

(2012) 08 AP CK 0072

In the Andhra Pradesh High Court

Case No : Company Petition No"s. 70, 71, 72, 117, 171, 172, 213, 214, 173 of 2010; and 104, 169 and 199 of 2011 and C.A. No"s. 48, 68 and 290 of 2012 in C.P. No. 172 of 2010

Krishna Kilaru and Another

APPELLANT

Vs

Maytas Properties Limited

RESPONDENT

Date of Decision : 21-08-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Companies Act, 1956 — Section 2(29A), 227(4A), 433, 433(a)
Contract Act, 1872 — Section 2(e), 56, 73, 75
Evidence Act, 1872 — Section 58
Registration Act, 1908 — Section 17(1)(g), 2(14), 49
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 3(1)(ga)
Stamp Act, 1899 — Section 35
Transfer of Property Act, 1882 — Section 6(e)

Citation : (2013) 113 CLA 435 : (2013) 176 CompCas 483 : (2013) 2 CompLJ 322

Hon'ble Judges : Ramesh Ranganathan, J

Bench : Single Bench

Advocate : Prabhakara Sripada, for the Appellant; S. Niranjan Reddy, for the Respondent

Judgement

Ramesh Ranganathan

1. C.P. Nos. 172 of 2010 and batch are filed, u/s 433 (e) read with Section 434 and 439 of the Companies Act, 1956, seeking winding up of the respondent company. The petitioners are all individuals who had sought allotment of flats in an apartment complex known as "Hill County" situated at Bachupally village, Qutubullapur Mandal, Rangareddy District. Agreements of sale were entered into, between the petitioners and the respondent, during the years 2006 to 2008. All the petitioners herein have admittedly paid a substantial part of the sale consideration running into several lakhs each. All of them also claim to have terminated the agreements of sale in accordance with the conditions stipulated

therein.

2. The respondent is a company incorporated under the Companies Act with its registered office at Hyderabad. Its authorized share capital is Rs. 75 Crores divided into 75 lakh equity shares of Rs. 100/- each. Its paid up capital is said to be Rupees Five lakhs consisting of 5000 shares of Rs. 100/- each. The respondent claims to have entered into a development agreement-cum-GPA dated 30.12.2005 with 14 other companies, (which later became its subsidiaries), for construction of independent houses and multi-storeyed buildings consisting of residential apartments along with certain common utilities and facilities forming part of the township. These apartment buildings were to come up in different extent of lands earmarked for construction of the apartment complex from out of the total extent of Ac. 85-36 gts situated in the Hill County lay out. Brochures were released and wide publicity was given, in both the print and electronic media, for the proposed venture which the petitioners herein claim to have been influenced by, and to have been induced thereby, to purchase an apartment which the respondent had promised to construct and deliver within a stipulated time frame.

3. The respondent company, along with the 14 land owning companies (now its subsidiaries), executed agreements of sale in favour of the petitioners on different dates during the years 2006-2008 in respect of an undivided share of land admeasuring 105 sq. yards in respect of the land earmarked for construction of the apartment complex. Counsel on either side are agreed that C.P. No. 172 of 2010 can be taken as illustrative of this batch of company petitions. The petitioner in C.P. No. 172 of 2010 paid Rs. 15,77,376/- to the respondent on the date of agreement of sale and, in all, paid Rs. 76,47,122/- as part of the sale consideration which the respondent had acknowledged in its ledger accounts as having been received from the petitioner.

4. It is not in dispute that the construction activity came to a halt in December, 2008, and in the first week of January, 2009 Sri B. Ramalinga Raju, Chairman of Satyam Computer Services Limited, confessed that he had committed a huge corporate fraud of Rs. 7000 crores. The erstwhile directors of the respondent-company are said to be the sons of Sri B. Ramalinga Raju. C.P. No. 4 of 2009 was filed by the Central Government, before the Company Law Board (CLB) to restrain Sri B. Teja Raju, Sri B. Rama Raju and Sri D. Gopala Krishnam Raju from acting as Directors of the respondent company. The CLB, by its order dated 05.03.2009, appointed its nominee on the Board of Directors of the respondent company. The petitioners would contend that the respondent had collected Rs. 654 Crores from the prospective apartment owners and had diverted a major portion thereof for other purposes such as buying of lands in the name of other front and surrogate companies; all the petitioners issued legal notices on different dates terminating the agreement of sale in terms of clause 9(e) thereof. They also requested the respondent to return the sale consideration paid by them, after deducting Rs. 5000/- towards documentation charges. In reply

thereto the respondent issued legal notice dated 13.07.2010 contending that the project could not be completed on account of force majeure events. The petitioners sent another legal notice dated 16.07.2010 by registered post pointing out the discrepancies in the reply legal notice dated 13.07.2010. Thereafter a statutory notice u/s 434(1)(a) of the Companies Act was issued, (in the case of the petitioner in C.P. No. 172 of 2010 on 25.07.2010), and was delivered at the registered office of the respondent company. In reply to the statutory notice the respondent, vide legal notice dated 16.08.2010, admitted receipt of the sale consideration. They, however, contended that the delay in completion of the project was because several private investors and financial institutions had withdrawn from the Hill County project.

5. Sri Prabhakar Sripada, Learned Counsel for the petitioners, made elaborate submissions both oral and written. Sri S.R. Ashok, Learned Senior Counsel and Sri S. Niranjan Reddy, Learned Counsel appearing on behalf of the respondent company in these company petitions, and Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of ILFS, have also put forth extensive oral and written submissions. Ms. G. Sudha, Learned Counsel appearing on behalf of the Hill County Home Owners Association, and Sri V. Mohan Srinivas, Learned Counsel appearing on behalf of the MAYTAS Hill County apartment Buyers Association also made submissions. Several judgments were cited by Counsel on either side which shall be referred to and considered hereinafter under different heads.

I. IMPLEAD APPLICATIONS:

6. C.A. No. 48 of 2012 in C.P. No. 172 of 2010 is filed by M/s. IL&FS Engineering and Construction Company Limited to implead them as a respondent in the Company Petition. It is their case that they were recommended to be inducted into the respondent-company as a strategic investor giving them 80% shareholding by allotment of preferential shares; the said recommendation was accepted by the Company Law Board; pursuant thereto, they had taken over the management of respondent-company; they had infused fresh capital for completion of the Hill County Project; and, since they would be directly affected by the outcome of these company petitions, they ought to be impleaded to support the respondent in opposition to the winding up petition.

7. C.A. No. 68 of 2012 in C.P. No. 172 of 2012 is filed by Hill County Home Owners Welfare Association requesting that they be impleaded as a respondent to enable their members, who had advanced money for allotment of villas/apartments in the Hill County Project, to oppose the petition for winding up. C.A. No. 290 of 2012 in C.P. No. 172 of 2010 is filed by Maytas Hill County Apartment Buyers Association requesting that they be impleaded as respondents to enable them to support the petitioners in seeking winding up of the respondent.

8. Sri Prabhakar Sripada learned counsel for the petitioners, would rely on Severn Trent Water Purification, Inc. Vs. Chloro Controls (India) Private Ltd. and

Another, wherein the Supreme Court held that Section 439(4) of the Companies Act was a self-contained code, to submit that intervention by third parties is permissible only after admission of the winding up petition, and not prior thereto; and, as such, neither IL&FS nor the so-called Hill Country Owners Welfare Association had locus standi to be heard at this stage. On the other hand Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of M/s. IL&FS, would submit that the scope of Section 557 is wide requiring the Court to take into consideration the interest of stakeholders even at the stage of admission.

9. Having due regard to the provisions of Section 557(1) of the Companies Act, 1956, the principle which has been laid down in National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others, in the case of the workers, must necessarily apply to the creditors also. There is an express statutory recognition of the position that the Court must have regard to the wishes of creditors and contributories in all matters relating to the winding up of a company. (Bharat Petroleum Corporation Ltd. v. National Organic Chemical Industries Ltd. (2004) 120 CC 333 (Bom. H.C.); National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others, . Neither the petitioner nor the court would be under any obligation to give notice of such application to the workers (or creditors). It would be for them to apply for being heard and, if they do so, they would be entitled to appear and be heard. National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others, . It is, therefore, evident that, while the Court would not give notice of the filing of the company petition to the creditors and shareholders, it is open for any one of them to file an application before this Court requesting that they be heard in the matter.

10. As IL&FS has been inducted into the management, and has invested in the share capital, of the respondent company and as the applicants, in the other applications, are all persons who have advance money to the respondent for construction and allotment of a villa or apartment, I consider it appropriate to allow the said applications and give them an opportunity of being heard. C.A. Nos. 48, 68 and 290 of 2012 in C.P. No. 172 of 2010 are allowed.

II. PRELIMINARY OBJECTIONS:

11. Before examining the rival contentions, it is necessary to deal with the twin preliminary objections raised by Sri S. Niranjan Reddy, Learned Counsel for the respondent, to the maintainability of these winding up petitions i.e., (1) the agreement of sale and the clauses therein cannot be examined as the said document has not been adequately stamped or registered; and (2) since arbitration proceedings have already been instituted, the remedy of the petitioners is to submit their claims before the arbitrator, and not in filing winding up petitions.

(a). STAMP DUTY AND REGISTRATION:

12. Sri S. Niranjan Reddy, Learned counsel, would submit that the agreements of sale, relied upon by the petitioners, purports to create rights in immovable

property and has to be compulsorily stamped at 1% as stipulated under Article 6B of Schedule 1A of the Indian Stamp Act, 1899; the agreement of sale is stamped merely with Rs. 100/-; as such the said document can neither be received nor looked into for any purpose u/s 35 of the Stamp Act; the petitioner had merely filed a photocopy of the agreement which cannot be impounded, and its contents cannot be looked into at all; the said agreement of sale is also inadmissible as it is not registered as required u/s 17(1)(g) of the Registration Act; the said document cannot, therefore, be relied upon in view of Section 49 of the Registration Act; and, even if the both parties rely on a document which is not duly stamped, the Court cannot look into such a document for any purpose.

13. Sri Prabhakar Sripada, Learned counsel, would submit that the total amount paid by the petitioners in these batch of Company Petitions, as consideration for construction of the apartments, was nearly Rs. 7.75 crores; the respondent, having admitted the existence of the agreements of sale in their counter-affidavit, cannot now turn around and contend that the said agreement of sale is inadmissible in evidence as it is not properly stamped or registered; this objection is an afterthought and a mere wrangle to avoid payment of the debt due; as execution of the agreements of sale is admitted, there is no need to prove its contents; the respondent cannot be permitted to resile from its admission made in the initial counter affidavit; without filing a petition for amending the pleadings, merely filing an additional counter does not meet the requirements of law; the respondent has received payments in accordance with the payment schedule contained in the agreement of sale, and has referred the matter for arbitration in terms of clause No. 14 thereof; as such the respondent is not entitled to take the plea of insufficiency of stamp duty or non-registration, more so as it had acted upon the agreement of sale much prior to the filing of these winding up petitions; and the original copy of the agreement of sale has been handed over to State Bank of India from whom the petitioner availed a housing loan.

14. I find considerable force in the submission of Sri S. Niranjan Reddy, Learned Counsel, that an agreement of sale is required to be stamped with the amount specified in Article 6B of Schedule 1A of the Indian Stamp Act, 1899 i.e., at 1%; the agreement of sale, in the present case, is stamped only with Rs. 100/-which is insufficient; and it requires registration in terms of Section 17(1)(g) of the Registration Act.

15. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon. (*Hindustan Steel Ltd. v. M/s. Dilip Construction Co.* AIR 1969 SC 1238). Unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument. *SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd., Smt. Burra Anitha Vs. Elagari Mallavva, Elagariyadavva and Elagari Chandraiah ; Telugu Kishna Mohan and Another Vs. Smt. Boggula Padmavathi and Others, Avinash Kumar Chauhan Vs. Vijay Krishna Mishra,*

16. The original agreement of sale has not been placed on record, and reliance is placed by the petitioner on a photostat copy thereof. A party can only be allowed to rely on the document which is an instrument within the meaning of Section 2(14). Hariom Agrawal Vs. Prakash Chand Malviya, A photostat copy of a document would not fall within the meaning of "instrument", and cannot be received as evidence even on condition of payment of stamp duty and penalty. (Sunkara Surya Prakash Rao v. Madireddi Narasimha Rao 2009(3) ALD 388).

17. A document required to be registered, if unregistered, is not admissible in evidence. Such unregistered document can, however, be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act. K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd., A purpose would be collateral if it is other than the one which the document itself serves. S. Kaladevi Vs. V.R. Somasundaram and Others, . If an objection is taken to the admissibility of a document on the ground that it is not stamped and registered, the Court must first decide both the questions. (Nori srirama Sastri Vs. Nori Lakshmiddevamma and Others ; Shyamal Kumar Roy Vs. Sushil Kumar Agarwal,

18. It cannot, however, be lost sight of that the respondent - company has not only admitted existence of the agreement of sale but has also relied on, and has acted in terms of, certain clauses thereof. In its reply notice dated 13.7.2010 the respondent stated that, along with land owners, they had entered into an agreement of sale with the petitioner with respect of the undivided share of land admeasuring 105 sq. yards; and the petitioner, by entering into the said agreement of sale with the respondent along with land owners, had accepted the terms and conditions mentioned therein. Again in its reply notice dated 16.8.2010 the respondent reiterated the aforesaid admission.

19. In the counter affidavit filed to the company petition the respondent stated that the petitioner was misinterpreting and misunderstanding the agreed terms and conditions of the agreement of sale, and had purported to unilaterally and arbitrarily cancel/terminate it by a request for cancellation; they were seeking refund of money, by their notices; the respondent had replied thereto stating that all claims, disputes and all issues pertaining to the agreement were referred to arbitration; and the agreement of sale provided for the disputes between the parties to be referred to arbitration. The respondent further stated that the relationship between the petitioner and the respondent was governed by the agreement of sale, and the crux of the dispute between the parties was whether the petitioners were entitled to terminate and rescind the agreement of sale.

20. It is evident, therefore, that the respondent has not only admitted that an agreement of sale was entered into between them and the petitioners, but have also relied on certain clauses of the agreement including the arbitration clause. u/ s 58 of the Indian Evidence Act, admitted facts need not be proved. Admissions, if true and clear, are by far the best proof of the facts admitted. (Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others, Vice-Chairman, Kendriya Vidyalaya Sangathan v. Girdharilal Yadav (2004) 6 SCC 325). The

petitioner/respondent, at a much later stage, cannot be permitted to take a stand which is contrary to or inconsistent with the original pleadings nor can they be permitted to resile from the admissions contained therein. (Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and Others, Heeralal Vs. Kalyan Mal and Others, Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., Jaswant Kaur and Another Vs. Subhash Paliwal and Others, Smt. Naseem Bano Vs. State of U.P. and others,). Parties cannot depart from the factual position which they have admitted. (Rajendra Pratap Singh Vs. Rameshwar Prasad,

21. In Alimane Sahiba Vs. Kolisetti Subbarayudu, the Madras High Court held that, having regard to the provisions of Section 58 of the Evidence Act, facts admitted need not be proved and, therefore, the circumstance that the promissory note was not admissible in evidence was immaterial; and the whole discussion, turning on the inadmissibility of the promissory note, on the ground that it was not duly stamped, was quite irrelevant in the circumstances having regard to the defendant's admission regarding execution of the promissory note.

22. In Ponnuswami Chettiar Vs. Kailasam Chettiar, the Madras High Court held:-

.....It is not necessary for me to decide as to the exact nature of these two documents to determine whether they are admissible in evidence. Assuming that these two documents should not have been legally admitted in evidence, nevertheless it is contended for the petitioner by Mr. M.S. Vidhyanatha Aiyar, and I agree with his contention, that as the defendant had admitted the execution of the documents and had only pleaded a substitution of liability by the execution of another promissory note and a partial discharge towards it there was no necessity for the plaintiff to adduce proof of his claim by seeking to get the two documents admitted in evidence. In other words the plaintiff will be entitled to a decree on the failure of the defendant to make out the plea set up by him in defence. The contention of the petitioner is supported by the observations of Ananthakrishna Aiyar J. in 63 MLJ 303 at p. 308 with which I respectfully agree. The learned Judge therein points out after referring to the provisions of S. 58, Evidence Act, that when the fact of an execution of a document is admitted it need not be proved and this would be so even when the document in question is not admissible on account of any provision of the Stamp Act.....

(emphasis supplied)

23. Both the judgments of the Madras High Court in Alimane Sahiba Vs. Kolisetti Subbarayudu, , and Ponnuswami Chettiar Vs. Kailasam Chettiar, are binding on this Court, as has been laid down by the Full bench of this Court in M. Subbarayudu and Others Vs. The State,

24. The respondent has admitted having received large sums of money from the petitioners. (that the petitioner in C.P. No. 172 of 2010 had paid Rs. 76,47,122/- to the respondent is evident from the petitioner's account in the books of accounts of the respondent). It is not even the case of the respondent that the

petitioners had donated such large sums of money to them. As such the amount paid by the petitioners has, necessarily, to be returned to them. In effect, as the aforesaid amounts paid by the petitioners has to be refunded to them, it would constitute a "debt due" to them from the respondent.

(b). ALTERNATIVE REMEDY:

25. Sri S. Niranjan Reddy, Learned Counsel, would submit that where arbitration proceedings are pending between the parties, to determine the liability of the respondent, a winding up petition cannot be maintained since the debt has to crystallize for maintaining a winding up petition and, pending arbitration proceedings, the liability does not crystallize.

26. Section 433 of the Companies Act provides for six circumstances in which a company may be wound up by the Court. The sixth clause i.e., Section 433(f), namely "just and equitable", is not to be read as ejusdem generis with the preceding five clauses. Section 433 (f) has to be read with Section 443 (2) of the Act. *Hind Overseas Private Limited Vs. Raghunath Prasad Jhunhunwalla and Another*, A contrast between the provisions under clause (a) to (e) of Section 433 of the Act on the one hand, and clause (f) thereof on the other, makes it abundantly clear that the Statute itself created a bar u/s 443(2) of the Act from entertaining a winding-up petition on "just and equitable" grounds when an alternative remedy is available. (*K. Mohan Babu v. Heritage Foods India Ltd., Hyd. (2001) 5 ALD 80; P Sridevi W/o P Murali Krishna v. Cherishma Housing Private Ltd. 2008 LAP 340*). The legislature has consciously chosen not to extend the requirement of compliance with Section 443(2) to any of the other circumstances in clause (a) to (e) of Section 433. Extending the requirement of Section 443(2) also to a petition u/s 433(e) of the Companies Act would either require deletion of the words "just and equitable" or adding the words "unable to pay its debts" in Section 443(2) of the Act. It is not a sound principle of construction to brush aside words in a statute, as being inapposite surplussage, if they can have a proper application in circumstances conceivable within the contemplation of the statute. *Gurudevdatla VKSSS Maryadit and Others Vs. State of Maharashtra and Others, , Manohar Lal Vs. Vinesh Anand and Others*,

27. It is left to the discretion of the Court whether a petition for winding up should be entertained or not despite the fact that an alternative remedy is available, and has been availed by the petitioner. (*UTI Bank Ltd. v. Shree Rama Multitech Ltd. (2005) 126 CC 15 (Guj)*). Existence of an alternate remedy, in terms of the arbitration clause, does not necessitate refusal by this Court to exercise its discretionary jurisdiction u/s 433(e) of the Companies Act. Proceedings u/s 433/434 read with Section 439 of the Companies Act are in a completely different jurisdiction than the one under which the remedy or relief can be sought by way of arbitration. It does not appear to be the intention of the Legislature that the power of winding up, available to the High Court, can be conferred on an arbitrator. The petition for winding-up cannot be treated as one for recovery of debt from the Company. (*William Jacks & Company (India)*

Limited v. Saraswati Industrial Syndicate Limited 1986 (59) CC 876 (P&H HC); Hind Mercantile Corporation P. Ltd. v. J.H. Rayner & Co. Ltd. 1971 (41) CC 548, (Mad. HC); Tirlok Chand Jain v. Swastika Strips (p.) Ltd. 1991 (70) CC 197 (P&H)).

28. The jurisdiction of the Company Court will not be taken away by the mere existence of an arbitration clause. (Maruti Ltd. (In Liquidation) v. B.G. Shirke and Co. Pvt. Ltd., (1981) 51 Comp Cas 11 (P&H); Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., The power to order winding up of a company is conferred on the Court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., Everest Holding Limited v. Shyam Kumar Shrivastava (2008) 16 SCC 774; Prime Century City Developments Pvt. Ltd. v. Ansal Buildwell Ltd. 2003 (113) CC 68 (Del)). Even if an arbitration clause subsists between the parties, the High Court would have unfettered powers to entertain winding up petitions. (Madhya Pradesh Iron & Steel v. G.B. Springs (P) Ltd., 2003 (117) CC 327). There is no conflict between the statutory relief of winding up and of the contractual right to have disputes settled by arbitration. Once a bonafide defence is shown to exist, arbitration will be the efficacious and proper remedy. Where, however, the defence is malafide or a moonshine, an arbitrable dispute would not exist and the company judge would have the power to pass appropriate orders. (G.B. Springs (P) Ltd., 2003 (117) CC 327; Everest Holding Limited (2008) 16 SCC 774).

29. Reliance placed, on behalf of the respondent, on the judgment of the Bombay High Court in Manipal Finance Corporation Ltd. Vs. CRC Carrier Ltd., , and on the judgment of the Madras High Court in Chettinadu Constructions Vs. Muthukumarasamy Textiles Ltd., , is therefore misplaced. Both the preliminary objections, raised on behalf of the respondent, necessitate rejection.

III. ADMISSION OF THE PETITION FOR WINDING UP - SCOPE OF ENQUIRY:

30. While elaborate submissions have been made, and several contentions urged on the merits of the case by Counsel on either side, it must be borne in mind that the winding up petitions, in this batch, have not even been admitted. It is, therefore, necessary at the outset to examine the scope of an enquiry by a Company Court in deciding whether or not these company petitions should be admitted.

31. It is for the Court to decide as to whether a strong prima facie case on facts is made out for admission of a winding up petition. (ICDS Limited v. Kamar Trading Co. (P) Ltd., (2005) 125 CC 849 (MP)). In appropriate cases the Company Judge may, before a petition is admitted and advertised, hold a summary enquiry to ascertain whether a prima facie case is made out by the petitioning creditor. At the stage of summary enquiry the Court is called upon to satisfy itself that it is a case for admission and advertisement and nothing more. Before admitting and advertising a petition for winding-up the Company Court, in

a summary enquiry, after hearing the petitioning-creditor and the Company, should record its prima facie findings on (i) Whether the petitioning-creditor is a creditor to whom the Company owes an ascertained sum of money or substantially ascertained sum of money; (ii) Whether the said debt is within limitation; (iii) Whether the defence of the Company is valid and bonafide or whether it is a mere moonshine; (iv) whether, from the material on record, a presumption arises that the Company is unable to pay its debts as contemplated under S. 434 (1) (a) or (b) as the case may be; or (v) Whether, from the material on record, the Court is prima facie satisfied that the Company is commercially insolvent as contemplated under S. 434 (1) (c). The Court takes only the prima facie view. (Goetze India Ltd. v. Pure Drinks (New Delhi) Ltd., (1994) 80 Comp Cas 340; Reliance Infocomm Ltd. v. Sheetal Refineries Pvt. Ltd., (2008) 142 Comp. Cas. 170; Airwings (P). Ltd. v. Viktoria Air Cargo GmbH Langer Kornweg AIR 1995 Kar 69; American Express Bank Ltd. Vs. Core Health Care Ltd., . When the grounds on which a winding up order can be refused, while considering the petition after admission, appear to exist from the material already before the court, it would be a sound exercise of discretion not to admit the petition American Express Bank Ltd. Vs. Core Health Care Ltd.,) In Re: Rishi Enterprises,

32. The analogy derived from the principles underlying Order 37 of CPC is apposite and is an acceptable test which ought to be employed in winding up proceedings. If the Company Court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction, it would have granted unconditional leave to defend, it must dismiss the winding up petition. (Major N. Radhakrishnan (Retd.) v. ACME D?cor India Pvt. Limited (2005) 123 CC 127 (Del); German Homeopathic Distributors Pvt. Ltd. v. Deutsche Homeopathic Union DHU (2009) 161 DLT 703; S.M. Patel Iron Traders Private Limited Vs. Sugam Construction Private Ltd.,). If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend. If the defendant has no defence, or if the defence is a sham or is illusory or is practically a moonshine, the defendant is not entitled to leave to defend. (M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank Ltd., Santosh Kumar Vs. Bhai Mool Singh, Milkhiram (India) Private Ltd. and Others Vs. Chamanlal Bros., and Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, . Summary judgments under Order 37 should not be granted where there is a serious conflict as to a matter of fact or where any difficulty on issues as to law arises. (AIR 1990 2218 (SC)

IV. AGREEMENT OF SALE: ITS TERMS AND CONDITIONS:

33. Bearing in mind the aforesaid principles, let us now examine the merits of the case. The petitioner in C.P. No. 172 of 2010 was allotted a flat by the respondent in an apartment known as "Nainital" Type 4, Apartment No. 12G, with a built up area of 1889 square feet plus one car parking plus garden deck

area of 394 square feet; the sale consideration was Rs. 77,75,836/-; the agreement required Rs. 73,87,043/- to be paid by November, 2008; the balance amount of Rs. 3,88,793/- was to be paid on the date of handing over of the apartment; the petitioner paid Rs. 76,47,122/-; and, thereafter, by December, 2008 the entire construction activity came to a stand still. The petitioner, in C.P. No. 172 of 2010, terminated the agreement by notice dated 27.06.2010, and had called upon the respondent to repay the advance amount of Rs. 76,47,122/-. Subsequently, by way of the notice dated 25.07.2010, the petitioner called upon the respondent to pay Rs. 76,47,122/- failing which he would initiate action for winding up. As such the requirement of making a demand, u/s 434(1)(a), has been complied with. However it is only if the petitioner is held to be a creditor, to whom the respondent is indebted for a sum exceeding Rs. 500/-, and the respondent has "neglected to pay" the said sum within three weeks of demand would the legal fiction u/s 434(1)(a) apply necessitating this Court to deem that the respondent-company is unable to pay its debts.

34. The principles laid down in Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, ; and Vijay Industries Vs. NATL Technologies Limited, , are that, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 434(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play. (IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., M/s. P.G. Bhatia & Co. v. Softsule Private Ltd., (1977) 47 Comp Cas 438; Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, . To raise the presumption of inability to pay, it must be shown that the company "neglected to pay" i.e., omitted to pay without reasonable cause, and that a condition of insolvency in the commercial sense exists. (In re Federal Chemical Works Ltd., 1964 (34) CC 963 (All), Kanchanaganga Chemical Industries v. Mysore Chip Boards Ltd (1998) 91 Comp Cas 646; Harinagar Sugar Mills Ltd. and Another Vs. State of Bihar and Others, If the demand is not met, and an application for liquidation is filed in reliance of the presumption u/s 434(1) (a) that the company is unable to pay its debts, the law should take its own course and the company, will have an opportunity on the liquidation application to rebut that presumption. IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., What is envisaged u/s 433(e) is not inability to pay a particular debt, but inability of the company to pay its debts. Section 434 only provides a rule of evidence by providing circumstances in which it can be presumed that the company is unable to pay its debts. With the aid of the presumption the court may be satisfied that the company is unable to meet the current liabilities in the commercial sense which includes the debt due to the petitioner as well as other debts. But the presumption is a rebuttable one. The presumption may be rebutted on existing material. What evidence is sufficient, depends on the facts and circumstances of the case. American Express Bank Ltd. Vs. Core Health Care Ltd.,

35. While the petitioners have raised a demand by issuing the statutory notice u/s 434(1)(a) and as their claim for being paid the money due, consequent upon termination of the agreement, has not been satisfied by the respondent, it is necessary to examine whether failure on the part of the respondent to pay the sum claimed would amount to "neglect to pay", and the disputes raised by them, regarding non-payment of the amounts claimed by the petitioner, are bonafide or not, for it is only if the respondent is held to have neglected to pay the debt due, and their defence is held to be a mere moonshine, can the ingredients of Section 433(e) read with Section 434(1)(a) be said to have been satisfied. It is convenient to classify the rival contentions, elaborately urged by Counsel on either side, into different sub-heads.

(i). BREACH OF CONTRACT: WOULD A WINDING UP PETITION LIE?

36. Sri S. Niranjan Reddy, Learned Counsel, would submit that, in order to maintain a winding up petition, crystallization of the debt/liability is an essential ingredient for which there must be an adjudication of the petitioner's claim; such an adjudication cannot be made in a company petition as a claim for damages cannot be construed as a debt; the petitioners claims are seriously disputed; a claim for payment of compensation must, therefore, be instituted for realization of the amount; it would be open to the defendant in such an action to plead and demonstrate that there was no breach, or that the breach was beyond his control or was rendered impossible on account of factors beyond his control; if an entire contract can be frustrated, it is equally permissible that a part of the contract can be termed as frustrated; it is the discretion of the fora to require the deficiency to be removed and/or provide for the penalty for delay and/or direct cancellation of the contract; and it cannot be presumed that the petitioners would automatically be entitled for compensation for laying the basis for instituting a company petition.

37. "Damages" is money claimed by, or ordered to be paid to, a person as compensation for loss or injury. It merely remains a claim till adjudication by a Court, and becomes a "debt" when a Court awards it. In regard to a claim for damages, (whether liquidated or unliquidated), there is no "existing obligation" to pay any amount. A claim for damages becomes a "debt due", not when the loss is quantified by the party complaining of the breach, but when a competent Court holds, on enquiry, that the person, against whom the claim for damages is made, has committed breach and has incurred a pecuniary liability towards the party complaining of the breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the Court. Liability to pay damages arises only when a party is found to have committed breach. Ascertainment of the amount awardable as damages is only consequential. (Greenhills Exports (Private) Limited, Mangalore v. Coffee Board, Bangalore (2001) 106 CC 391 (Kar) (DB); Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros., ; Mirza Javed Murtaza Vs. U.P. Financial Corporation and Another, ; SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd.,

38. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim, and Section 6(e) of the Transfer of Property Act provides that a mere right to sue for damages cannot be transferred. A claim for damages for breach of contract is not a claim for a sum presently due and payable, and does not become a debt even after a verdict is returned in favour of the plaintiff till the judgment is actually delivered. Union of India (UOI) Vs. Raman Iron Foundry, ; Javed Sheikh v. Taher Mallik AIR 1941 Cal. 629; S. Milkha Singh v. N.K. Gopala Krishna Mudaliar AIR 1956 Punj. 174; Iron and Hardware (India) Co. Vs. Firm Shamlal and Bros., Jones v. Thompson (1858) 27 LJQB 234; O'Driscoll v. Manchester Insurance Committee (1915) 3 KB 499). Adjudication upon the issue relating to a breach of a condition of the contract, and adjudication of assessing damages arising out of the breach, are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, ; J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, While there may be a difference in regard to ascertainment of loss or the quantum of damages awardable, the basic requirement for both is a finding by a competent Court (or Arbitrator) that the person against whom the claim is made has committed breach and has incurred a pecuniary liability. (Greenhills Exports (Private) Limited, Mangalore (2001) 106 CC 391 (Kar) Union of India (UOI) Vs. Raman Iron Foundry, Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.,

39. In a petition u/s 433(e), the Court should not decide claims which are disputed bonafide nor quantify the loss suffered by the petitioner and award damages. (Greenhills Exports (Private) Limited, Mangalore (2001) 106 CC 391 (Kar) (DB) Deepak Insulated Cable Corporation Ltd. Vs. Union of India (UOI) and Others, ; Sardar Singh Kohli v. Ahuja Properties, Financiers and Promoters (Private) Limited (1994)13 Corp. L.A. 66 (Del); Gleason Works Vs. Punjab Tractors Ltd., Newfinds (India) Vs. Vorion Chemicals and Distilleries Ltd., i and M/s. Multimetals Limited Vs. M/s. Suryatronics Privated Limited, . Where the amount claimed is damages, for breach of a contract, it is not a "debt" due and therefore a company petition will not be maintainable. Claims for damages or compensation has to be assessed by a Court before it becomes due and payable, (Greenhills Exports (Private) Limited, Mangalore (2001) 106 CC 391 (Kar) (DB); Deepak Insulated Cable Corporation Ltd. Vs. Union of India (UOI) and Others, and damages become payable only when they are crystallized upon adjudication. Until and unless an adjudication takes place with a resultant decree for damages, there is no debt due and payable. E-City Media Private Limited a Private Limited Company Vs. Sadhrta Retail Limited a Public Limited Company, SMS Tea Estates Pvt. Ltd.5; Nagarjuna Constructions Co. Ltd. v. Sharat Industries Ltd., (2001) 104 CC 602)

40. Section 2(e) of the Indian Contract Act defines every set of promises forming the consideration for each of the agreements to be an "agreement". Clause 2(h)

defines "Contract" to be an agreement enforceable by law. Section 73 of the Contract Act stipulates that, when a contract has been broken, the party who suffers such breach is entitled to receive, from the party who was broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 75 stipulates that the person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.

41. Black's Law Dictionary Sixth Edition defines "Breach of contract" as failure, without legal excuse, to perform any promise which forms the whole or a part of a contract; prevention or hindrance by a party to the contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favour of the other party or the discharge of a duty by him; and unequivocal, distinct and absolute refusal to perform the agreement.

42. While a claim for damages, arising out of a breach of contract, must be adjudicated by a competent civil court or an arbitrator before it crystallizes into a "debt", the submission that a few High Court have held that the remedy for breach of contract is only by way of a civil suit, and a winding up petition does not lie in such cases, does not merit acceptance. Stray observations, to that effect, in judgments should not be read out of context. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of a Statute, and that too taken out of their context. The observations must be read in the context in which they appear to have been stated. Judges interpret words of statutes, their words are not to be interpreted as statutes. (Bharat Petroleum Corporation Ltd., (2004) 120 CC 333 (Bom Ashwani Kumar Singh Vs. U.P. Public Service Commission and Others, ; Union of India (UOI) Vs. Amrit Lal Manchanda and Another, Sri Konaseema Co-operative Central Bank Ltd., Amalapuram and another Vs. N. Seetharama Raju,

43. It is difficult to accept the submission that, in every case of a breach of contract, a winding up petition would not lie. While it is open to the person, who has suffered by the breach, to file a suit for damages, the said person is also entitled to invoke the jurisdiction of this Court u/s 433 read with 434 of the Companies Act. While a civil suit is filed for recovery of money, a company petition is filed for winding up on the ground that the respondent company is unable to pay its debts. Proceedings for winding up are not proceedings for recovery of any amount. (Tirlok Chand Jain 1991 (70) CC 197 (P&H); William Jacks & Company (India) Limited 1986 (59) CC 876 (P&H); Salig Ram v. New Suraj Financiers & Chit Fund Company Judgment of P&H High Court in C.A. No. 8 of 1979 in C.P. No. 147 of 1978 dt. 18.7.1979). It is not an invariable rule of law that, where a suit for the recovery of a debt on the same cause of action is pending in a civil court, a petition for winding up does not lie. (Fibex Inc. v. A.B.K. Publications Ltd., (1999) 97 Company Cases 947 (A.P)). Mere pendency of

a suit by itself cannot be put up as a defence for winding up. (Goetze India Ltd., (1994) 80 Comp Cas 340). It is evident that the Legislature contemplated the simultaneous existence and continuance of a winding-up petition as well as a suit for the recovery of money on the same cause of action. No provision in the Companies Act has been shown mandating that, on the filing of a suit for recovery of moneys due, the winding up petition must be dismissed. (G.B. Springs (P) Ltd. 2003(117) CC 327).

44. A suit for recovery of money is essentially a suit between the parties where no third party can seek any indulgence or impleadment. In winding up proceedings, the lis is not merely between the petitioning party and the company sought to be wound up. Once the petition is admitted the creditors, contributories, shareholders, etc., seek redress in the proceedings, and even oppose the winding up. Sometimes the relief for winding up is denied when it is against public interest. (Coromandel International Ltd. v. Chemcel Biotech Ltd., (2011) 4 Comp. Law. J 279 (AP)). Section 433 of the Companies Act is not intended to supplant the jurisdiction of a Civil Court to adjudicate a money suit. (Viral Filaments Ltd. v. Indusind Bank Limited 2003 (113) CC 85 (Bom)).

45. In Indo Alusys Industries Ltd v. Assotech Contracts (India) Ltd., 2009 (11) DRJ 384 the Delhi High Court, following its earlier judgment in Rishi Pal Gupta v. S.J. Knitting and Rishi Pal Gupta Vs. S.J. Knitting and Finishing Mills Pvt. Ltd., and in Karam Chand Thapar and Brothers (Coal) Sales Ltd. Vs. Acme Paper Ltd., the Delhi Court, following the judgment of the Patna High Court in Central Bank of India v. Sukhani Mining And Engineering Industries Pvt. Ltd., (1987) (47) Company Cases 1, held that, if the Legislature had intended that, on account of the fact that a suit or proceeding had been filed in another Court, the court in seisin of the winding up application should stay the winding up proceeding on that ground alone, there would have been a provision to that effect in the Companies Act.

46. Default of the borrower in repaying the instalments of a loan, due to a bank or a financial institution, is a breach of contract. Likewise failure on the part of the company to pay its suppliers for the goods supplied to, and utilized by, them would amount to a breach of contract by them. While a claim for damages, arising out of a breach of contract, can only be adjudicated by a competent Civil Court or an arbitrator, and the damages claimed would not become a debt till the judgment is delivered or an award is passed, it cannot be said that even the principal amount due by the company to the bank or financial institution would not constitute a "debt", and disentitle the bank/financial institution from filing a petition for its winding up. A "debt", u/s 433(e) of the Companies Act, is a determined or a definite sum of money payable immediately or at a future date. The word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. The former is a debt owing, and the latter is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in praesenti or, in other words, which is presently

payable. Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, People v. Arguello [1869] 37 Calif 524; Union of India (UOI) Vs. Raman Iron Foundry, ; Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, The concept of a "debt" for a sum due is the same thing as a debt due. There must be debitum in praesenti; solvendum may be in praesenti or in futuro -- that is immaterial. Union of India (UOI) Vs. Raman Iron Foundry, Web v. Stenton [1988] 11 QBD 518). A debt is property, and is treated as property under the Transfer of Property Act which calls it an "actionable claim" The Delhi Cloth and General Mills Co. Ltd. Vs. Harnam Singh and Others,

47. If failure to pay the loan instalment by a company to a bank/financial institution is required to be adjudicated only in a civil suit or before the arbitrator, and as not to be examined by this Court in winding up proceedings, it would mean that, despite a breach of contract by the borrower -company in not adhering to the repayment schedule under the loan agreement, and even if the amount due to the bank/financial institution is shown by the company to be a liability in its Balance Sheet, the bank/financial institution cannot file a petition for winding up. To so hold would render Section 433(e) and Section 434 of the Companies Act redundant, and inapposite surplusage, for there can hardly be a case where a "debt due" does not result from a breach of contract. Any interpretation which results either in addition or deletion of words, or as rendering any statutory provision redundant, must be avoided Banarasi Devi Vs. Income Tax Officer, Calcutta, Attorney-General v. Carlton Bank (1899)2 QB 158; V. Narasimha Rao v. The Government of Andhra Pradesh Judgment in W.P. No. 25583 of 2010 dated: 31.01.2012). If there is no bonafide dispute with regards the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company. Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd. (1990)3 Comp. LJ 322).

48. In cases where the petitioners are entitled for repayment of their principal, consequent upon termination of the agreement by them because of its breach by the respondent, it cannot be said that their remedy is only by way of a civil suit and that a winding up petition does not lie. This contention, urged on behalf of the respondent, necessitates rejection.

(ii). FORCE MAJEURE EVENTS:

49. Sri S. Niranjan Reddy, Learned Counsel, would submit that the delay in completion of the project was only on account of force majeure events which were and are beyond the control of the respondent; it is only on a wholly incorrect understanding of the respondent company's perceived association with Sri B. Ramalinga Raju and Satyam Computer Services Ltd, and on the basis of misinformation disseminated by the electronic and press media, had the financial institutions, which had committed to funding the project, resiled and withdrawn from the project causing a mismatch of funds which affected its timely completion; even before the unrelated and independent status of the respondent

could be established, various investigations and proceedings were incorrectly instituted against it; various attachments and court orders had also delayed the project; where an agreement contains a "force majeure" clause, the intention is to save the performing party from the consequences of anything over which he has no control; and the requirement of "force majeure" are : (a) it must proceed from a cause not brought about by the defaulting party's default; (b) the cause must be inevitable and unforeseeable; and (c) the cause must make execution of the contract wholly impossible.

50. On the other hand Sri Prabhakar Sripada, Learned Counsel, would submit that the land owning companies had no role to play except providing land; the petitioner, exercising his rights under clause 9(b) and (e) of the agreement, had issued legal notice dated 27.06.2010 expressing his intention to terminate the agreement of sale citing various grounds for cancellation, including lack of progress in construction; a reply notice dated 13.07.2010 was issued by the respondent admitting that acute shortage of funds had paralysed development of the Hill County Project; no details of the alleged investors and financial institutions, which the respondent claimed had earlier committed to funding the project and had later resiled and withdrawn therefrom, were mentioned in the notice; while blame was sought to be laid on various attachments and court orders for the delay in completion of the project, no details of such Court orders or attachment orders were specified; the names of the erstwhile Chairman of the respondent company Sri B. Ramaraju, S/o Sri B. Ramalingaraju and his brother Sri B. Tejaraju, (who are also the shareholders of the respondent company), were shown in the provisional attachment order dated 18.08.2009 passed by the Director of Enforcement in terms of the provisions of the Prevention of Money Laundering Act, as persons who had received "proceeds of the crime" of Rs. 28,02,750/- and Rs. 28,52,750/- respectively; the said provisional attachment order was upheld by this Court by its order dated 04.03.2011 (B. Ramaraju v. Union of India 2011(4) ALD 383); it is not even the case of the respondent that they had notified the petitioner of the "force majeure" events as stipulated under clause 6(ix); no document to this effect has been placed on record; the Balance Sheet of the respondent showed Rs. 3,25,86,426/- as having been set apart as contractual penalty to customers as stipulated under clause 7(d); this was itself proof that the respondent was conscious that it had incurred liability to its customers on account of its failure to construct and deliver the apartments within the time stipulated in the contract; this provision was increased to Rs. 5,51,82,730/- in the next year; and a provision, being made in the account books, for penalty to be paid to the customers for the delay in completion of construction, and delivery of flats, was itself proof that the conditions of "force majeure" were not attracted.

51. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is a term of wider import. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major", are included in "force majeure". Where reference is made to "force

majeure", the intention is to save the performing party from the consequences of anything over which he has no control *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.*, The expression "force majeure clause" is defined in "Chitty on contracts" as normally used to describe a contractual term by which one (or both) of the parties is excused from performance of the contract, in whole or in part, or is entitled to suspend performance or to claim an extension of time for performance, on the happening of a specified event or events beyond his control.

52. Before examining the question whether the reasons furnished by the respondent-company constitute force majeure events, it is useful to note that the doctrine of frustration of contract is an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and, hence, comes within the purview of S. 56 of the Indian Contract Act. S. 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties *Boothalinga Agencies Vs. V.T.C. Poriaswami Nadar, Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another*, . The word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do *Ganga Retreat and Towers Ltd. and Another Vs. State of Rajasthan and Others, Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another*,

53. The agreement of sale, in C.P. No. 172 of 2010, was made and executed on 05.09.2007 between fourteen land owning companies and the respondent company-developer on the one hand, and the petitioner on the other. Clause 3 of the said agreement prescribes the payment terms. Clause 6(ix) stipulates that the land owners and the developer shall complete construction within the stipulated time mentioned in the agreement unless suffered by reasons of "force majeure", and any event of "force majeure" shall be notified by the land owners and the developers to the purchasers. Clause 7 of the agreement of sale relates to construction and, under sub-clause (a) thereof, the developer and land owners assured that they would complete construction of the schedule apartment within twenty months from the date of execution of the agreement subject to the availability of steel and other construction material, and/or any other causes beyond the control of the developer. Sub-clause (b) of Clause 7 stipulates that the developer shall have a further grace period of three months. Clause 7(c) entitles the developer to further periods if the construction is delayed due to natural calamities like floods, wars, earthquake, fire or stay of construction by any Court or authority or any other emergencies including riots and any terrorist activities, which are beyond the normal control of the first party. Clause 7(d) stipulates that, in the event of further delay beyond the time stipulated under clause 7(a), 7(b) and 7(c), the developer and the land owners shall pay the

purchaser Rs. 5/- per square feet of the contracted built up area for every month of delay upto a maximum of eight months. Clause 7(f) casts a responsibility on the developer to complete construction of the apartment and stipulates that any construction in the Hill County shall be solely arranged by the Developer. Clause 9 deals with termination of the agreement. Clause 9(a) provides for termination of the agreement by the developer (respondent herein). Clause 9(b) enables the purchaser to terminate the agreement upon the developer failing to construct the property within the period stipulated in the agreement, and the given grace period and the additional eight months penalty period, as provided in clause 7(a), 7(b) and 7(c) if the developer gave, prior to the expiry of the grace period of eight months, a revised schedule of construction completion or assured that construction would be completed by a new contractor of repute or a combination of both. The purchaser is obligated to accept the same provided the total consideration is not increased. Clause 9(c) stipulates that the termination shall be by a written notice delivered to the opposite party in the manner set out in the agreement. Clause 9(e) provides that, if termination of the agreement is by the purchaser due to the developer's default, the developer and the land owners shall pay back the amounts received from the purchaser within thirty days of cancellation and, if payment is made after the thirtieth day, the developer and the land owners shall pay interest of ten percent per annum beyond the thirtieth day upto the date of actual payment. Clause 13(a) requires all notices, to be given under the agreement by any party to the other, to be in writing, in English language and delivered in person or by registered post addressed to the concerned party at the address set out in the said clause. The address of both the land owners and the developer is the address of the respondent company. Clause 14(a) provides that, in the event of any dispute between the parties in connection with the validity, interpretation, implementation or breach of any provision of the agreement or any other disputes including the question whether there was a proper termination of the agreement, the dispute should be resolved through arbitration. Schedule 2 of the agreement stipulates the payment schedule, and Schedule 4 the properties specifications.

54. As the agreement was entered into on 05.09.2007, the twenty month period stipulated in Clause 7(a) expired on 05.05.2009. The grace period of three months, as stipulated in Clause 7(b), expired by 5th August, 2009. The eight month penalty period, as stipulated in clause 7(d) of the agreement, also expired by 5th April, 2010, as it is not in dispute that the respondent did not give a revised schedule of construction completion to the petitioners before expiry of the aforesaid eight month period. The petitioner terminated the agreement by their letter dated 27.6.2010, only after expiry of the aforementioned periods.

55. It is no doubt true that the twenty month period, stipulated in Clause 7(a), is subject to other causes beyond the control of the developer and, under sub-clause (c), the developer is entitled for a further period if the delay in construction was because of natural calamities or any other emergencies which were beyond the normal control of the respondent-company. As noted

hereinabove, under clause 6(ix), an obligation is cast on the developers to complete construction within a stipulated time frame except for reasons of "force majeure" which event is required to be notified by them to the purchasers. It is not even the case of the respondent that, in terms of clause 6(ix), they had notified the petitioners of any "force majeure events" prior to the purchasers having terminated the agreement.

56. The instances of "force majeure", as stated in the counter affidavit, are (1) the "perceived association" of the respondent with Sri B. Ramalingaraju and Satyam Computer Service Limited, which resulted in investigation and proceedings being incorrectly instituted against the respondent; and (2) financial institutions and customers, who had committed to funding the project, had resiled and withdrawn from the Hill County Project. Except for these bald and vague pleas, no material has been placed on record to show which banks/financial institutions or customers had allegedly withdrawn from the project and when had they withdrawn from funding the project, or details of the vendors and when they had stopped supplies. The provisional attachment order dated 18.08.2009 did not result in attachment of any of the properties of the respondent or of the 14 land owning companies (all of whom are subsidiaries of the respondent) and, therefore, the provisional attachment order cannot be cited as a ground for non-performance of the contract. The relief sought for in O.P. No. 2339 of 2009 was only for stay of alienation of the property, and an order of status quo was passed on 09.11.2009. However, subsequently, final orders were passed on 12.03.2010 making it clear that the respondent was outside the purview of the injunction order. The orders in O.P. No. 2339 of 2009 did not, therefore, preclude the respondent from continuing construction. Even otherwise it is not in dispute that the construction activity was stopped in the month of December, 2008 itself, much prior to the status quo order of 09.11.2009 and this order cannot, therefore, be pleaded as a "force majeure" event. No judgment has been placed before this Court wherein an attachment order passed by the Income tax department has been held to fall within the ambit of "force majeure" events. The then Chairman of the respondent company Sri B. Rama Raju, and the then director Sri B. Teja Raju, (who were both also the shareholders of the respondent), are the sons of Sri B. Ramalinga Raju, and are said to have been shown in the provisional attachment order dated 18.08.2009 as persons who received "proceeds of the crime". In any event the plea that investigations and proceedings were incorrectly instituted against the respondent on the basis of their perceived association with Satyam Computer Services Ltd is not supported by any evidence on record, and does not merit acceptance in the absence of any Court recording a finding that the investigation and other proceedings were incorrectly instituted. Courts have no power to absolve a party from liability to perform a contract merely because the performance becomes onerous. The expressed covenants in a contract cannot be ignored only on account of unexpected and un contemplated turn of events after the contract. *Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)*, ; *Ganga Retreat and Towers Ltd. and*

Another Vs. State of Rajasthan and Others,

57. The contention that the reasons for not completing the project even till date is because of force majeure events or because of causes beyond the control of the respondent or because of emergencies which were beyond its normal control does not, therefore, merit acceptance.

(iii). IS UNILATERAL CANCELLATION OF THE AGREEMENT PERMISSIBLE AND WHETHER TIME IS OF ESSENCE?

58. Sri S. Niranjana Reddy, Learned Counsel, would submit that the law presupposes that time is not of essence in matters pertaining to immovable property; even if the agreement can be looked into, it discloses that time is not of the essence; where clauses in the agreement, pertaining to imposition of penalty and extension of time are included, it becomes clear that time was never intended by the parties to be of essence, even if it has been expressly stated that time is of essence of the contract; all the provisions of an agreement have to be read together to understand if time was of the essence of the contract; any cancellation of the agreement of sale has to be consented to by all the parties to the agreement; any unilateral cancellation of the agreement by any one party is illegal and not binding on the other; the agreement of sale is a multi-party agreement wherein 14 land owning companies are also parties; the consideration received from the petitioners, towards cost of the land, was adjusted by the respondent with the other parties to the agreement of sale as they were the land owning companies; there has been no breach of the agreement, and the petitioners are not entitled to seek termination of the contract as such termination was improper, and not in accordance with the terms of the contract.

59. The submission that the agreement of sale does not provide for unilateral termination of the contract is misconceived. Clause 9 deals with termination of the agreement and, under sub-clause (a) thereof, the developer and the land owners are entitled to terminate the agreement on the grounds specified therein which includes failure on the part of the purchaser to adhere to the payment schedule contained in Schedule 2 of the agreement, or the purchaser's default to pay interest and the principal within the grace period; and violation of the terms and conditions of the agreement. Clause 9(b) relates to termination of the agreement by the purchaser. Sub-clauses (a) and (b) of Clause 9 confer power on the developer and land owners on the one hand, and on the purchaser on the other respectively, to unilaterally terminate the agreement. Prima facie, on a reading of Clause 9, it is evident that cancellation of the agreement is not required to be consented to by all the parties to the agreement.

60. It is not in dispute that the entire payment made by the petitioners herein was only to the respondent, and not directly to the 14 land owning companies. The submission that the respondent had shared the amount, received from the petitioners, with the land owning companies, (which are all subsidiaries of the respondent company), is an internal arrangement between the respondent and

those companies and, since the petitioners are not parties to such a mutual arrangement, the amount repayable, in terms of Clause 9(e) of the agreement, is required to be paid to the petitioners only by the respondent-company.

61. In the case of immovable property time has, ordinarily, been held not to be of the essence. The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. The parties may expressly provide that time is of the essence of the contract and, where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that completion of the works by a particular date is fundamental. (4th Edn. of HL E 4, 1179 Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, . For instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished, on the expiry of the time provided in the contract, such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra,

62. The question whether or not time was of the essence of the contract would essentially be a question of fact, and the real test is the intention of the parties to be gathered from the terms of the contract. It depends upon the facts and circumstances of each case. Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, . The intention can be ascertained from (i) the express words used in the contract; (ii) the nature of the property which forms the subject-matter of the contract; (iii) the nature of the contract itself; and (iv) the surrounding circumstances. The onus to plead and prove that time was of the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence Smt. Swarnam Ramachandran and Another Vs. Aravacode Chakungal Jayapalan, Pollock & Mulla: Indian Contract & Specific Relief Acts (2001), 12th Edn., p. 1086).

63. It is no doubt true that Clause 7(d) is a penal clause requiring the developer and land owners to pay certain amounts for eight months if construction is delayed beyond the stipulated time. It must, however, be borne in mind that the agreement must be read as a whole and, as clause 9(d) and (e) provide for repayment of the amounts (received earlier) to the purchaser within 30 days of cancellation of the agreement, prima facie clause 7(d) would apply only during the eight months grace period beyond the time stipulated under Clause 7(a), 7(b) and 7(c), and as long as the agreement is in force. While clause 7(d) requires penalty at Rs. 5/- per square feet of the contractual built up area to be paid for every month of delay, upto a maximum of eight months, by the

respondent company to the petitioners herein, and though the Balance Sheet of the respondent company as at 30.03.2010 contains a provision for penalty of Rs. 5,51,82,730/- to be paid to the customers for the delay in completion of construction and delivery of flats, neither has such amounts been paid by the respondent to the petitioners nor have the petitioners claimed that the penal amount was a "debt due". Prima facie clause 7(d) would have not application after the agreement has been terminated. In view of the unambiguous language used in clauses 9(d) and (e), the mere prescription of a penal clause in Clause 7(d), that too only for a period of eight months after expiry of the period stipulated in Clauses 7(a), 7(b) and 7(c), would not disentitle the purchaser from unilaterally canceling the agreement for just and valid reasons and, consequently, the respondent is required thereby to pay back the amount received by them from the purchasers earlier. On a reading of the agreement as a whole it appears, prima facie, that time is of the essence of the contract. The submissions of the Learned Counsel for the respondent, to the contrary, does not merit acceptance.

V. IS THE DISPUTE RAISED BY THE RESPONDENT BONAFIDE:

64. As the contentions aforementioned, as urged on behalf of the respondent, have been rejected, can it be said that there exists a bonafide dispute necessitating rejection of the Company petitions at the stage of admission itself?

65. Sri S. Niranjan Reddy, Learned Counsel, would submit that the petitioners have failed to make out even a prima facie case for the winding up of the respondent; there is no debt owed by the respondent to the petitioner; the respondent cannot, therefore, be said to have neglected to pay its dues; the petitioners had filed winding up petitions only to arm-twist and coerce the respondent to repay the amount paid by the petitioners earlier as sale consideration; there exists a bonafide dispute between the petitioner and the respondent with regards the obligation to pay the monies claimed; no money is due or liable to be paid to the petitioners; there is no admitted debt as alleged; the aforesaid issues constitute a substantive defence for refusing cancellation of the agreement, if a suit were to be instituted; the Company Court must dismiss the winding up petition if it reaches the conclusion that a Civil Court, in a summary suit, would have granted leave to defend; in the present case, the defences are not only plausible but raise serious triable issues; the respondent company cannot be deemed to be unable to pay its debts as the prerequisite for such a presumption is not satisfied; and the company petition is liable to be dismissed.

66. On the other hand Sri Prabhakar Sripada, Learned counsel, would submit that the petitioner, in C.P. No. 172 of 2010, had pleaded that Rs. 76,47,122 is due and payable to him by the respondent; even if the exact amount due is not specified, as long as the sum admittedly due exceeds the minimum prescribed sum u/s 434(1)(a), failure to make payment would amount to "neglect to pay"; the defence put forth by the respondent is frivolous, not substantial and is a

mere moonshine; the respondent is unable to pay its debts; they did not even file their annual returns before the Registrar of Companies for the financial years 2008-09 and 2009-10; the Registrar of Companies issued a show cause notice to the respondent for their failure to do so; and, despite 15 days time being granted, the respondent did not file their returns resulting in the Registrar of Companies filing three criminal complaints before the Special Judge for Economic Offences which were later registered as C.C. Nos. 191 to 193 of 2010; the Income Tax attachment orders against the respondent and its 14 subsidiary companies are still in force; as the respondent failed to pay the amount demanded, within three weeks of receipt of the statutory notice, the petitioners have invoked the jurisdiction of this Court u/s 433 (e) read with Section 434 of the Companies Act for winding up on the ground of the respondent's inability to pay its debts; the Company Court is not only a Court of law but also a Court of equity; the defence of the respondent, regarding inadmissibility of the agreement of sale dated 05.09.2007, was an ingenious mask invented to deprive the petitioners-creditors of a just and honest entitlement; the alleged disputes were manufactured only for delaying the payments due to the petitioners; and the petitioners had issued a statutory notice detailing the precarious financial position of the respondent company, including its outstanding debts on that date.

67. Bona fide dispute implies substantial grounds for the dispute raised. (Indian Overseas Bank v. M/s. Sanghi Polyesters Limited Judgment of A.P. High Court in C.P. No. 24 of 2008 dated 26.04.2010). If the debt is bona fide disputed, and the defence is a substantial one, the court will not wind up the company. Where the debt is undisputed, the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. (In Re. A Company (1894) 2 Ch 349 IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., . Where there is no doubt that the company owes the creditor a debt entitling him to a winding up order, but the exact amount of the debt is disputed, the court will make a winding up order without requiring the creditor to quantify the debt precisely. (In Re Tweeds Garages Ltd. (1962) 32 Comp Cas 795 (Chd.)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance; secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends. Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., Reliance Infocomm Ltd. (2008) 142 Comp. Cas. 170; Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH,

68. If the debt is not disputed on some substantial ground, the Court/Tribunal may decide it on the petition and make the order. Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, The Court is entitled to investigate the question as to whether a dispute has been manufactured in order to delay and defeat realisation of the dues of the petitioning creditor, and is merely a cloak for the inability of the company to pay its just debts. S.M. Patel Iron Traders Private Limited Vs. Sugam Construction Private Ltd., . If a debt is undisputedly owing,

then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd.,

69. The petitioner is not entitled *ex debito justitiae* to an order of winding-up on the mere plea that the debt was not paid. A petition presented ostensibly for a winding-up order but really to exert pressure will be dismissed. (Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, i; Buckley on the Companies Act, 13th edition, page 451; Reliance Infocomm Ltd. (2008) 142 Comp. Cas. 170). Where there are serious disputes between the parties on each essential fact which necessitates a trial in appropriate civil proceedings, and the defence raised by the company is genuine and bonafide, a petition for winding-up is not the remedy. (Ram Kishan v. Kanwar Papers Private Ltd. (1990) 69 Comp Cas 209 (HP)).

70. A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at the stage of admission, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The Company Court is expected to go into the causes of the refusal by the company to pay before coming to that conclusion. The Company Court is expected to ascertain whether the company's refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated by a trial in a civil court. The Company Court should ascertain whether the company has a defence which is substantial in nature and, if not adjudicated in a proper forum, would cause serious prejudice to the company IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd.,

71. The object and scope of winding up of a company cannot be confined to the claim of the petitioner alone but has to be viewed, judged and tested in its entirety, including the petitioner's claim, the defence taken by the company in relation to the claim in question, the financial position of the company, its viability, commercial sustainability in the market, etc., and whether or not the debt is admitted by the respondent. Petitions for winding up ought not to be entertained unless a very strong *prima facie* case is made out on facts. (Mysore Sales International Limited Vs. United Breweries Limited, . Exercise of discretion would arise only after the Court comes to a *prima facie* conclusion that the defence raised by the Company in respect of the debt, which is the subject matter of a petition, is not bonafide and/not acceptable. In that case, the Court would have to consider various other factors so as to decide whether the discretion should be exercised for the purpose of winding up the Company or dismissing the petition. S.M. Patel Iron Traders Private Limited Vs. Sugam Construction Private Ltd., . The company court can go behind the disputes, agreement, award or can pass any order to determine whether the disputes sought to be raised are bonafide or not. (Goetze India Ltd. (1994) 80 Comp Cas 340). The machinery for winding up will not be allowed to be utilised merely as a means for realising the debts due from a company. (P.G. Bhatia & Co. (1977) 47

Comp Cas 438; State Trading Corporation of India Ltd. v. Punjab Tanneries Ltd (1994) 2 CLJ 270; Kanchanaganga Chemical Industries (1998) 91 Comp Cas 646; Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, ; Reliance Infocomm Ltd. (2008) 142 Comp. Cas. 170). Winding up jurisdiction should not be allowed to deteriorate into an instrument of arm-twisting of a corporate body to compel it to meet a claim, which it would not otherwise pay for legitimate reasons, even though the reasons may not eventually be able to survive a close judicial scrutiny. (Agrob Anlagewbau Gmbh v. Orient Ceramics and Industries Ltd., (1986) 60 Comp Cas 691).

72. No hard and fast rule can be laid down in inquiring into the question of a bonafide dispute with regard to any debt. Whether there is a bona fide dispute or not will necessarily depend on the facts and circumstances of each particular case. (P.G. Bhatia & Co. (1977) 47 Comp Cas 438). The controversy must be bonafide in both the subjective and objective sense. This means that it must be honestly believed to exist and must be based on substantial or reasonable grounds. "Substantial" means having substance and not frivolous or vexatious and which the court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action or by some other proceedings. Tata Iron and Steel Co. Vs. Micro Forge (India) Ltd.,

73. None of the contentions urged by Sri S. Niranjan Reddy, Learned Counsel, constitute a bonafide dispute necessitating dismissal of the company petitions at the stage of admission. Neither is the defence of the respondent in good faith and of substance nor is it likely to succeed in point of law. The respondent has also not adduced prima-facie proof of the facts on which their defence depended. Even in a summary suit, if the defence of the defendant is a sham or is illusory or is practically a moonshine, the defendant is not entitled to leave to defend. Consequent to the termination of the agreement, the principal amount paid earlier by the petitioners are liable to be repaid to them by the respondent. The said amount due is a "debt", the petitioners are creditors, and the respondent their debtor. The defence of the respondent is neither valid nor is it bonafide, and is a mere moonshine. A presumption u/s 434(1)(a) arises that the respondent is unable to pay its debts. Such a presumption has not been satisfactorily rebutted by the respondent. Prima facie the ingredients of Section 433(e) read with Section 434(1)(a) of the Companies Act are satisfied which may well necessitate exercise of discretion by this Court to admit the Company Petition.

VI. COMMERCIAL INSOLVENCY:

74. u/s 439(1)(b) of the Companies Act, an application to the Court for the winding up of the company can be presented by any creditor including any contingent or prospective creditor. If leave, as required u/s 439(8), is granted by

the Court before the Company Petition is admitted, the question whether the respondent company is unable to pay its debts, attracting the ingredients of Section 433(e) read with Section 434(1)(c), has necessarily to be examined even in a petition filed by a contingent or prospective creditor. Black's Law Dictionary defines "contingent" as possible, but not assured; doubtful or uncertain; conditioned upon the occurrence of some future event which is itself uncertain, or questionable; synonymous with provisional; this term, when applied to a legal right or interest, implies that no present interest exists, and whether such interest or right ever will exist depends upon a future uncertain event. "Contingent debt" has been defined therein to mean one which is not presently fixed, but may become so in the future with the occurrence of some uncertain events. As even a debt which is not presently fixed, but may become so on the occurrence of an uncertain event, is a "contingent debt", a person to whom such a contingent debt may have to be paid in future would be a "contingent creditor". Even if the respondent's contention that the petitioners are not their creditors is presumed to have some basis, the petitioners may well be entitled to file winding up petitions as "contingent creditors" as the amounts paid by them to the respondent, (which is liable to be refunded consequent upon termination of the agreement), can be realized by way of a suit, and the contingency would crystallize on a decree being passed by a competent Civil Court. Rule 96 of the Companies Court Rules, 1959 stipulates that admission is contemplated for every winding-up petition whether it be by a prospective or contingent creditor or by any one else eligible to apply for winding up. In the case of a prospective or contingent creditor, before admission is made, leave also has to be obtained and the guidelines for grant of such leave are indicated in Section 439(8) of the Act. (Anil Vasudev Salgaonkar v. Kermeen Foods (P) Ltd., (1985) 58 CC 156 (Guj)). Whether a petition is filed by a creditor or a contingent creditor, and both under Sections 434(1)(a) and (c) of the Act, this Court can examine whether the respondent company is unable to pay its debts, (which would include its contingent and prospective liabilities), and whether it is commercially insolvent.

75. Sri Prabhakar Sripada, Learned Counsel, would submit that the respondent, in collusion with M/s Ernst and Young, had over-valued its assets at Rs. 6523 Crores as against its turnover of merely Rs. 22 crores; the very fact that the exercise of valuation was completed in one day was proof of the perfunctory manner of valuation of the respondent company's properties; works relating to the walls, wall finishes, flooring, doors and hand railings etc. of the apartments had not even commenced; though the valuation report of Cushman & Wakefield dated 12.04.2010 was strictly "confidential to the addressee", it was enclosed along with the counter affidavit; it was evident from the report that no due and legal diligence was undertaken by the valuer; copies of the title deeds were not even seen by them; even the basic precautions for valuing the property was not taken; the property was not physically measured to arrive at its value; the report was based on the premise that certain lands, which are presently notified as a special economic zone, would be de-notified; the report includes an extent of

38.29 guntas of land which is already mortgaged to State Bank of Mysore, and a notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was issued on 13.11.2010 by the bank; the respondent had advanced Rs. 247 crores as loans and advances to its subsidiaries; the respondent had become commercially insolvent, and was not in a position to repay its debts; it owed huge sums to various other institutions and individuals; the respondent had suffered an award for Rs. 600 crores on the claim of S.R.S. Orion Investments Limited and 4 others, who filed O.P. No. 2339 of 2009 before the III Addl. Chief Judge, City Civil Court, Hyderabad u/s 9 of the Arbitration and Conciliation Act, and obtained an order of injunction against the respondent restraining them from alienating various properties; while the Balance Sheet showed advances from customers, for purchase of apartments, was more than Rs. 4.88 crores as on 31.03.2006, the said amount increased to Rs. 110.50 crores as on 31.03.2007; not even a single apartment has been completely constructed; the entire advance amount is a liability; and, in order to suppress their precarious financial position from being revealed, the respondent had deliberately chosen not to file its annual returns with the Registrar of Companies for the financial years 2008-09 and 2009-10. Reference is made by the Learned Counsel to the arbitration fees claimed by the arbitrator of Rs. 15,000/- to contend that failure even to make payment of the said fee reflects the respondent's inability to pay.

76. Sri S. Niranjan Reddy, Learned Counsel, would submit that the accounts of the respondent, for the financial year 2008-2009, could not be audited because of various investigations which are still pending; as a result documents and records were not available for audit; subsequently, for the year 2008-09, audit has been conducted, and the respondent has filed its annual returns belatedly; the audited balance sheet for the year 2009-2010 was being placed on record, and the annual returns for the said year would be filed shortly; the respondent is not commercially insolvent; they are in a position to repay their debts, and do not owe huge amounts to various other institutions and individuals; the award of Rs. 600 crores passed against them, on a claim filed by one of their investors, has been challenged and is pending adjudication; against the order of the Civil Court in O.P. No. 2339 of 2009 dated 12.03.2009, the respondent filed C.M. As before this Court which are still pending; the respondent has not admitted liability of Rs. 870 crores; the properties of the Hill County project have not been attached by the Income tax authorities, much less were they on the verge of putting it to auction; the respondent is not commercially insolvent; the Balance Sheet is prepared on several fundamental accounting assumptions in accordance with the general accepted accounting principles such as the principle of conservatism, going concern, accrual, historical cost etc; financial insolvency is different from commercial insolvency; commercial insolvency only means that the company is not able to pay its debts as and when it is due; and a mere statement in the Balance Sheet that the liabilities of the respondent exceed its assets would not amount to commercial insolvency.

77. An examination of the company's solvency may be a useful aid in deciding whether the refusal to pay is a result of a bonafide dispute as to liability or whether it reflects an inability to pay. *IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd.*, . In cases where the presumption u/s 434 (1) (a) does not arise then, of necessity, the Court has to consider whether any such presumption arises u/s 434 (1) (c) and satisfy itself that, prima facie, the Company is unable to pay its debt as its assets are insufficient to meet all its liabilities, actual and contingent. (*Reliance Infocomm Ltd. (2008) 142 Comp. Cas. 170*; *Airwings (P). Ltd. AIR 1995 Kar 69*; *American Express Bank Ltd. Vs. Core Health Care Ltd.*, . The phrase "Plainly and commercially insolvent", to attract Section 434(1)(c), means that the assets of the company are such, and its existing liabilities are such, as to make it reasonably certain-as to make the court feel satisfied-that the existing and probable assets would be insufficient to meet the existing liabilities. The question is not whether, at the given time, the company can pay all its debts whether presently due or only in the future, and still continue to function. The question is whether it is able to meet its current demands-it would, of course, be insolvent if it cannot do that even if it has assets not presently available but more than ample to pay its debts and is in that sense rich-and whether its existing and probable assets would suffice to meet future demands. (*V.V. Krishna Iyer Sons v. New Era Manufacturing Co. Ltd.*, (1965) Comp. L.J. 179 = (1965) 35 Comp Cas 410 (Ker); *In re, European Life Assurance Society (1869) L R 9 Eq 122*). Section 434(1)(c) expressly authorizes a winding up if the existing and probable assets are insufficient to meet the liabilities, taking into account not only liabilities presently due but also those which are "contingent and prospective", (*Registrar of Companies v. S. Sohanmull Gotcha P. Ltd.*, (1972) 42 Comp Cas 386; *In re European Life Assurance Society (1869) L R 9 Eq 122*; *Buckley on the Companies Acts, 13th edition*), and it is unable to pay its debts as they become due, although its assets when realised, including uncalled capital, exceed its liabilities. (*S. Sohanmull Gotcha P. Ltd.*, (1972) 42 Comp Cas 386; *Halsbury's Laws of England, third edition, volume 6, paragraph 1033*). The words "unable to pay its debts" in Section 433(e) should be taken in the commercial sense in that the company is unable to meet its current demands i.e., it is plainly and commercially insolvent. (*Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, . One of the considerations, to determine whether the company is able to pay its debts or not, is whether the company is able to meet its liabilities as and when they accrue. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise. *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, Softsule (P) Ltd. Re (1977) 47 CC 438 (BOM).*; *Ranbaxy Lab Ltd v. M.S. Shoes East (I) Ltd.*, (1998) 93 Comp. Cas. 296). A Company is commercially insolvent when it has no wherewithal to meet its commercial liabilities *Excel Embroideries and Others Vs. Trend Designs Limited and Others*, . The petitioner is obliged to show that the financial status or the monetary substratum or the commercial viability of the company has gone so low and down that winding up is obviously, and evidently, unavoidable. *Tata Iron*

and Steel Co. Vs. Micro Forge (India) Ltd., The Court has to examine the company's inability to pay its debts with reference to the date when it became absolutely due for payment, along with the contingent and prospective liabilities of the company Sree Shanmugar Mills Ltd., by Managing Agents Sri Alagai Ltd. Vs. S.K. Dharmaraja Nadar and Another, ; S. Sohanmull Gotcha P. Ltd., (1972) 42 Comp Cas 386). One of the considerations to determine inability of a company to pay its debts is whether the company is commercially insolvent and unable to meet its liabilities as and when they accrue. (P.G. Bhatia & Co. (1977) 47 Comp Cas 438). That it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise. Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, Reliance Infocomm Ltd. (2008) 142 Comp. Cas. 170).

78. Discretion under Sections 433 and 434 is to be exercised only when it is proved that the company is unable to pay its debts to its creditors on account of the fact that it has become commercially insolvent National Research Development Corporation Vs. Electro Flux (P) Ltd., , and keeping in view the facts of each case. There is no reason why discretion should be exercised in favour of the respondent-company when there is sufficient material on record to show that it is not in a position to meet its current liabilities. (Ranbaxy Lab Ltd., (1998) 93 Comp. Cas. 296).

79. The Company Court ought to examine the material placed before it by the petitioning-creditor and further evidence, if any, which the Company Court may require the petitioning-Creditor to furnish. The Company Court must also examine the evidence placed before it by the respondent-Company at the stage of admission. The Balance Sheet of the company is one such document which may be kept in view. On assessment of the evidence, let in by the petitioning-creditor and the contesting Company, if the Company Court comes to the conclusion that the Company, prima facie, appears to be commercially insolvent, a rebuttable presumption would arise under S. 434 (1) (c) that the Company is unable to pay its debts, and then admission and advertisement may follow. (Airwing Private Limited AIR 1995 Kar 69; Reliance Infocomm Ltd., (2008) 142 Comp. Cas. 170).

80. Ordinarily the Court does not go behind the Company's Balance Sheet to ascertain its financial position, but this does not mean that the mere fact that a particular item appears in the Balance Sheet under the head "liabilities" conclusively establishes that the item is a liability of the company in the sense in which the word "liability" is used in Section 434(1) (c) of the Companies Act. Notwithstanding that the word, "liabilities", and not the word "debt", is used in that provision when referring to the contingent and prospective liabilities of the company, it is quite apparent that the liability referred to therein must be a debt which the company has, or might or will have, to pay, something which cannot be said with regard to its share capital. (V.V. Krishna Iyer Sons (1965) Comp. L.J. 179 = (1965) 35 Comp Cas 410 (Ker)). Contingent liabilities are liabilities that

may or may not be incurred by a company depending on the outcome of a future event. These liabilities are recorded in a company's accounts and shown in the Balance Sheet if they are both probable and reasonably estimable. A footnote to the Balance Sheet describes the nature and extent of the contingent liabilities. The likelihood of the loss is described as probable, reasonably possible, or remote. The ability to estimate a loss is described as known, reasonably estimable, or not reasonably estimable.

81. S.R. Batliboi & Associates (auditors of the respondent) in their audit report, annexed to the Balance Sheet as at 31.3.2009, stated that the respondent had incurred losses of Rs. 538,90,76,457/- during the year; its accumulated losses were Rs. 518,04,82,387/- resulting in complete erosion of its net worth; subsequent to the year end, and till the date of the report, the company had insignificant sales; a number of customers had cancelled their bookings; there had been no significant progress of the project; the construction contract, by the sole contractor, had been terminated; restrictions had been imposed by the Income Tax Department on registration of units in favour of customers; and these conditions indicated the existence of a material uncertainty that may cast significant doubt about the company's ability to continue as a going concern.

82. In their audit report, annexed to the Balance Sheet as at 31.3.2010, S.R. Batliboi & Associates (auditors of the respondent) stated that the respondent had incurred a loss of Rs. 41,35,16,269/- during the year; and its accumulated losses were Rs. 559,39,98,656/- resulting in complete erosion of its net worth. The auditors reiterated what they had stated in their earlier report for the year ending 31.03.2009.

83. Section 227(4A) of the Companies Act, 1956 enables the Central Government, by general or special order, to direct that, in case of such class or description of companies as may be specified in the order, the auditor's report shall also include a statement on such matters as may be specified. Section 2(29-A) of the Companies Act defines the term "net worth" as "sum total of the paid-up capital and free reserves after deducting the provisions or expenses as may be prescribed". Explanation to Section 2(29A) stipulates that, for the purpose of this definition, "free reserves" means "all reserves created out of profits and share premium account but does not include reserves created out of revaluation of assets, write back of depreciation provisions and amalgamation." The definition of "net worth" u/s 3(1)(ga) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) is similar to the definition u/s 2(29A) of the Companies Act.

84. In exercise of the powers conferred by Section 227(4A), the Central Government made the "Statement on the Companies Auditor's Report Order, 2003". Para 4(x) of the said Order requires the auditor to report whether the accumulated losses at the end of the financial year are not less than that of its net worth, and whether the company has incurred cash losses during the period covered by the report, and in the immediately preceding financial year covered

by the report. As the provisions or expenses to be deducted from the paid-up capital and reserves, for calculating the net-worth, has not yet been prescribed, the term "net-worth", in effect, is the sum total of the paid-up capital and free reserves. In order to determine "cash loss" the profit/loss shown by the profit and loss account is to be adjusted for the effects of transactions of a non-cash nature such as depreciation, amortization, deferred tax expenses etc. As the explanation to Section 2(29-A) of the Companies requires the reserves created from out of revaluation of assets to be excluded from the ambit of "free reserves", the net worth of a company must necessarily be determined on the basis of the historical cost of its assets, and not any value which is placed thereon consequent upon its revaluation.

85. Net-worth is calculated to determine the creditworthiness of a company. Excess of liabilities over assets and capital stock, resulting from operating losses, is also called negative net-worth. Erosion of net-worth of a company means that the accumulated losses of a company, at the end of a financial year, are more than its entire net-worth (total assets minus total liabilities). Complete erosion of net worth means "that the accumulated losses of a company coupled with the liabilities of the company far exceed its assets".

86. The Balance Sheet of the respondent company, as at 31.3.2008, shows that its share capital was Rs. 5.00 lakhs, and its reserves and surplus was Rs. 20,85,94,070/-. However the entire reserves and surplus stood wiped out as is evident from the Balance Sheet as at 31.3.2009. While the net current assets of the respondent, as reflected in the Balance Sheet as at 31.3.2008 was Rs. 602,21,55,062/-, it stood reduced to Rs. 141,58,67,798/- for the year ending 31.3.2009. As against its net current assets of Rs. 141,58,67,798/-, the respondent suffered a loss of Rs. 518,04,82,387/- for the year ending 31.03.2009. The respondent suffered negative earnings per share of Rs. 10,77,815/- for the said year i.e., as against the share value of one share of Rs. 100/-, the loss per share was Rs. 10,77,815/-. As against its liabilities (Secured loans plus unsecured loans) of Rs. 777,51,67,157/-, the assets of the respondent company (fixed assets plus investments plus net current assets) was merely Rs. 259,51,84,770/- i.e., the total outstanding dues were nearly three times its available assets. The Balance sheet as at 31.3.2010 reflects an even more dismal financial picture of the respondent company. As against the loss of Rs. 518,04,82,387/- for the year ending 31.3.2009, the total accumulated loss for the year ending 31.3.2010 increased to Rs. 559,39,98,656/-. The value of the net current assets of the respondent, as at 31.03.2010, fell down to Rs. 122,07,89,930/- which is less than 1/4th of its accumulated losses of Rs. 559,39,98,656/-. For the year ending 31.3.2010, while the liabilities (secured and unsecured loans) was Rs. 798,08,08,090/-, its assets (fixed assets plus investments plus net current assets) was merely Rs. 238,73,09,434/- i.e., the total debt due by the respondent increased to nearly 3 1/2 times its available assets.

87. Sri S. Niranjan Reddy, Learned Counsel, draws a distinction between financial

and commercial insolvency, and places reliance on the valuation report of M/s Cushman & Wakefield dated 12.4.2010. The said valuation report is a report of valuation of the properties of the respondent at Hyderabad. The valuation purpose, is stated in the report, as for "internal purposes". Part B of the said report relates to property. The note to Clause 2.2 thereof states that no physical measurement survey has been carried out by them; they had relied completely on the information supplied to them; and they had assumed that they were correct. Under the note to clause 2.5, the valuers stated that no legal due diligence had been undertaken by them on the said property, or on the copies of the title deeds as shared with them by the respondent; unless disclosed to them to the contrary, and recorded in the property report - Part B, their valuation was on the basis that the property in the subject location possessed a good and marketable title, and was free from any unusually onerous encumbrances. Under the head "other key assumptions" in Clause 2.8.4 the valuers stated that, in view of the fact that there existed high vacancies in the commercial office space real estate market in the city, there was little visible demand for additional commercial office space in the micro market; due to this it was assumed that the land lord/developer (respondent) would denotify the SEZ status of Ac. 74 of land to unlock the maximum value of the property; and the value, as arrived of the subject property, was assuming a mixed use and not SEZ usage. It is not in dispute that these Ac. 74-00, allotted for an SEZ, has not been de-notified from the SEZ status till date. Reliance placed by the respondent on the valuation report to contend that they had large properties of high value, and their submission that the Balance Sheet which reflects its historical cost should not be taken as the basis for determining the value of the land, does not, therefore, merit acceptance.

88. The phrase "plainly and commercially insolvent", as required to attract Section 434(1)(c) of the Companies Act, mean that the assets of the company and its existing liabilities are such as to satisfy the Court that the existing and probable assets are insufficient to meet the existing liabilities. The Balance Sheets of the respondent company, as at 31.3.2009 and 31.3.2010, show that its total existing assets are wholly insufficient to meet its total existing liabilities, both short term and long term. As noted hereinabove, Section 433(e) read with Section 434(1)(c) enables the Court to wind up the company if its existing and probable assets are insufficient to meet its liabilities taking into account not only its existing liabilities but also those which are contingent and prospective. Even in cases where the company is unable to pay its debts when they become due, although its assets including its capital exceed its liabilities, such a company must also be held to be "commercially insolvent", and as being unable to pay its debts. In the case on hand, the Balance Sheet of the respondent company reflects that, even without taking into account its contingent and prospective liabilities, the total assets of the respondent-company is less than 1/3rd its total existing liabilities, i.e., its net worth has completely eroded, it is commercially insolvent, and is "unable to pay its debts". The respondent company must,

therefore, be deemed to be "unable to pay its debts" on a conjoint reading of Section 433(e) and Section 434 (1)(c) of the Companies Act.

VII. SHOULD THE COMPANY PETITIONS BE ADMITTED AND THE PETITIONERS PERMITTED TO ISSUE ADVERTISEMENT?

89. Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of IL&FS, would submit that, pursuant to the order of the Company Law Board dated 13.01.2011, M/s. IL&FS (consisting of three companies all belonging to the same group) were inducted as the new promoter of the respondent company owning 80% of its equity; the IL&FS Group has constructed several projects of national importance both in Andhra Pradesh and in other parts of the country; ever since their induction, the IL&FS Group has been actively involved in infusing funds into the respondent-company to bring the Hill County Project, back on track, and to settle all disputes including tax liabilities of the respondent; the new promoters have invested more than Rs. 150 crores, and the project is now proceeding at a fast pace; the validity of the order of the CLB dated 13.1.2011 has not been challenged and, therefore, is binding on the customers; IL & FS has been focusing mainly on completion of the Hill County Project; if any adverse order is passed against the respondent-Company at this juncture, it would cause irreparable and seriously damage to the reputation of the IL&FS Group in which a major shareholding is that of public sector undertakings; and it would, therefore, be in the interest of the customers, the company, the implead petitioners, workers, and in general public interest, that the Company Petitions be dismissed.

90. Sri S. Niranjan Reddy, Learned Counsel, would submit that, of the eleven residential towers that were planned, the company is taking steps to complete construction of the flats in nine towers and, accordingly, had requested the customers in the remaining two towers to choose a similar flat of their choice in any of the remaining nine towers; of the total 57 customers in the 2 towers, 48 have given their consent, and the Company is now pursuing with the remaining 9 customers to choose a flat of a similar choice in any of the 9 towers so that delivery could be made to them; since a part of the construction activity was stopped for quite some time, the site needed to be prepared; IL&FS then commenced conducting soil testing and structural stability tests for the semi-completed apartments and, after all clearances were obtained, it recommenced construction; tremendous progress has been achieved as the work has been taken up on a war footing with approximately 1700 labourers working everyday; construction of 100 independent houses has already been completed and possession thereof delivered; construction of 172 independent houses is at the final stage, and is expected to be handed over within a short time; the respondent is committed to completing the Hill County Project, and to hand over the completed apartments and houses; the temporary delay in completing the project would be overcome, and the project would be completed at the earliest; the anticipated delivery schedule of various apartments has been sent to the customers vide letter dated 08.09.2011; the respondent company intends to fully

adhere to the delivery schedule; this Court ought to calibrate its discretion having regard to the jurisdiction exercised by another statutory tribunal i.e., the Company Law Board; an order of winding up is discretionary u/s 433(e); even when the debt owed to the petitioner is undisputed, the Court will still not pass the winding up order if it is not in the larger interest of justice to wind up the company; winding up of the respondent would not be in the interest of customers, and other stake holders including the petitioners; the policy of the Court should be to attempt to revive the Company though the company may not be solvent at the moment, and may not be able to meet its obligations to its creditors, but the Court is informed of a specific proposal which, in the opinion of the Court, is likely to materialize; the Company Court would look into not only the interest of the creditors, but also the interest of the public at large since publication in the newspapers, of the filing of a winding up petition, may damage the credit worthiness or financial standing of the company; the winding up procedure has to be resorted to only when other means of healing an ailing company are of absolutely no avail; and this Court can adjourn the matter conditionally or unconditionally or make such interim orders as it thinks fit, exercising its powers u/s 443(1)(b), so that winding up proceedings are not reduced into an instrument of arm-twisting a corporate body or of destroying it; and this Court should refrain from exercising its discretion to admit the Company Petition in larger public interest, and in the interests of the stakeholders, as the Company is on a revival path.

91. On the other hand Sri Prabhakar Sripada, Learned counsel, would submit that, on the order of the CLB dated 13.01.2011 being challenged by SRS Orion and Investments Limited, the Supreme Court had directed the CLB to hear their objections, and to reexamine the correctness of its order dated 13.01.2011; hearing before the CLB is in progress; the respondent continued to be oblivious to the hardships faced by the petitioners; the order of the CLB dated 13.01.2011 called upon IL&FS to settle all disputes, including contractual dues of the creditors of the respondent; instead of settling the disputes in a dignified manner IL&FS was driving the petitioners and others to arbitration, and was making them pay 1% of the total claim as arbitration fees in respect of a debt which should have been paid within one month from the date of cancellation of the agreement of sale; at this rate, the petitioners would never get back their money in the near future; the apprehension expressed by the respondent, that an order of publication of admission may affect its creditworthiness or its financial standing, was not warranted on the facts of the present case; and, as the net worth of the respondent-company has already eroded, the question of any further damage to its reputation would not arise.

(a). EXERCISE OF POWER BY THE COURT u/s 433 OF THE COMPANIES ACT IS DISCRETIONARY:

92. Once a Company is held to be unable to pay its debts, and the statutory fiction u/s 434 has come into play, it is open to the Company Court to entertain

the petition u/s 433(e) of the Companies Act. 1956. (Viral Filaments Limited⁹¹). While a creditor is entitled to bring a winding-up petition on any of the grounds mentioned in Clauses (a) to (f) of Section 433 of the Act, (V.V. Krishna Iyer Sons (1965) Comp. L.J. 179 = (1965) 35 Comp Cas 410 (Ker)), an order u/s 433(e) of the Companies Act is discretionary. (Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, The words "may", used in Section 433, is indicative of the fact that even if one or more grounds mentioned in Section 434 is made out, and the company is deemed to be unable to pay its debt, it is still not mandatory but rests in the discretion of the Court whether or not to make an order of winding up. The court must, in each case, exercise its discretion in deciding whether, in the circumstances of the case, it would be in the interest of justice to wind up the company. American Express Bank Ltd. Vs. Core Health Care Ltd., . The mere fact that the company is unable, as at present, to pay its debt does not justify its being wound up as the discretion to pass such an order even in the case of inability of the Company to pay its debts is, by section 433, vested in the Court and that discretion has to be exercised judiciously. Jugalkishore Benarsidas Vs. South India Saw Mills (P.) Ltd., The Company Court is not bound to entertain a petition for winding up nor is it bound to order winding up even if a case to that effect on facts is made out. (Premalal Birla v. Gilt Pack Ltd., (2004) 121 Comp Cas 802 (MP)).

93. A petition for winding up would be deemed to be a representative action, and in public interest. An order passed in a winding up petition is an order in rem. The court is bound to keep in view the public interest. Primarily, the court is concerned not only with the interest of the petitioner or the creditors but it has to keep in view the interest of the company's shareholders, contributories, etc., also. While ordering the winding up of a company, when it is unable to pay its debts, the court will keep in view (1) that the winding up is for the benefit of all concerned; (2) the winding up does not result in conferring any special privilege on the petitioner, i.e., the creditor or any other person making the application for winding up. (Goetze India Ltd. (1994) 80 Comp Cas 340).

(b): WINDING UP: REMEDY OF THE LAST RESORT:

94. Winding up of any company is always regarded as an extreme and/or last remedy. (ICDS Limited (2005) 125 CC 849 (MP)). Creditors cannot insist on the winding up of a Company by the Court as a matter of right. As long as it can be resurrected, it would not be right to wind up a company merely because the company is unable to pay its debts. S.M. Patel Iron Traders Private Limited Vs. Sugam Construction Private Ltd., . It should be the policy of the court to attempt to revive though, at the moment, the company may not be solvent and may not be able to meet its obligations to its creditors; but this should be only if it is shown that there is a reasonable prospect for resurrection and survival. It is the duty of the Court to welcome revival rather than affirm the death of a company. (New Swadeshi Mills of Ahmedabad Ltd. v. Dye-Chem Corporation (1986) 59 CC 183 (Guj); In Re In Re: Rishi Enterprises, ; New Swadeshi Mills of Ahmedabad

Ltd. (1986) 59 CC 183 (Guj); Registrar of Companies Vs. Navjivan Trading Finance Pvt. Ltd., American Express Bank Ltd. Vs. Core Health Care Ltd.,

95. The power of winding up, conferred by Section 433 of the Act, is drastic. Satish Chandra Vs. Union of India, A winding up petition, praying for the economic death of a running and live commercial organization, is an extreme remedy to be resorted to sparingly. Kesar Enterprises Ltd. Vs. IDI Ltd., . In the case of a running concern, and considering the larger interest of the employees and workmen, the Court should be very slow in entertaining winding up petitions. However the Court should be equally concerned with the interests of the creditors. Banks, financial institutions, suppliers of goods or services and trade creditors are the main backbone of any industry or business organisation and, at their peril or disadvantage, unscrupulous management of Companies must not be allowed to defend winding up petitions under the guise of workers' interests. (Shree Rama Multitech Ltd. (2005) 126 CC 15 (Guj)).

96. What is important in a case of winding up of a company is not the interest of the applicant but the interest of the stakeholders of the company as a whole. M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, . The basic principle is to stave off the winding up of a company as far as possible, and an order of winding up is to be resorted to only as a last course. All efforts are to be made for saving the company from being wound up. M.S.D.C. Radharamanan Vs. M.S.D. Chandrasekara Raja and Another, Daulat Makanmal Luthria Vs. Solitaire Hotels Pvt. Ltd. and others, . Winding up is the last thing the Court would do and not the first thing to do having regard to its impact and consequences. Tata Iron and Steel Co. Vs. Micro Forge (India) Ltd., ; Ranjana Kumar Vs. Indian Dyestuff Industries Ltd.,

(c): ADMISSION OF A COMPANY PETITION: ITS EFFECT

97. An order of admission seriously affects the market position of a company-subject to the order. The confidence of the business or trade in the ability of a company to meet its liabilities is liable to be affected upon an order of admission with the consequential advertising of the petition which follows. The admission of a petition for winding up is a serious matter. (Bharat Petroleum Corporation Ltd., (2004) 120 CC 333 (Bom)). A creditor's winding-up petition, in certain situations, implies insolvency of the financial position with other creditors, banking institutions, customers and so on. Publication in the newspaper of the filing of a winding-up petition may damage the creditworthiness or financial standing of the company, and may also have other economic and social ramifications. IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., Winding up proceedings cannot be heard and decided without issuing a public advertisement under the rules. Such a public advertisement would have very serious repercussions. (Indian Overseas Bank Judgment of A.P. High Court in C.P. No. 24 of 2008 dated 26.04.2010).

(d): SHOULD THE COMPANY PETITIONS IN THIS BATCH BE ADMITTED:

98. The Union of India moved an application before the Company Law Board, Delhi (CLB) pursuant to which the CLB, by its order dated 5.3.2009, directed the Central Government to appoint a nominee Director on its behalf who should have an affirmative vote on any decision, and be present at all board meetings. Pursuant thereto Sri Ved Kumar Jain, who was appointed as the CLB's nominee director by the Central Government, conducted board meetings wherein it was decided that a strategic investor should be brought in who would takeover the company, and complete the sole project undertaken by the Company. The Board of the respondent company, under the supervision of Sri Ved Jain, appointed SBI Market Capital Private Limited as the transaction advisor to identify a strategic investor. Dr. Justice A.R. Lakshmanan was requested to oversee the process of the selection of the strategic investor. After an elaborate process, SBI Market Caps identified International Leasing & Financial Services (IL&FS) group as the strategic investor for the company, which finding was recommended by Dr. Justice A.R. Lakshmanan and, accordingly, an application was moved before the CLB which, by its order dated 13.01.2011, permitted induction of the IL&FS group as the new promoters of the respondent company, and for reconstitution of the board; directed investment of Rs. 20 lakhs in the equity share capital of the respondent by the IL&FS group which would result in their holding 80% of the capital of the company; directed that the IL&FS group shall, after induction, take over the management control and reconstitute the Board nominating four directors, including the Chairman; and that the then existing directors should resign as directors immediately on induction of the IL&FS group. The CLB nominee director's term was extended by a further period of three years. IL&FS group was directed to mobilize funds of Rs. 150 crores within a period of three months, and to complete the Hill County Residential Project Phase - I within eighteen months of its induction, and also settle all disputes, tax liabilities, and the contractual dues of other creditors of the respondent company. IL&FS group was also required to submit quarterly reports to the CLB, and the Ministry of Corporate Affairs, regarding the status of Maytas Hill County Residential Project Phase I; and all government agencies, banks etc., were directed to co-operate in the implementation of the said order.

99. IL&FS group is said to be one of the leading infrastructure Development and Finance Companies having a net worth of approximately Rs. 2440 crores. The IL&FS group was promoted by Central Bank of India (CBI), Housing Development Finance Corporation Limited (HDFC) and Unit Trust of India (UTI). Life Insurance Corporation of India, State Bank of India, ORIX Corporation, Japan and Abu Dhabi Investment Authority are said to have been inducted as institutional shareholders in the IL&FS group. At present a majority shareholding, in the IL&FS group, is said to be held by LIC having 27.07% of the share capital of all the three IL&FS group companies put together. The IL&FS Group, which had taken over management of the respondent-Company, is said to have assets valued at over Rs. 27,000 crores. It is also said to have been rated "AAA" by three independent rating agencies viz. ICRA, CARE and FITCJ which signified

their reliability factor to be very high in the global financial market.

100. In the light of the order of the CLB, and M/s IL & FS being inducted into the management of the respondent company and, as they are said to have 80% of the share capital and are said to have invested more than Rs. 150 in the respondent company, it might be inappropriate to exercise discretion at this stage to admit the company petitions filed for winding up of the respondent company. On the other hand this Court cannot also ignore the fact that the net worth of the respondent company has completely eroded, and its exercise of discretion not to entertain the company petitions may well result in further increase of the total debt due to banks and financial institutions, and their inability later to recover the debt, even in part.

VIII. SECTION 443(1) OF THE COMPANIES ACT: ITS SCOPE:

101. Section 443(1) enables the Company Court, on the hearing of a winding up petition, to (a) dismiss it, with or without cost; or (b) adjourn the hearing conditionally or unconditionally; or (c) make any interim order that it thinks fit; or (d) make an order for winding up the company with or without costs or any other order that it thinks fit. The proviso thereto stipulates that the Company Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets. Section 443(1) sets about enumerating the different ways in which the court can tackle a winding-up petition when it comes before it for hearing. The section, in this context, enumerates the court's powers. The words "on hearing a winding-up petition" would cover the entire period from the date of entertainment and issuing of notice till an actual order of winding-up is made or the winding-up petition is dismissed. "Hearing" does not mean hearing the respondent to the company petition. Hearing of the petitioner for the purpose of admitting the petition and issuing notice is also part of the hearing of the winding-up petition. (Ramakrishna Industries (P) Ltd. v. P.R. Ramakrishnan (1988) 64 CC 425 (Mad)). Even at the stage of admitting the winding-up petition, or entertaining the winding-up petition, the court has the inherent power to do all that is necessary to prevent the abuse of the process of the court or to advance the cause of justice or make such orders which are necessary to meet the ends of justice. That inherent power of the court is not taken away or in any way restricted by Section 443(1) of the Companies Act. (Ramakrishna Industries (P) Ltd. (1988) vol. 64 CC 425 (Mad)). What a court can direct, in an application for winding up, is set out in S. 443 of the Act. During the pendency of the petition, it can adjourn the hearing conditionally or unconditionally or make such interim order as it thinks fit. It will be competent for the Court, while adjourning the winding up petition, to impose conditions as to the management of the affairs of the company. Such powers can be exercised only if the petition for winding up of the company is kept pending. Gitanjali Press Private Ltd. Vs. S. Thangaswami and Another,

102. In *Tinsukia Vastra Bhandar v. Assam Tea Corporation Ltd.*, (1991) 72 CC 178 the Gauhati High Court observed:-

.....Clause (1) of Section 443 lays down the various orders which can be passed by the Court when hearing a winding up petition. On a reading of Clause (1) of Section 443 together with Section 433, it indicates that whether or not a winding up order is to be made is within the discretion of the Court. Therefore, the Court is not bound to make an order of winding up u/s 433, although a ground for winding up u/s 433(a) to (e) is made out. In the present case, I am of the opinion that it will be just and fair to give a chance to the respondent-company which has an authorized share capital of Rs. 2,00,00,000 (rupees two crores), for maintaining commercial morality, to settle with the petitioner-firm, that is to say, to pay what the company owes to the petitioner-firm, within three (3) months from today, if the respondent-company is so inclined. I do so accordingly. The winding up petition would remain unclosed. The matter to appear in the cause list on September 5, 1991, for further orders.....

(emphasis supplied)

IX: CONCLUSION:

103. In this context it is necessary to refer to the order of the CLB in C.P. No. 4 of 2009 dated 13.1.2011 wherein, at para 7(v), the IL&FS group was directed to complete the Maytas Hill County Residential Project Phase I within 18 months of its induction as a promoter in Maytas Properties Limited, and to arrange the required finances to complete the project. Under Para 7(vii) of its order, the CLB directed IL&FS to settle all disputes, tax liability and the contractual dues of other creditors of Maytas Properties Limited. Consequent to the order of the CLB dated 13.1.2011, the respondent addressed letter dated 8.9.2011 to its customers wherein, while furnishing details of the progress of the project, they furnished a complete plan for completion of all the apartments in the form of a tabular statement extracted herein below. While, for certain apartments and towers, the handover date has been stated to be December, 2012, for certain others it has been stipulated as March, 2013.

104. As a case for admission of the Company Petitions have been made out by the petitioners, I consider it appropriate to exercise discretion u/s 433 read with Section 443(1) of the Companies Act to defer further hearing of the Company Petition beyond the promised date of handing over the apartments to the buyers i.e., till 21st June, 2013 subject to the following conditions. The respondent company shall file half yearly financial statements certified by a Chartered accountant, for the financial year 2012-13, within one month of completion of the half year, along with an application to this Court to receive the said report. For the half year period from April to September, 2012, the financial statements certified by a Chartered Accountant, based on an examination of the books of accounts of the respondent, shall be filed before this Court on or before 31.10.2012. Since audit of the respondent's books of accounts, for financial year

2011-12, would have been completed by then, the audited financial statements, including its Balance Sheet and profit and loss account for the year 2011-12 along with the audit report, shall also be filed before this Court along with an application to receive the said documents. Likewise, for the half year period from 1st October 2012 to 31st March, 2013, the half-yearly financial statements of the respondent company, certified by a Chartered Accountant, shall be filed before April, 30th 2013, and the audited financial statements for the year ending 31.3.2013, along with a copy of the auditors report shall be placed before this Court by June, 21st, 2013 on which date these company petitions shall be listed for hearing.

105. As a case of admission has already been made out by the petitioners u/s 433(e) read with both 434(1)(a) and 434(1)(c) of the Companies Act, there shall be no further hearing on merits including on the maintainability of these company petitions and whether there exists a bonafide dispute. It is only if the respondent company's audited financial statements for the year ending 2011-12 and 2012-13 reflect that its net worth has become positive, and it has completed construction of all the apartments as promised in its letter dated 08.09.2011, (the schedule date for completion of all the apartments is February, 2013), would this Court examine whether it should exercise its discretion not to admit the company petitions. In case the respondent company's audited financial statements show that the networth of the respondent, for the year ending 2012-13, continues to be negative these Company Petitions shall stand admitted automatically, and the order of admission shall be advertisement in Indian Express (English Daily) and Andhra Prabha (Telugu Daily) State Editions before 26th July, 2013 subject, of course, to the condition that the petitioners, in these batch of company petitions, do not file applications, under Rule 100 of the Company Court Rules, seeking permission to withdraw the Company petitions. List these Company Petitions for hearing on 21st June, 2013.