. The revenue generated from consumer durables for last six months ended on 30 June 2012, is Rs. 5,294.324 crores, from crude oil and natural gas it is Rs. 718.39 crores. It is averred in the reply that the Respondent has 335000 shareholders, has 78 offices in India, 4 factories and employs around 4500 employees. It has been urged that the Respondent Company is one of the leading Indian Company, having several branches and employs substantial number of workmen. It is submitted that in the circumstances there is no warrant to wind up the Company.

63. It is no doubt true that the court will keep in mind the commercial solvency of a company, larger public interest and repercussions of the order of admission. The commercial solvency, however, cannot be a stand alone ground. If that be so, then every Company which is commercially solvent will refuse to pay the admitted debts and then take up the ground of commercial solvency. The Apex court in the case IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., , has clearly laid down in passage reproduced below that the commercial solvency cannot be considered as a stand alone ground.

25. An examination of the Company's solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the Company's liability, it is difficult to hold that the Company should be able to pay the debt merely by proving that it is able to pay the debts.

If the debt is an undisputedly owing, then it should be paid. If the Company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterised as a stand alone ground.

64. In the case of ITW Signode India Limited Vs. Bhushan Steel and Strips Limited, an argument was advanced to reject the winding-up proceedings on the ground that the Respondent is commercially solvent. The learned Single Judge held that in view of the resolute refusal to pay the admitted debts solvency of Company alone would not be a relevant factor for rejecting a petition presented by a creditor. Decision of the Andhra Pradesh High Court in Mittal Iron Foundry (P) Ltd. Vs. Elektro Flame Limited, was followed. The Apex Court in the decision of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., held that where the debt is undisputed the Court will not act upon a defence that the Company has ability to pay the debts but chooses not to pay the particular debt. Thus the Company cannot take a defence that it is commercially solvent and has ability to pay the debts, but will not pay the debt, by putting forward commercial solvency as a defence to a winding-up petition. If such defence is accepted it will mean that any Company which is commercially solvent can choose which creditor it will pay with complete impunity, and if an unsatisfied creditor chooses to exercise its statutory right for winding-up the Company will put forward commercial solvency and repercussions of winding-up petition as a defence to a winding-up petition. If the repercussions of admission of a winding-up petition are serious then the Company must also act with equal seriousness and pay the debts which are not disputed so as to avoid any order leading to winding-up of the Company. In the present case, after the service of statutory notice, there is a complete change in stand. A resolute stand is taken to contest the petition on all grounds. Even suits, which prima facie appear collusive, have been set up as hurdles.

65. The Company Court may in appropriate cases consider the larger public interest. For instance, such criterion has effect on production, markets, workers and investors. But equally important considerations are of commercial morality, national prestige and need to instill confidence in international commercial transactions. Post liberalization Indian companies have engaged in large scale commerce and financial dealings with the banks and companies abroad. Finances are advanced to the Indian companies by foreign investors. If the conduct such as the one exhibited by the Respondent Company, is condoned purely on the ground of public interest, it may protect this Company but will send a wrong signal to the investors and lenders all over the world. Investors will be reluctant to advance capital even to commercial solvent and honest companies. The division bench of Delhi High Court echoed similar sentiments in the case of SRM Exploration Pvt. Ltd Vs. N and S and N Consultants S.R.O., as under:

12. The world is a shrinking place today and commercial transactions spanning across borders abound. We have wondered whether we should be dissuaded for the reason of the transaction for which the appellant Company had stood surety/guarantee being between foreign companies. We are of the opinion that if we do so, we would be sending a wrong signal and dissuading foreign commercial entities from relying on the assurances/guarantees given by Indian companies and which would ultimately restrict the role of India in such international commercial transactions.

This is the larger public interest which goes beyond the interest of trying to protect the Respondent Company on the ground of repercussions of the admission of the petition.

66. Before I conclude, I must state, shorn of all legal niceties, that there is no manner of doubt that amounts were guaranteed to be repaid to the Petitioner by the respondent company. Respondent has resolutely refused to pay it back inspite of assuring to do so many times earlier. Absolutely nothing is placed on record to even hint that the Respondent Company does not owe the money to the Petitioner. Any other creditor would be as a right entitled to ask for admission of the petition against such a company. If so then why the Petitioner be kept away from this right, its only fault being that it lent the monies outside India and filed a suit for recovery of the same in the Court where the transaction took place. To deprive the Petitioner will encourage Indian companies to be dishonest in their international dealings. With globalisation of trade and investments, cross border flow of capital and the dependence of the country's economy on international commerce, the company court needs to be alive to the changing commercial and economic realities, and exercise its discretionary powers accordingly.

67. To sum up: the petition is based on the guarantee contained in the Patronage Letter and the admissions, and not on the decree of the Turin court. Question of merger of the Patronage Letter in the decree of Turin Court therefore does not arise. Merely because the Petitioner has obtained a decree from the Turin court and has instituted a suit for enforcement of the same, the Petitioner cannot be deprived of its right to file a winding up petition. The jurisdiction to entertain a winding up petition is only with this court. No bonafide defence on merits has been raised by the respondent. The events of default contemplated under the Patronage Letter are clearly admitted in the correspondence between the parties. The ad-interim order in the suit instituted in Calcutta by one of the bond holders is not a bar for entertaining the petition. Commercial solvency of the Company is not a stand alone ground. Commercial morality and the need to instill confidence in the mind of international investors, are also matters of public interest.

68. The Company has proceeded as if it is unconcerned with the consequences of the order of admission of the company petition and what would happen if it's submissions are not accepted. In such circumstance, I would proceed to admit the petition straightway. However, keeping in mind the interest of the workmen,

employees and investors of the company, I propose to give an opportunity to the company to remedy the situation and avoid consequences of the admission of the company petition, before the petition is admitted. Accordingly, the following order is passed:

(a) If the Respondent Company deposits in this Court amount of Rs. 259,73,00,000/- (Rupees Two Hundred Fifty Nine Crores Seventy Three Lakhs only) equivalent to Euros 38,000,000/- (Euros Thirty Eight Million), claimed in this Company Petition, which amount the Petitioner will be entitled to withdraw, by 27 January 2014, the company petition shall stand dismissed.

(b) If the aforesaid amount is not deposited on or before 27 January 2014, then following order will come into effect forthwith, without further reference to the court:

(I) The company is admitted with following directions:

(i) Petition is made returnable on 07 March, 2014.

(ii) The advocate for the petitioner undertakes to publish the next date of hearing of the petition in two newspapers, namely, "Times of India" in English language and translation thereof in "Navshakti" in Marathi language both having circulation in Mumbai and also in the "Maharashtra Government Gazette".

(iii) The petitioner shall deposit Rs. 10,000/- in respect of the publication charges within two weeks from today with intimation of the same to the Company Registrar failing which the Company petition shall stand dismissed without any further reference to the Court.

(iv) Office is directed to issue notice to the Company under Rule 28 of the Companies (Court) Rules, 1959.

10. Company Petition 20 of 2009 decided 26 August 2009