
(2015) 07 AP CK 0034

In the Andhra Pradesh High Court

Case No : O.S.A. Nos. 16 and 22 of 2015

Mauritius Commercial Bank Ltd.

APPELLANT

Vs

Sujana Universal Industries Limited

RESPONDENT

Date of Decision : 28-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 151
Companies Act, 1956 — Section 433, 433 (e), 433(e), 433(f), 434
Constitution of India, 1950 — Article 12
Contract Act, 1872 — Section 128
State Financial Corporations Act, 1951 — Section 2[c], 29, 30, 31, 31(1)(aa)
Transfer of Property Act, 1882 — Section 69

Citation : (2015) 07 AP CK 0034

Hon'ble Judges : Ramesh Ranganathan, J;S. Ravi Kumar, J

Bench : Division Bench

Advocate : S. Niranjan Reddy, for the Appellant; A. Sudarshan Reddy, Learned Senior Counsel, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Ramesh Ranganathan, J—O.S.A. Nos. 16 and 22 OF 2015 have been filed by the petitioner and the respondent in C.P. No. 169 of 2014 respectively. While the appellant in O.S.A. No. 22 of 2015 (respondent in C.P. No. 169 of 2014) is aggrieved by the order of the learned Company Judge admitting the appeal, the appellant in O.S.A. No. 16 of 2015 (the petitioner in C.P. No. 169 of 2014) is aggrieved to the limited extent that the learned Company Judge deferred advertisement, of admission of the Company Petition, for a period of six months. Parties shall, hereinafter, be referred to as they are arrayed in the Company Petition.

2. The Petitioner-bank, a limited Company registered under the laws of the Republic of Mauritius, has its registered office at Port Louis, Mauritius. Hestia Holdings Limited (HHL for short), a company incorporated under the Laws of Mauritius, has its registered Office in the Republic of Mauritius. HHL, a wholly

owned subsidiary of the respondent-company, entered into a facility agreement dated 9-11-2010 with the petitioner-bank whereby a trade finance banking facility was established in favour of HHL upto a limit of 10 million US dollars. On 9-12-2010, the respondent-company executed a deed of guarantee, guaranteeing the obligations of HHL under the facility agreement. On 12-7-2011, the facility agreement dated 09-11-2010 was amended, and the limit facility increased to 20 million US dollars. The respondent-company executed another deed of guarantee dated 3-8-2011 guaranteeing the obligations of HHL under the facility agreement.

3. Before the learned Company Judge, the petitioner contended that HHL had drawn around 19.997 Million US dollars between 13.2.2012 to 22.6.2012 which was almost the full extent of the facility amount provided under the amended facility agreement; HHL had defaulted in its repayment obligations on 11.8.2012, which constituted an event of default under Clause 2 (II) of the facility agreement; the jurisdiction of the Commercial Court was invoked, and a decree was passed directing both HHL and the respondent-company to pay the petitioner approximately 15.39 million US dollars towards the principal, and nearly 1.2 million US dollars as interest, in addition to costs; E.P. Nos. 3 and 4 of 2014 were filed by them before the City Civil Court, Hyderabad for recovery of the decretal amount; they sent a statutory notice, under Section 434 of the Companies Act, to the respondent company and its Directors on 20.05.2014; the notice was served on 21.05.2014; the respondent sent their reply thereto on 20.06.2014; and the respondent company was unable to pay its debts under Section 433(e) of the Companies Act.

4. In the order under appeal dated 21-4-2015, the learned Company Judge noted various clauses of the amendment and re-statement agreement between the petitioner as the lender, HHL as the borrower and the respondent-company as the guarantor; and the contents of the letter addressed by the Director of the respondent-company on 17-11-2014, to the counsel for the petitioner, admitting their liability towards HHL. The learned Company Judge observed that the respondent-company had not pleaded that it had not stood as a guarantor for HHL, or that they did not undertake to indemnify the petitioner for the default committed by HHL; they had executed guarantee deeds at various points of time agreeing to indemnify the petitioner in respect of the obligations of HHL; the respondent went on executing indemnity bonds to indemnify the petitioner for the defaults of HHL; the respondent executed two guarantee deeds dated 09.12.2010 and 03.08.2011; since the respondent-company did not deny that HHL had defaulted in repayment of the amount to the petitioner, it could not be said that the respondent-company was not the debtor, and had no obligation to pay in case of default by HHL in repayment of the loan to the petitioner; there existed a creditor-debtor relationship; the debt came into existence when HHL defaulted in payment of the amount; the petitioner, being the creditor, had the right to approach the Company Court pointing out that the admitted debt was not paid by HHL being the debtor, and the respondent-company, being the

guarantor, had to pay the admitted debt to the petitioner; the said debt was admitted by the Chairman of the respondent company, in the SMS sent by him on 16.10.2012; it is evident, from the said letter dated 16.10.2012, that HHL had defaulted in payment of dues to the petitioner; the statutory notice dated 20.05.2014 was not based merely on the decree of the High Court of Justice, London, England dated 08.11.2014, but also on the admissions of the respondent-company; the total outstanding amount, as on the date of issuance of the statutory notice, was duly reflected in the books of accounts of the petitioner, and in the statutory auditors report of the respondent-company for the financial year ending March, 2014; these showed that HHL had defaulted in making payment, in terms of the facility secured by the corporate guarantee issued by the respondent-company; the Chairman of the respondent-company had admitted the default on 16.10.2012; and the Director of the respondent-company had reiterated these admissions by his letters dated 14.12.2012 and 17.11.2014; there was no dispute with regards the outstanding amount payable by the respondent-company as on date; existence of the debt was also not disputed; it was also not in dispute that there was a default on the part of HHL, which was the ground for invocation of the guarantee agreement with the respondent; a presumption arose, under Section 434 (1) of the Companies Act, that the respondent was unable to pay its debts; such a presumption has not been satisfactorily rebutted by the respondent-company and, prima facie, the ingredients of Section 433 (e) read with Section 434(1)(a) of the Companies Act were satisfied which necessitated exercise of discretion by the Court to admit the Company Petition.

5. The learned Company Judge further observed that no appeal was preferred against the decree passed by the High Court in England; the basis for filing the Company Petition was not only the decree, but also admission of the debt by the respondent-company; the petitioner had established that HHL had failed to fulfill its obligations under the agreement dated 11.12.2012, and the respondent had guaranteed the obligations of HHL; as such the respondent-company had to fulfill its obligations under the guarantee deed, and indemnify the petitioner; since the petitioner was, prima facie, able to prove that the respondent-company had failed to fulfill its obligations, it should be presumed that the respondent-company was unable to pay its admitted debt; there was no manner of doubt that the petitioner was guaranteed repayment of the amount by the respondent-company; the respondent had resolutely refused to pay back the amount inspite of assuring the petitioner several times earlier; the petitioner had lent money to a subsidiary, of the respondent-company, outside India and had filed a suit for recovery of the same in Court; as regards the liability, the admission in the correspondence by the respondent-company was sufficient to form the basis of the petition for winding up; even assuming that there was an execution petition, filed for enforcement of a foreign decree, it could not be said that the petitioner had ceased to remain the creditor of the respondent-company; and to deprive the petitioner would encourage Indian companies to be dishonest in their

international dealings. While admitting the Company Petition the learned Company Judge, however, deferred advertisement of admission of the company petition for a period of six months in order to give one more opportunity to the respondent-company.

6. Elaborate submissions were put forth by Sri A. Sudarshan Reddy, Learned Senior Counsel appearing on behalf of the respondent-company and Sri S. Niranjan Reddy, Learned Counsel for the petitioner-bank. It is convenient to examine the rival contentions, urged by Learned Counsel for both the petitioner and the respondent, under different heads.

1. ON FAILURE OF THE BORROWER TO REPAY THE LOAN, CAN THE LENDER SEEK TO HAVE THE COMPANY, WHICH HAD STOOD AS GUARANTOR FOR THE SAID LOAN, WOUND UP UNDER SECTION 433 AND 434 OF THE COMPANIES ACT?

7. Sri A. Sudershan Reddy, learned Senior Counsel appearing on behalf of the respondent-company, (appellant in O.S.A. No. 22 of 2015), would submit that both Sections 433 and 434 of the Companies Act speak of the company, sought to be wound up, being unable to pay its debts; the underlying premise of both the aforesaid provisions is that petitioner is the creditor and the respondent-company its debtor; this presupposes the existence of a debt; it is not in dispute that the respondent-company did not borrow any money from the petitioner; it is HHL which had borrowed 20 Million US dollars from the petitioner; the mere fact that HHL is a wholly owned subsidiary of the respondent-company is of no consequence, as HHL is an independent legal entity; while the debt was owed to the petitioner by HHL, and a relationship of creditor-debtor existed between them, the respondent-company had merely guaranteed the loan; a guarantor of the loan cannot be said to owe a debt to the lender; while the petitioner can file a civil suit and obtain a decree against both the borrower and the guarantor, or against either of them, they cannot invoke the jurisdiction of the Company Court, under Section 433 and 434 of the Companies Act, seeking winding up of the guarantor-company; Sections 433 and 434 of the Companies Act do not bring the guarantor company within its ambit; there is no material on record to show that the petitioner is either a contingent or a prospective creditor, nor is it their case that they are; the respondent company is not a debtor, and no debt is owed by them to the petitioner; and the order of the learned Company Judge, admitting the company petition, therefore necessitates being set aside. Learned Senior Counsel would place reliance on *Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others*, AIR 2008 SC 1797 : (2009) 1 CLR 223 : (2008) 143 CompCas 176 : (2008) 4 JT 183 : (2008) 4 SCALE 473 : (2008) 5 SCC 176 : (2008) 1 UJ 506 : (2008) AIRSCW 2480 : (2008) AIRSCW 1548 : (2008) 7 Supreme 549 : (2008) 2 Supreme 80 and *Subhransu Sekhar Padhi Vs. Gunamani Swain*, AIR 2015 SC 542 : (2014) AIRSCW 6684 : (2014) 9 SCALE 494 .

8. On the other hand Sri S. Niranjan Reddy, learned counsel for the petitioner, would submit that, in view of Section 128 of the Indian Contract Act, a liability of a surety is co-extensive with that of the borrower; it is not necessary for the

lender to first proceed against the borrower, before proceeding against the surety; the moment there is a default on the part of the borrower, a right accrues in favour of the lender to recover the outstanding dues either from the borrower or from the surety or from both; on the borrower defaulting in repayment of the amounts due, a debt is owed to the lender both by the borrower and the surety; the amount due from the surety to the lender is a debt under Section 433 and 434 of the Companies Act; it is open to the lender, therefore, to proceed against the guarantor instead of the borrower; in the present case, the respondent-company had also specifically stated in the agreement that they were co-obligants to the loan facility; they had also admitted their liability, and had sought time to repay the amount due to the petitioner; and it is, therefore, not open to them to now contend that they cannot be held liable for repayment of the amount borrowed from the petitioner by HHL, their wholly owned subsidiary. Learned counsel would rely on *Ram Bahadur Thakur and Company Vs. Sabu Jain Ltd.*, (1981) 51 CompCas 301 ; *Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another*, AIR 1969 SC 297 : (1969) 39 CompCas 133 : (1969) 1 SCR 620 ; *Coventry Spring and Engineering Co. Ltd. Vs. I.C.I.C.I. Bank Ltd.*, (2009) 152 CompCas 68 : (2010) 1 CompLJ 66 ; *Tata Capital Financial Services Ltd. Vs. Sea Rock Investments Limited*, (2014) 6 KarLJ 99 ; *Videocon Industries Limited Vs. Intesa Sanpaolo S.P.A.* ; *Walnut Packaging Private Limited Vs. The Sirpur Paper Mills Limited and Another*, (2009) 4 ALD 7 : (2009) 1 APLJ 155 : (2008) 144 CompCas 454 : (2008) 4 CompLJ 360 : (2009) 90 SCL 39 ; and *Krishna Kilaru and Another Vs. Maytas Properties Limited*, (2013) 113 CLA 435 : (2013) 176 CompCas 483 : (2013) 2 CompLJ 322 .

9. Before examining the rival submissions of counsel on either side it is necessary to note, to the extent relevant, the contents of the corporate guarantee agreement, and the correspondence between the parties. The Corporate Guarantee Agreement dated 09.12.2010 was signed by the respondent company. Clause 3 thereof reads as under.

10. The Guarantor irrevocably and unconditionally guarantees joint and severally with the Subsidiary, as co-principal debtor, the due and principal payment, on demand, of the Facilities guaranteed. This Guarantee shall also be a continuing guarantee and shall not be considered as either wholly or partially satisfied by receipt by Bank of any sums at any time in payment or discharge wholly or partly of the said monies or of the debt for the time being owing by the Subsidiary but shall extend to cover all the Facilities notwithstanding the receipt by the Bank of any part of such sums. The Guarantor further agrees that all outstanding payments of principal or interest due on any obligation hereby guaranteed will, when made, be final and agree that if any such payment is due to be recovered from the Subsidiary by the Bank in whole or in part, as a result of any final court order in any bankruptcy, insolvency or similar proceeding instituted by or against Subsidiary, this Guarantee shall continue to be fully applicable to such obligation to the same extent as though the payment to be so recovered had never been originally made on such obligation.

11. If after due demand we make default in paying or satisfying any sums or liabilities, the Bank are hereby authorized in accordance with law to appropriate-action on the basis of our following representations and warranties provided in Section 11 herein below. (emphasis supplied).

12. In their letter addressed both to HHL and the respondent-company on 06.09.2012, the petitioner referred to the facility agreement dated 09.11.2010 as amended and supplemented on 01.08.2011 for an aggregate amount of 20 million US dollars; to the corporate guarantee dated 09.12.2010 issued by the respondent guaranteeing the facility given to HHL for an aggregate amount of 10 million US dollars; and to the corporate guarantee dated 03.08.2011 issued by the respondent in favour of the petitioner guaranteeing the facility for a further sum of 10 million US dollars, subsequent to the facility agreement dated 01.08.2011. The said letter of the petitioner dated 06.09.2012 (notice of default and waiver and consent letter) records that, upon a request made by the guarantor, the bank had agreed to waive its right to enforce the corporate guarantee for a period of seven business days from the effective date subject to, limited by, and conditioned upon the conditions stipulated therein. Clause (b) thereof required that a confirmation should be given by the guarantor that, notwithstanding the terms of the letter, the provisions of the corporate guarantee would remain in full force and effect on and after the effective date. The said proceedings were signed both by the Director of HHL and the Director of the respondent-company.

13. An SMS was sent on 16.10.2012, by the Chairman of the respondent-company to the petitioner, admitting that they had defaulted; and they would be settling as soon as possible, though they were delayed for reasons beyond their control. Again, by proceedings dated 30.11.2012, a demand notice was issued by the petitioner, in terms of the restated agreement as varied by the waiver letter dated 19.10.2012, to HHL and the respondent-company. The said demand notice dated 30.11.2012 records that, pursuant to the guarantee, the guarantor had undertaken to pay the petitioner, immediately on demand, any amount due in connection with the restated agreement; as on the date of the letter, the borrower had failed to comply with his obligations to make payment in full on certain settlement instalments contained within clause 4.2 (c) of the restated agreement as amended by the November, 2012 waiver; they had failed, in breach, to comply with their obligations to make payment in full; such failure to pay constituted events of default pursuant to clause 13.1 of the restated agreement (as amended by the November, 2012 waiver); as these events of default were continuing, the petitioner was entitled (in addition to any other right or remedy it may have against HHL or the guarantor) to take action in accordance with Clause 13.16 (acceleration) of the restated agreement; pursuant to clause 13.16 (a) of the restated agreement, they were giving notice that all outstanding loans, and all other amounts accrued or outstanding under the restated agreement were immediately due and payable; and, failing payment, the petitioner would take legal action to recover the sum due to it.

14. The respondent sent an e-mail to the petitioner on 14.12.2012 admitting their failure to adhere to the agreed schedule of payment. In the said e-mail the respondent-company expressed its deep regret for not adhering to the agreed schedule of payment. They further stated that, in order to repay the facility, they were taking steps to improve their operating cash flows. They requested the petitioner to allow them to clear the outstanding of 15.1 million US dollars in six monthly instalments commencing from June, 2013. They assured that they were taking steps to clear the whole outstanding amount.

15. From the aforesaid facts, and the above referred documents, it is evident that HHL defaulted in repayment of the loan facility extended to them by the petitioner; the petitioner had sent a notice of default dated 06.09.2012 agreeing to waive its right to enforce the corporate guarantee only for seven days as requested by the respondent company (guarantor); the respondent company, while admitting its liability and of having committed default, had agreed to clear the outstanding debt of 15.1 million US dollars in six monthly instalments commencing from June, 2013; and the petitioner had issued demand notice dated 30.11.2012 informing the respondent-company that all outstanding loans were immediately due and payable; and, failing payment, they would take legal action to recover the sum due.

16. Section 433 of the Companies Act, 1956 prescribes the circumstances in which a company may be wound up by Court and, under sub-section (e) thereof, a company may be wound up by the Court if it is unable to pay its debts. Section 434 of the Act prescribes the circumstances under which a company is deemed to be unable to pay its debts. Under sub-section (1) thereof, a company shall be deemed to be unable to pay its debts (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has, for three weeks thereafter, neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; (b) if execution or other process issued on a decree or order of any Court, in favour of a creditor of the company, is returned unsatisfied in whole or in part; or (c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

17. Section 434 provides for situations where, by legal fiction, a company is held unable to pay its debts, which would enable the court to wind up the said company under Section 433(e) of the Act. Section 434(1)(a) is attracted in cases where the company, which is sought to be wound up, is indebted to a creditor for a sum exceeding Rs. 500/- then due. The premise, underlying both Sections 433 and 434, is the existence of a debt; and a creditor -debtor relationship between the petitioner which seeks an order of winding up, and the respondent which is

sought to be wound up. It is only if the company sought to be wound up is indebted to the petitioning creditor can the latter seek an order of winding up of the former.

18. Section 439 of the Companies Act relates to applications for winding up and, under-sub-section (1)(b) thereof, an application to the Court, for the winding up of a company, shall be presented by petition, among others, by any creditor, including any contingent or prospective creditor. Section 439(2) stipulates that a secured creditor, the holder of any debentures (including debenture stock), and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of Section 439(1)(b). Section 439(8) stipulates that before a petition for winding up a company, presented by a contingent or prospective creditor, is admitted, the leave of the Court shall be obtained for the admission of the petition and such leave shall not be granted (a) unless, in the opinion of the Court there is a prima facie case for winding up the company; and (b) until such security for costs has been given as the Court thinks reasonable.

19. Rule 97 of the Companies Court Rules, 1959 (hereinafter called the Rules) relates to a petition filed by a contingent or prospective creditor and, thereunder, a petition for the winding-up of a company, presented by a contingent or a prospective creditor, shall be accompanied by an application under Section 439(8) seeking the leave of the Court for admission of the petition; and no advertisement of the petition shall be made unless leave has been granted or, where leave has been granted subject to any conditions precedent to the admission of the petition, unless such conditions have been satisfied. If leave, as required under Section 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, has necessarily to be examined even in a petition filed by a contingent or a prospective creditor. (Krishna Kilaru and Another Vs. Maytas Properties Limited, (2013) 113 CLA 435 : (2013) 176 CompCas 483 : (2013) 2 CompLJ 322).

20. Section 439 of the Companies Act enables not only a creditor but also a contingent or a prospective creditor to file a petition for winding up. Who, then, is a contingent or a 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 event. 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". (Krishna Kilaru and Another Vs. Maytas Properties Limited, (2013) 113 CLA

435 : (2013) 176 CompCas 483 : (2013) 2 CompLJ 322 ; Anil Vasudev Salgaonkar Vs. Kermeen Foods P. Ltd., (1984) 58 CompCas 156 . Unlike a contingent or a prospective creditor who can only file a petition for winding up with the leave of the Court, no such fetters are placed on a creditor to seek winding up a company, which is indebted to him for a sum exceeding Rs. 500/- then due. Whether a petition is filed by a creditor, or a contingent creditor, the company court can examine whether the company, which is sought to be wound up, is unable to pay its debts (which would include its contingent and prospective liabilities). (Krishna Kilaru 2013 Vol.176 Comp Cases 483).

21. The requirement of Section 434(1)(a) is not only the existence of a debt, but also that the debt must be due. If a debt is not due, the legal fiction under Section 434(1)(a) is not attracted and, consequently, the company cannot be wound up under Section 433(e) of the Act. What does the word debt mean? The meaning of the expression "debt" may take colour from the provisions of the concerned Act. It may have different shades of meaning. (Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, AIR 1966 SC 1370 : (1966) 59 ITR 767 : (1966) 2 SCR 688). But the following definition is unanimously accepted i.e a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro*." (Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, AIR 1966 SC 1370 : (1966) 59 ITR 767 : (1966) 2 SCR 688 ; Kudremukh Iron Ore Co. Ltd. v. Kooky Roadways P. Ltd. (1990) 69 Comp Cas 178; Webb v. Stenton [1988] 11 QB 518 ; Banchharam Majumdar Vs. Adyanath Bhattacharjee, (1909) ILR (Cal) 936 . There must be *debitum in praesenti* : *solvendum* may be in *praesenti* or in *futuro* - that is immaterial. There must be an existing obligation to pay a sum of money now or in future. (Registrar of Companies, Gujarat Vs. Kavita Benefit Pvt. Ltd., (1978) 48 CompCas 231 ; Bichitrananda Panda Vs. Orissa Construction Corporation Ltd., (1999) 97 CompCas 345 ; Union of India (UOI) Vs. Raman Iron Foundry, AIR 1974 SC 1265 : (1974) 2 SCC 231 : (1974) 3 SCR 556). If there is a liability in *praesenti*, the fact that the amount is yet to be ascertained does not make it any the less a debt. (Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, AIR 1966 SC 1370 : (1966) 59 ITR 767 : (1966) 2 SCR 688). The meaning which is ascribed to the word "debt" generally, can be ascribed to the word "debt" in clause (e) of section 433 of the Companies Act in as much as there is nothing in that clause which circumscribes such a meaning. (Kudremukh Iron Ore Co. Ltd. (1990) 69 Comp Cas 178).

22. The Court must be satisfied that there is, in fact, a debt in the sense that there is a liability of the company in *praesenti*. Unless the liability to pay a sum of money in *praesenti* is made out, it cannot be said that a person is in debt. (Registrar of Companies, Gujarat Vs. Kavita Benefit Pvt. Ltd., (1978) 48 CompCas 231 . A liability depending upon a contingency is not a debt in *praesenti* or in *futuro* till the contingency has happened. (Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, AIR

1966 SC 1370 : (1966) 59 ITR 767 : (1966) 2 SCR 688 . Standing alone, 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. In other words, debts are of two kinds : solvendum in praesenti and solvendum in future. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency is, however, not a debt in praesenti or in futuro, or does not become a debt until the contingency has happened. (People v. Arguello (1869) 37 Calif 524 ; Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, AIR 1966 SC 1370 : (1966) 59 ITR 767 : (1966) 2 SCR 688). When the debt becomes due, in the sense that the creditor is entitled to claim its payment presently, it is a debt which is payable by the company within the meaning of Section 433(e) of the Companies Act. (Registrar of Companies Vs. S. Sohanmull Golcha P. Ltd., (1971) 4 WLN 329 ; Registrar of Companies Vs. Atlas Transport Private Ltd. and Others, (1974) 44 CompCas 496).

23. The distinction, between cases where there is an existing debt payment whereof is deferred, and a case where both the debt and its payment rest in the future, must be borne in mind. If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing till the contingency happens. (Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, AIR 1966 SC 1370 : (1966) 59 ITR 767 : (1966) 2 SCR 688 ; Webb [1988] 11 QB 518). As a debt is a determined or a definite sum of money, payable immediately or at a future date, a contingent or conditional liability is not a debt, unless the contingency or condition has already happened. (Registrar of Companies, Gujarat Vs. Kavita Benefit Pvt. Ltd., (1978) 48 CompCas 231 ; Shri Ram Phal Chaudhary Vs. Yashu Forests (India) Ltd., (2001) 103 CompCas 25).

24. When money is lent by the lender to the borrower, the latter is said to owe a debt to the former. The liability of the surety (who has guaranteed the lender repayment of the debt by the borrower), to pay the guaranteed sum to the lender, arises only when the borrower has defaulted in payment. As long as the borrower continues to adhere to the schedule of repayment stipulated in the agreement, and has not committed any default in this regard, the surety is not liable to repay the said debt to the lender. It is only when the borrower defaults in payment, would the lender be entitled to take action not only against the borrower, but also against the surety, for recovery of the amount lent to the borrower. The liability of the guarantor/surety is contingent on the happening of an unforeseen future event i.e., the borrower defaulting in payment. That is why the corporate guarantee executed by the respondent-company in favour of HHL for 20 Million US dollars is reflected as a contingent liability, under Clause 2.35 of the Notes on accounts to the Balance Sheet of the respondent-company as at 31.03.2013. The amount guaranteed remains a contingent debt till default of by the borrower and, while the lender may possibly be held to be a contingent or a

prospective creditor till then, the moment the borrower defaults in repayment of the loan, the contingent liability of the guarantor crystallizes into a debt and, consequent thereto, the guarantor also owes a debt to the creditor enabling the latter to recover the debt from either the guarantor or the borrower or both. The liability of the guarantor, which was contingent on the borrower defaulting in repayment of the debt to the lender, crystallises into a debt the moment the borrower fails to adhere to the schedule of repayment stipulated in the agreement, between himself and the lender, and defaults in repayment. Consequently the amount payable, on such default by the borrower, becomes a debt due payable both by the guarantor/surety and the borrower.

25. If support of a precedent is required to show that a petition, to wind up the guarantor-company, would lie under Section 433(e) read with Section 434(1)(a) of the Companies Act, it would suffice to refer to *Ram Bahadur Thakur & Co. 1981 Vo. 51 Comp Cases 301* wherein the company, which was sought to be wound up, had entered into a deed of guarantee by which it stood as a guarantor for the payment due to the firm by the Paper Mills; and by the said deed of guarantee, the company agreed and undertook to pay to the firm the agreed amounts in case of default by the paper mills. Before the Delhi High Court it was contended, on behalf of the Company, that the provisions of Section 433(e) read with Section 434(1)(a) of the Companies Act had no application; these provisions were attracted only where there was a "debt" owed by the company to a creditor; in the present case there was no "debt" owed by the company to the firm; no such debt could arise until the amount thereof was ascertained and a decree, on the basis of the deed of guarantee, was obtained against the company; and, though the term "debt" was not defined in the Act, it should nonetheless be understood in a practical and pragmatic sense. It is in this context that the Delhi High Court held that it was clear that a "debt" from the company to the firm had come into existence in the present case; under the deed of guarantee, the company had undertaken an obligation to pay to the firm the amounts due to it by the paper mills; no "debt" came into existence merely on the execution of the deed of guarantee because it was not a present liability, but a contingent liability; the liability of the company to pay did not arise unless (a) the paper mills defaulted in making the payments as scheduled, and (b) there was a request/notice calling upon the company to pay the amounts due; the moment these contingencies happened, a present obligation arose resulting in the accrual of a "debt"; the contingent liability, under the guarantee, would get crystallised into a debt only on notice to the company under the agreement; it was not necessary for the firm to let in all the evidence, in support of its claim, at the stage of admission of the Company Petition; it must be taken, atleast prima facie for the purpose of admission, that demands had been made on the paper mills and on the company, and the obligation to pay had arisen under the agreement, giving rise to a "debt" in respect of which proceedings were permissible under Section 433; the correct position could be determined only after the parties lead evidence in support of the petition but, at the present

stage, it prima facie appeared that there was a debt in respect of which the petition was maintainable; the law did not compel the creditor to proceed against the principal debtor, before proceeding against the surety; in most cases, the guarantor enters the picture at the request of the principal debtor, and he should have no handicap in putting forward a clear defense to the creditor's petition, had there been one; if there was a plausible and clear ground of defense, no winding up would be ordered; but where one is unable to see any grounds on which the debt is disputed, there was no reason why the creditor should be driven to a suit, and not be granted relief in a winding-up petition.

26. Under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. It is only because the earlier contingent liability has crystallised into a debt, on the default of the borrower to repay the loan, does Section 128 of Contract Act enable the creditor to recover the said amount, due from the borrower, from the surety also. The liability of a surety/guarantor, to repay the loan of the borrower arises only on a default by the latter. (*Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others*, AIR 2008 SC 1797 : (2009) 1 CLR 223 : (2008) 143 CompCas 176 : (2008) 4 JT 183 : (2008) 4 SCALE 473 : (2008) 5 SCC 176 : (2008) 1 UJ 506 : (2008) AIRSCW 2480 : (2008) AIRSCW 1548 : (2008) 7 Supreme 549 : (2008) 2 Supreme 80). A contract of guarantee is an independent contract and, therefore, the plea that, unless and until the lender takes steps for realization of the amount from the principal borrower, they are not entitled to invoke the guarantee is not tenable. (*Coventry Spring and Engineering Co. Ltd. Vs. I.C.I.C.I. Bank Ltd.*, (2009) 152 CompCas 68 : (2010) 1 CompLJ 66). The liability of the surety is immediate, and is not deferred until the creditor has exhausted his remedies against the principal debtor. Before payment, the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. (*Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another*, AIR 1969 SC 297 : (1969) 39 CompCas 133 : (1969) 1 SCR 620).

27. The surety is a guarantee and it is his business to see that the principal pays, and not that of the creditor. In the absence of some special equity, the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings. (*Wright v. Simpson* (1) 6 Ves. Jun. 714. 734: 31 E.R. 1272, 1282 ; *Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another*, AIR 1969 SC 297 : (1969) 39 CompCas 133 : (1969) 1 SCR 620) . A creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and, when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt. (*Lachhman Joharimal v. Bapu Khandu and Surety Tukaram Khandoji* (1869) 6 Bombay High Court Reports 241 ; *Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another*, AIR 1969 SC 297 : (1969) 39 CompCas 133 : (1969) 1 SCR 620). Where a company acts as guarantor for repayment of a loan, and the principal debtor has committed default, the amount

guaranteed is a debt in respect of which a petition for winding up will lie. (Ram Bahadur Thakur and Company Vs. Sabu Jain Ltd., (1981) 51 CompCas 301 ; Sical-CWT Distriparks Ltd. v. Besser Concrete Systems Ltd., (2003) 113 Com Cases 383 (Mad) ; Standard Chartered Bank Vs. Jain Studio Limited, (2003) 66 DRJ 709).

28. It is open to the surety, just like the borrower, to raise all defence available to them in a winding up petition, including that they had not guaranteed the debt or that the borrower had not defaulted in payment or even that there exists a bonafide dispute regarding repayment of the debt claimed to be due. On any such defence being taken by the surety, the Company Court must necessarily examine whether there is a bonafide dispute regarding the debt allegedly due, or whether the defence taken by the company is merely a moonshine. No such defence is taken by the respondent-company in the present case. Sri A. Sudershan Reddy, Learned Senior Counsel appearing on behalf of the respondent-company, does not dispute the fact that the petitioner had lent money to HHL; the respondent company had guaranteed the loan facility extended by the petitioner to HHL; HHL had defaulted in repayment of the debt due to the petitioner; the respondent company, as the guarantor, had agreed to repay the amount borrowed by HHL; and that the petitioner is entitled to recover the money, due from the borrower, even from the surety by filing a civil suit before the Civil Court of competent jurisdiction. The submission of the Learned Senior Counsel is only that, while the petitioner may be entitled to avail the remedy of a civil suit for recovery of the money lent to the borrower from the surety also, they are not entitled to seek winding up of the respondent-company which has only guaranteed the amount lent to the borrower.

29. Clause 3 of the Corporate Guarantee Agreement stipulates that the guarantor, irrevocably and unconditionally, guarantees, jointly and severally with the subsidiary, as a co-principal debtor the due and principal payment, on demand, of the facilities guaranteed. It is evident therefrom that the respondent company had guaranteed repayment of the amount due on demand, as the co-principal debtor jointly and severally with the subsidiary ie HHL. As noted hereinabove, HHL is a wholly owned subsidiary of the respondent-company. The respondent-company, under clause 3 of the Corporate Guarantee Agreement, has acknowledged that it is the co-principal debtor along with the borrower ie HHL. They also agreed, jointly and severally with the subsidiary (HHL), to pay the guaranteed facility on demand. Clause 3 is an acknowledgment by the respondent-company that they are the debtor of the petitioner-creditor. In view of their acceptance of being a co-principal debtor, the amount guaranteed by them is a debt; and, on default in repayment by HHL, the debt became a debt due and payable by them. While the creditor can file a suit for recovery of money, failure of the guarantor/surety to pay the debt, on a demand being made by the creditor under Section 434(1)(a) of the Companies Act, would attract the legal fiction stipulated thereunder, and would require this Court to deem that the respondent-company (surety/guarantor) is unable to pay its debts under Section

433(e) of the Companies Act. Where a surety/guarantor guarantees repayment of the loan, by the borrower to the lender, the liability of the guarantor remains contingent on the failure of the borrower to repay the loan in terms of the agreement. This contingent liability of the guarantor crystallizes into a debt, the moment the borrower commits default in repayment of the loan in terms of the agreement. The liability of the guarantor is not contingent on the inability of the borrower to pay, but on his failure to repay the debt. Accepting the submission that the liability of the guarantor would crystallize into a debt only on the inability of the borrower, and not on his failure, to repay the loan to the lender, would require the lender to first proceed against the borrower and, only on the inability of the borrower to repay the debt, to then proceed against the surety. The very fact that the lender can proceed simultaneously against the borrower and the surety, or against either of them, makes it clear that the contingent liability of the guarantor crystallizes into a debt, on failure of the borrower to repay the loan in accordance with the terms of the agreement. While Section 433(e) of the Companies Act also refers to the inability of the company, sought to be wound up, to pay its debts, the legal fiction in Section 434(1)(a) thereof equates neglect to pay with inability to pay. Neglect to pay is failure to pay without just cause. Save cases where there is a bonafide dispute regarding repayment of the debt, failure to pay is equated, by Section 434(1)(a), to inability to pay the debt.

30. If, on compliance with the conditions stipulated in 434(1)(a) of the Companies Act, the respondent company still fails to pay the debt without reasonable cause, it must, in law, be deemed to be unable to pay its debts. In other words, on default by the borrower to repay the debt in terms of the agreement to the lender, and on the latter putting the borrower and the guarantor on notice calling upon them to repay the outstanding loan, the liability of the guarantor, which was till then a contingent liability, crystallizes into a debt due and payable by them to the lender. If, on the lender complying with the conditions of Section 434(1)(a) of the Companies Act, the guarantor company still fails to repay the debt due to the lender without reasonable cause, the guarantor company must be deemed in law, under Section 433(e) read with Section 434(1)(a) of the Companies Act, to be unable to pay its debts justifying the petitioning creditor invoking the jurisdiction of the company court seeking winding up of the guarantor company.

31. In *Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others*, AIR 2008 SC 1797 : (2009) 1 CLR 223 : (2008) 143 CompCas 176 : (2008) 4 JT 183 : (2008) 4 SCALE 473 : (2008) 5 SCC 176 : (2008) 1 UJ 506 : (2008) AIRSCW 2480 : (2008) AIRSCW 1548 : (2008) 7 Supreme 549 : (2008) 2 Supreme 80 , reliance upon which is placed on behalf of the respondent-company, the interpretation of Section 29 vis-?-vis Section 31 of the State Financial Corporations Act, 1951 (for short "the SFC Act") was in question. The appellant-Corporation, in the exercise of its powers under Section 29 of the SFC Act, had directed that possession of two properties of the guarantors be taken

over. The respondent filed a writ petition before the Karnataka High Court contending that the appellant-Corporation could not have proceeded against the guarantors under Section 29 of the Act. The High Court quashed the order passed by the appellant, under Section 29 of the SFC Act, authorizing its officers to take possession of the properties. In appeal, the Supreme Court held that a lender of money, under the common law, had the remedy to file a suit for realization of the amount lent, if the borrower did not repay the same; the SFC Act, however, provided for a special remedy in favour of the Financial Corporation constituted thereunder, enabling it to exercise a statutory power of either selling the property or to take over the management or possession or both belonging to the industrial concern; Section 29 conferred an extra-ordinary power upon the "Corporation" which, being a "State" within the meaning of Article 12 of the Constitution of India, was expected to exercise its statutory powers reasonably and bona fide; if special provisions were made, in derogation of the general right of a citizen, the statute should receive strict construction; for the purpose of enforcing a liability of an industrial concern, recourse could be taken both under Sections 29 and 31 of the Act; the default contemplated by Section 29 was of the industrial concern; such a default created a liability on the industrial concern, and the liability arose when the industrial concern defaulted in repayment of any loan or advance, or any instalment thereof, under the agreement; it could also arise when it failed to meet its obligation(s) in relation to any guarantee given by the corporation; if it otherwise failed to comply with the terms of the agreement with the financial corporation, Section 29 applied; Section 29 of the Act did not state that the corporation could proceed against the surety, even if some properties were mortgaged or hypothecated by it; the right of the financial corporation, in terms of Section 29 of the Act, must be exercised only on a defaulting party; there could not be any default, as was envisaged in Section 29, by a surety or a guarantor; the liabilities of a surety, or the guarantor, to repay the loan of the principal debtor, arose only when a default was made by the latter; the rights and liabilities of a surety and the principal borrower were different and distinct; ordinarily, a guarantee should be enforced through a court having appropriate jurisdiction; in the absence of any express provision in the statute, a person being in lawful possession could not be deprived thereof by reason of default on the part of the principal borrower; if a remedy is provided to take action against one in a particular manner, it can only be exercised against him, but not against the other in the same manner; Section 31 of the Act provides for the reliefs which may be sought for by the Corporation strictly in terms thereof; clause (aa) of Sub-section (1) of Section 31 was inserted by Act No. 43 of 1985; prior thereto, even Section 31 could not have been taken recourse to against a surety; interpretation of a statute would not depend upon a contingency; it had to be interpreted on its own; only because a speedy remedy is provided for, that would not itself lead to the conclusion that the provisions of the Act had to be extended, although the statute did not say so; even if the legislation is beneficent, the same by itself would not be held to be extendable to a situation which the statute does not contemplate; when more than one

remedy is provided for, an option is given to a suitor to opt for one or the other remedy; and such a provision is not ultra vires. The judgment in *Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others*, AIR 2008 SC 1797 : (2009) 1 CLR 223 : (2008) 143 CompCas 176 : (2008) 4 JT 183 : (2008) 4 SCALE 473 : (2008) 5 SCC 176 : (2008) 1 UJ 506 : (2008) AIRSCW 2480 : (2008) AIRSCW 1548 : (2008) 7 Supreme 549 : (2008) 2 Supreme 80 , was followed by the Supreme Court in *Subhransu Sekhar Padhi Vs. Gunamani Swain*, AIR 2015 SC 542 : (2014) AIRSCW 6684 : (2014) 9 SCALE 494 .

32. Section 2[c] of the State Financial Corporation Act (SFC Act for short) defines industrial concern to mean any concern engaged or to be engaged in any of the activities specified therein. Section 29 of the SFC Act provides for the rights of the financial corporation to realize its dues in case of default and, under Sub-section (1) thereof, where any industrial concern, which is under a liability to the financial corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the corporation or otherwise fails to comply with the terms of its agreement with the financial corporation, the financial corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the financial corporation.

33. Section 31 of the SFC Act contains special provisions for enforcement of claims by the financial corporation and, under Sub-section (1) thereof, where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the corporation or otherwise fails to comply with the terms of its agreement with the financial corporation, or where the financial corporation requires an industrial concern to make immediate repayment of any loan or advance under Section 30 and the industrial concern fails to make such repayment then, without prejudice to the provisions of Section 29 of the SFC Act and of Section 69 of the Transfer of Property Act, 1882, any officer of the financial corporation, generally or specially authorised by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for, among others, enforcing the liability of any surety.

34. Section 29 of the SFC Act is attracted only when an industrial concern, which is under a liability to the financial corporation under an agreement, makes default in repayment of the loan. The financial corporation is empowered, by the said provision, to proceed only against the defaulting industrial concern i.e., only the borrower. Section 29 does not enable a financial corporation to proceed against the surety. Unlike Section 29, Section 31(1)(aa) of the SFC Act enables a financial corporation, where the borrowing industrial concern defaults in repayment of a loan, to apply to the District Judge for enforcing the liability of

any surety. It is only because the financial corporation sought to enforce the liability of the surety, under Section 29 of the SFC Act, that the Supreme Court, in *Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others*, AIR 2008 SC 1797 : (2009) 1 CLR 223 : (2008) 143 CompCas 176 : (2008) 4 JT 183 : (2008) 4 SCALE 473 : (2008) 5 SCC 176 : (2008) 1 UJ 506 : (2008) AIRSCW 2480 : (2008) AIRSCW 1548 : (2008) 7 Supreme 549 : (2008) 2 Supreme 80 , held that Section 29 did not enable them to do so.

35. HHL, which borrowed money from the petitioner, defaulted in repayment of the loan. If Section 29 of the SFC Act were applicable, action for recovery of money could have been taken only against HHL, and not the respondent-company. Unlike Section 29 of the SFC Act, which enables the financial corporation to proceed only against the defaulting industrial concern, Section 433(e) read with Section 434(1)(a) of the Companies Act enables the petitioning creditor to file a petition for winding up of the guarantor/surety company if it is unable to pay the debt due. As the liability of the guarantor crystallizes into a debt, on default by the borrower to repay the loan in accordance with the agreement, the guarantor company owes a debt to the lender the moment the borrower defaults in repayment of the loan. Consequently, the lender is entitled to initiate proceedings under Section 433(e) of the Companies Act if the guarantor-company neglects to repay the said debt. Reliance placed by Sri A. Sudershan Reddy on *Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others*, AIR 2008 SC 1797 : (2009) 1 CLR 223 : (2008) 143 CompCas 176 : (2008) 4 JT 183 : (2008) 4 SCALE 473 : (2008) 5 SCC 176 : (2008) 1 UJ 506 : (2008) AIRSCW 2480 : (2008) AIRSCW 1548 : (2008) 7 Supreme 549 : (2008) 2 Supreme 80 ; and *Subhransu Sekhar Padhi Vs. Gunamani Swain*, AIR 2015 SC 542 : (2014) AIRSCW 6684 : (2014) 9 SCALE 494 , to contend that the surety cannot be sought to be wound up under Section 433(e) read with Section 434(1) (a) of the Companies Act, is misplaced.

36. As noted hereinabove, HHL (which borrowed money from the petitioner and failed to repay the loan to them) is a wholly owned subsidiary of the respondent-company. A holding company is liable for the debt of the subsidiary, if it has guaranteed that debt. (*Lachhman Joharimal* (1869) 6 Bombay High Court Reports 241). In *Tata Capital Financial Services Ltd. Vs. Sea Rock Investments Limited*, (2014) 6 KarLJ 99 , a winding up petition was filed against the guarantor company, and not against the borrower company. The Karnataka High Court held that, in law, the creditor would have the option of proceeding against the guarantor. In *Videocon Industries Limited Vs. Intesa Sanpaolo S.P.A.* it was held that, in matters of commercial transactions involving crores of rupees where the company facing winding up proceedings had stood as a guarantor, if a dishonest defence taken by the company were to be accepted, the Court would be giving a wrong signal, dissuading foreign commercial entities from relying on the guarantees given by Indian Companies which would, ultimately, undermine the role of India in the world of trade and commerce.

37. In the present case, HHL has not only defaulted in repayment of the loan in accordance with the loan facility agreement, but the petitioner has also invoked the corporate guarantee, and has demanded that both the borrower and the guarantor (respondent-company) pay the outstanding loan. The petitioner issued demand notice dated 30.11.2012 both to HHL and the respondent-company informing them that they were giving notice that all outstanding loans were due and payable; and, failing payment, they would take legal action to recover the sum due. The petitioner issued a statutory notice, under Section 434(1)(a) of the Act, to the respondent-company on 20.05.2014, and as no payment was forthcoming they filed the petition for winding up under Section 433(e) of the Companies Act.

38. The liability of the respondent-company, which was earlier contingent on HHL defaulting in repayment of the loan facility, crystallized into a debt on the happening of the contingency ie default by HHL. As the contingent liability of the guarantor (respondent-company) had crystallized into a debt, the lender was entitled not only to file a civil suit for recovery of the debt due, but also to invoke the jurisdiction of the Company Court, under Section 433(e) and Section 434(1) of the Act, on the ground that, despite a demand being made, the respondent-company had neglected to pay the amount admittedly due; and neglect to pay the debt due enabled the Company Court to order winding up of the respondent-company, under Section 433(e) of the Act, on the ground of its inability to pay its debts. As it failed to repay the debt, guaranteed by it, the legal fiction under Section 434(1)(a) is attracted, and the respondent-company must be deemed to be unable to pay its debts under Section 433(e) of the Companies Act. The contention that a petition for winding up does not lie against the guarantor company, despite default in repayment of the loan by the borrower, does not merit acceptance.

II. REMEDY OF A CIVIL SUIT FOR RECOVERY OF MONEY DOES IT BAR THE CREDITOR FROM INVOKING THE JURISDICTION OF THE COMPANY COURT UNDER SECTION 433(e) AND 434(1)(a) OF THE COMPANIES ACT?

39. Sri A. Sudarshan Reddy, Learned Senior Counsel, would submit that the petitioner had filed a suit both against the borrower and the guarantor, and had obtained a decree; they have filed petitions before the XI Additional Chief Judge to execute the decree wherein the respondent had filed their objections thereto contending that the decree was not in accordance with Section 13 of the Civil Procedure Code; no petition for winding up can be filed against the guarantor, more so when the borrower company is still in existence, and has not been wound up; as the petitioner has obtained a decree, and has availed the remedy of an execution petition before the competent Civil Court, they cannot, at the same time, file a petition for winding up, that too not of the borrower but of the guarantor; the petitioners contention that the liability of a guarantor is co-extensive with that of a borrower is applicable only to a civil suit filed for recovery of the debt; the petitioner cannot convert proceedings for winding up

into a suit for recovery of money; the remedy, for recovery of money, is only by way of a civil suit before the competent Civil Court; and the petitioner seeks winding up of the respondent-company which had merely guaranteed repayment of the credit facility provided by the petitioner to HHL. Learned Senior Counsel would rely on *Kitti Steels Limited Vs. Sanghi Industries Limited*, (2010) 154 CompCas 102 : (2010) 102 SCL 308 in this regard.

40. On the other hand, Sri S. Niranjan Reddy, Learned Counsel for the petitioner, would submit that the mere fact that the petitioner has the remedy of filing a suit for recovery of money, does not disable them from invoking the jurisdiction of this Court under Sections 433 and 434 of the Companies Act; and the learned Company Judge had, rightly, admitted the Company Petition.

41. In examining the question, whether the remedy of a civil suit, for recovery of the debt due, would bar exercise of discretion to entertain a winding up petition under Section 433(e) of the Companies Act, it is necessary to note the distinction between a civil suit for recovery of money, and a petition for winding up of a company on the ground of its inability to pay its debts. Proceedings for winding up, under Section 433 of the Companies Act, cannot be equated to Suits or for that matter Suits for recovery of money. In the winding up proceedings, the lis is not merely between the petitioning creditor 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. The company is directed to be wound up depending upon a case being made out, whereupon the assets are taken over and distributed in accordance with the provisions of the Companies Act and the Rules. A suit for recovery of money is essentially a suit between the parties where no third party can seek indulgence or impleadment. Proceedings for winding up under the Companies Act are entirely different, a special remedy provided for. The idea is not to restrict the proceedings to the parties alone. Its range is widened and all steps taken in winding up proceedings are in public interest. Sometimes the relief for winding up is denied when it is against public interest. (*Coromandel International Ltd. Vs. Chemcel Biotech Ltd.*, (2011) 166 CompCas 676 : (2011) 4 CompLJ 279).

42. A petition presented under Section 433(e) of the Companies Act for winding up of a company is not equivalent to an application seeking recovery of a debt due to the petitioning creditor. Section 433 of the Companies Act is not intended to supplant the jurisdiction of a civil court to adjudicate a money suit. Section 433(e) vests in the Company Court the jurisdiction to wind up a Company, inter alia under clause (e), if the Company is unable to pay its debts. Once the statutory fiction under Section 434 comes into play, it is open to the Company Court to entertain a petition under Section 433(e) of the Companies Act. (*Viral Filaments Ltd., Mumbai Vs. Indusind Bank Ltd., Mumbai*, (2001) 3 ALLMR 737 : (2003) 113 CompCas 85). If there is no bonafide dispute with regards the sum payable, 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, AIR 2005 SC 4175 : (2005) 2 BC 366 : (2005) 124 CompCas 473 : (2005) 4 CompLJ 6 : (2005) 2 CTC 392 : (2005) 3 JT 380 : (2005) 7 SCC 42 : (2005) 59 SCL 255 : (2005) 2 SCR 1015 : (2005) 1 UJ 402 : (2005) AIRSCW 5324 : (2005) 3 Supreme 39 ; Tube Investments of India Ltd. Vs. Rim and Accessories (P) Ltd.).

43. In Indo Alusys Industries Ltd. Vs. Assotech Contracts (India) Ltd., (2009) 110 DRJ 384 : (2009) 156 PLR 17 , the Delhi High Court, following its earlier judgment in Rishi Pal Gupta Vs. S.J. Knitting and Finishing Mills Pvt. Ltd., (1998) 4 CLT 15 : (1998) 73 DLT 593 : (1998) 45 DRJ 522 : (1998) 119 PLR 53 , held that the remedy of recovery of money through a civil suit is distinct from that of the remedy provided for winding up of a company for non-payment of its debt under Section 434 of the Companies Act; in the winding up proceedings the final order passed is to wind up the company which is not only beneficial for the petitioner but is also beneficial to all the shareholders, creditors or contributories of the company; the purpose of filing a recovery suit and a winding up petition are separate and distinct and, therefore, even when a civil suit for recovery of a debt is filed, there is no bar for the creditors to file a petition in the Company Court for winding up of the defaulting company; the company petition filed by the petitioner is maintainable; mere filing of a suit, by the petitioner in order to protect its right, and by way of abundant caution, would not prohibit filing of the winding up petition or preclude the petitioner from maintaining the same.

44. In Karam Chand Thapar and Brothers (Coal) Sales Ltd. Vs. Acme Paper Ltd., AIR 1994 Delhi 1 : (1996) 86 CompCas 636 : (1993) 51 DLT 439 : (1999) 27 DRJ 440 : (1993) RLR 522 , the Delhi High Court, following the judgment of the Patna High Court in Central Bank of India v. Sukhani Mining And Engineering Industries Pvt. Ltd. (1987(47) Comp Cases 1, held that there was no provision in the Act which ousted the jurisdiction of the Court in continuing and deciding the winding up proceeding inspite of the fact that there was a suit by a creditor for the realisation of his debt; 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; however there was no such provision, as a winding up proceeding is not merely for the benefit of the petitioner but of all its shareholders, creditors or contributories; and merely because a creditor had filed a suit against the company, the winding up proceedings could not be stayed.

45. Availing the remedy of a civil suit would not bar exercise of discretion, under Section 433(e) of the Companies Act, to wind up the company. Section 433 of the Companies Act provides for the circumstances in which a company may be wound up by the Court. There are six recipes in this section, the sixth, namely, that a company may be wound up by the Court, if the Court is of the opinion that it is just and equitable that the company should be wound up. The sixth clause, namely just and equitable, is not to be read ejusdem generis with the preceding

five clauses. While the five earlier clauses prescribe definite conditions to be fulfilled for the one or the other to be attracted in a given case, the just and equitable clause leaves the entire matter to the wide and wise judicial discretion of the Court. The only limitations are the force and content of the words themselves, "just and equitable". Section 433(f) has to be read with Section 443 (2) of the Act. (Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, AIR 1976 SC 565 : (1976) 46 CompCas 91 : (1976) 3 SCC 259 : (1976) 2 SCR 226). 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 Companies Act itself created a bar, under Section 443(2) thereof, from entertaining a winding-up petition on "just and equitable" grounds when an alternative remedy is available. (K. Mohan Babu Vs. Heritage Foods India Ltd., Hyd. and others, (2001) 5 ALD 800).

46. The twin ingredients to be satisfied, under Section 443(2) of the Act, for the Court to refuse to make an order of winding up on just and equitable grounds, is the formation of the opinion that (i) some other remedy is available to the petitioner; and (ii) he is acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. Section 443 (2) does not bar exercise of jurisdiction, but further limits exercise of discretion under Section 433(f) of the Act. It is only if the other available remedy is not efficacious, can the discretionary jurisdiction of the Court under Section 433(f) be invoked. (Smt. P. Sridevi Vs. Cherishma Housing Private Ltd., A private limited company and Another, (2009) 147 CompCas 130 : (2009) 2 CompLJ 106).

47. In Viral Filaments Ltd., Mumbai Vs. Indusind Bank Ltd., Mumbai, (2001) 3 ALLMR 737 : (2003) 113 CompCas 85 , this Court held that Section 443(2) of the Act empowered the Court to refuse to make an order of winding up, if it was of opinion that some other remedy was available to the petitioner, and the petitioner was acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy; though the petitioner had obtained a decree from the civil court, which was the basis for filing a winding up petition, the decree was in appeal; and, in such a situation, a winding up petition under Section 433(e) of the Act would not lie. The judgment in Viral Filaments Ltd., Mumbai Vs. Indusind Bank Ltd., Mumbai, (2001) 3 ALLMR 737 : (2003) 113 CompCas 85 cannot either be read, or be understood, as extending the requirement of compliance with Section 443(2), (which is applicable to a petition for winding up under Section 433(f)), also to a petition under Section 433(e) of the Act. It is only where winding up is sought under Section 433(f) on just and equitable grounds would Section 443(2) enable this Court to refuse to make an order of winding up if it is of the opinion that some other remedy is available to the petitioner, and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. The legislature, in its wisdom, has chosen to prescribe the requirement of compliance with Section 443(2) only where a company is sought to be wound up on just and equitable grounds under Section 433(f) of the Act. It has consciously chosen not to extend

this requirement to any of the other circumstances in clause (a) to (e) of Section 433. Extending the requirement of Section 443(2), which the legislature has prescribed only to a petition filed for winding up under Section 433(f) on just and equitable grounds, also to a petition under Section 433(e) of the Companies Act would either require deletion of the words just and equitable or addition of the words unable to pay its debts in Section 443(2) of the Act.

48. Courts have adhered to the principle that effort should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute, as being inapposite surplusage, if they can have a proper application in circumstances conceivable within the contemplation of the statute. (Gurudevdatto VKSSS Maryadit and Others Vs. State of Maharashtra and Others, AIR 2001 SC 1980 : (2001) 4 JT 11 : (2001) 2 SCALE 670 : (2001) 4 SCC 534 : (2001) 2 SCR 654 : (2001) AIRSCW 1380 : (2001) 3 Supreme 28 , Manohar Lal Vs. Vinesh Anand and Others, AIR 2001 SC 1820 : (2001) 2 ARBLR 160 : (2001) 2 CompLJ 207 : (2001) CriLJ 2044 : (2001) 2 Crimes 202 : (2001) 4 JT 573 : (2001) 3 SCALE 270 : (2001) 5 SCC 407 : (2001) 2 SCR 1036 : (2001) AIRSCW 1590 : (2001) 3 Supreme 279). When the legislative intent is found specific mention and expression in the provisions of the Act itself, the same cannot be whittled down or curtailed and rendered nugatory. (Bharathidasan University and Another Vs. All India Council for Technical Education and Others, AIR 2001 SC 2861 : (2001) 8 SCC 676 : (2001) AIRSCW 3824 : (2001) 7 Supreme 196). Effect should be given to all the provisions and a construction that reduces one of the provisions to a dead letter must be avoided. (Anwar Hasan Khan Vs. Mohammad Shafi and Others, AIR 2001 SC 2984 : (2001) 9 JT 84 : (2001) 7 SCALE 398 : (2001) 8 SCC 540 : (2001) AIRSCW 4461 : (2001) 7 Supreme 794). 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, AIR 1964 SC 1742 : (1964) 53 ITR 100 : (1964) 7 SCR 539 ; 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).

49. Observations in judgments should not be read out of context. A word here, or a word there, should not be made the basis for inferring inconsistency or conflict of opinion. Law does not develop in a casual manner. It develops by conscious, considered steps. (Sri Konaseema Co-operative Central Bank Ltd., Amalapuram and another Vs. N. Seetharama Raju, (1990) 1 APLJ 368 : (1991) 72 CompCas 588). 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 statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. (Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another, (2004) 5 CTC 74 : (2004) 8 JT 171 : (2004) 8 SCALE 376 : (2004) 8 SCC 579 , Ashwani

Kumar Singh Vs. U.P. Public Service Commission and Others, AIR 2003 SC 2661 : (2003) 96 CLT 545 : (2003) 6 JT 184 : (2003) 5 SCALE 255 : (2003) 11 SCC 584 : (2004) SCC(L&S) 95 : (2003) 1 SCR 528 Supp : (2004) 1 SLJ 28 : (2003) AIRSCW 3387 : (2003) 4 Supreme 573 ; Union of India (UOI) Vs. Amrit Lal Manchanda and Another, AIR 2004 SC 1625 : (2004) CriLJ 1426 : (2004) 92 ECC 65 : (2004) 2 JT 378 : (2004) 2 SCALE 480 : (2004) 3 SCC 75 : (2004) 51 SCL 488 : (2004) 3 SCR 422 : (2004) AIRSCW 944 : (2004) 2 Supreme 150 ; and Deepak Bajaj Vs. State of Maharashtra and Another, AIR 2009 SC 628 : (2008) 11 JT 609). As the petitioner does not seek any relief under Section 433(f), and as their claim is limited to Section 433(e), we see no reason to dismiss the company petition on the ground of availability of the remedy of a civil suit.

50. Clauses (a) to (c) of Section 434(1) of the Companies Act deal with three distinct and different situations. Under Clause (a) failure on the part a debtor to pay the debt due to the creditor, within three weeks from the date on which a notice of demand is served on them at the registered office, would require the company to be deemed to be unable to pay its debts. Likewise under clause (b), if on a decree being obtained, and in execution proceedings the decretal amount is not satisfied in whole or in part, the judgment-debtor company must be deemed to be unable to pay its debts. The third situation is under Clause (c) where the company is deemed to be unable to pay its debt if it is proved to the satisfaction of the Court that the company is unable to pay its debts. The Court is required, under clause (c) of Section 434(1), to take into account the contingent and prospective liabilities of a company in determining whether the company is unable to pay its debts. Clauses (a), (b) and (c) of Section 434(1) of the Companies Act deal with three different and distinct situations and are, evidently, in the alternative. Reading the requirement of clauses (a) to (c) of Section 434(1) as cumulative, more so when the word or is used therein, would result in a situation where the legal fiction under Section 434(1) of Companies Act would not be attracted to any case at all. (PL Shipping & Logistics Pvt. Ltd. v. A.G.A. Publications Ltd. (Order in C.P. No. 34 of 2011 dated 24.04.2012)). While their having obtained a decree against the respondent-company, and the pendency of proceedings in execution of the said decree, may disentitle the petitioner from claiming that the legal fiction under Section 434(1)(b) is attracted, it does not disable them from seeking winding up of the respondent-company under Section 433(e) of the Act as the legal fiction, under Section 434(1)(a) of the Act, is attracted.

III. ADVERTISEMENT, OF ADMISSION OF THE PETITION FOR WINDING UP, CANNOT BE DEFERRED AS A MATTER OF COURSE:

51. Sri S. Niranjana Reddy, Learned counsel for the petitioner, would submit that, having admitted the Company Petition, the learned company Judge had erred in deferring advertisement by six months to give one more opportunity to the respondent; no reasons have been assigned by the learned Company Judge for granting the respondent six months time; consequent upon the Company Petition

being admitted, an advertisement must necessarily be issued; and, to the limited extent that the learned Company Judge had deferred advertisement of admission of the Company Petition by a period of six months, the order necessitates interference.

52. Part III of the Companies Court Rules, 1959 relates to winding up by Court. Rule 96 thereunder, which relates to admission of the petition for winding up and directions as to advertisement, provides that, upon the filing of the petition, it shall be posted before the Judge in chambers for admission of the petition and fixing a date for the hearing thereof, and for directions as to the advertisement to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition. Rule 99 relates to advertisement of the petition for winding up and thereunder, subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by Rule 24 of the Rules, and the advertisement shall be in Form No. 48.

53. Rule 24 of the Rules relates to advertisement of the petition and, under sub-rule (1) thereof, where any petition is required to be advertised, it shall, unless the Judge otherwise orders or the rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge. Under sub-rule (2), except in the case of a petition to wind-up a company, the Judge may, if he thinks fit, dispense with any advertisement required by these Rules. Form No. 48 relates to advertisement of the petition. Notice is given thereby that a petition for winding up of the company, presented by the creditor/contributory, has been directed by the Court to be heard on a particular date. The Form also stipulates that any creditor, contributory or other person, desirous of supporting or opposing the making of an order of winding up should send, to the petitioner or his advocate, notice of his intention to appear at the hearing for the said purpose. Rule 6 of the Rules stipulates that, save as provided by the Companies Act or by the Rules and practice and procedure of the Court, the provisions of the CPC, so far as applicable, shall apply to all proceedings under the Act and the Rules. Rule 9 relates to the inherent powers of the Court and, thereunder, nothing in the Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

54. A combined reading of Rules 6 and 9 of the Rules indicate that the inherent power of the Court can be exercised in the same manner as provided in Section 151 of the Code of Civil Procedure by the Court except in cases where the Companies Act, and the Rules made thereunder, provide otherwise. The

discretion conferred under Rule 24 is relatable only to that part of the Rule which provides for the Company Petition to be advertised not less than fourteen days before the date of hearing. Rule 24(1) also provides a particular manner in which advertisement is to be made. The Company Court cannot exercise its inherent jurisdiction to dispense with such a requirement. If a statutory provision or Rule requires a thing to be done in a particular manner, it should be done in that manner or not at all. In view of the clear mandate of Rule 24(2) of the Rules, the Company Court cannot invoke its powers under Rules 6, 9 or 99 to dispense with advertisement of the petition for the winding up of a Company. (Lt. Col. R.K. Saxena Vs. Imperial Forestry Corporation Ltd., Official Liquidator, (2001) 107 CompCas 401 : (2001) 1 DLT 777 : (2001) 60 DRJ 54 ; Taylor v. Taylor (1875) 1 Ch D 426, 45 LJ Ch 373 ; Nazir Ahmad vs. Emperor AIR 1936 253 (Privy Council) ; Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, AIR 1975 SC 915 : (1975) 1 SCC 559 : (1975) 3 SCR 839 ; and Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, (1993) 3 JT 238 : (1993) 2 SCALE 772 : (1993) 3 SCC 161 : (1993) 3 SCR 522). Winding up proceedings cannot be heard and decided without issuing a public advertisement under the rules. (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).

55. Rule 24(2) of the Rules fetters the discretion of the Company Court, and disables it from dispensing with an advertisement in a petition for winding up of a company. Form No. 48 is a public notice to all creditors, contributories and persons, other than the parties to the company petition, informing them that, if they so desire, they can appear at the hearing either in support of, or in opposition to, the making of an order of winding up. On the company petition being admitted, an advertisement must follow. It is only on such an advertisement being issued, would the other creditors and stake holders come to know that the petition for winding up has been admitted, and they can intervene and file applications either supporting or opposing the petition for winding up of the company. Adjudication of the company petition, in order to decide whether or not a winding up order should be passed and a liquidator appointed, can take place only after admission of the company petition is advertised in accordance with Rules 24 and 99 of the Rules, and not prior thereto. Rule 24(2) takes away the discretion of the Company Judge to dispense with the advertisement, and mandates that a petition to wind up the company must be advertised. (Lt. Col. R.K. Saxena Vs. Imperial Forestry Corporation Ltd., Official Liquidator, (2001) 107 CompCas 401 : (2001) 1 DLT 777 : (2001) 60 DRJ 54).

56. An order, deferring advertisement, would result in all subsequent proceedings, for winding up of the company, being stayed. While Section 443(1) of the Companies Act includes the power to adjourn hearing of the company petition conditionally or unconditionally, which may include deferring issuance of the advertisement of admission of the company petition, exercise of power thereunder must be for just and valid reasons, and not as a matter of course.

The Company Court should assign reasons why it considers it necessary to defer advertisement. In the present case, the Learned Company Judge has not assigned any reasons for deferring advertisement, of admission of the company petition, for a period of six months. Sri A. Sudarshan Reddy, Learned Senior Counsel appearing on behalf of the respondent-company, has also not shown any justifiable reason why advertisement, of admission of the petition for winding up, should be deferred, that too for six months. The order of the Learned Company Judge, to the limited extent advertisement of admission of the petition for winding up was deferred for six months, is set aside.

IV. CONCLUSION:

57. As default by HHL, in repayment of the loan to the petitioner, has resulted in crystallization of the liability of the respondent-company (which stood as guarantor for the loan extended by the petitioner to HHL) into a debt, the petitioner-bank is entitled to invoke the jurisdiction of the Company Court under Section 433(e) r/w. Section 434(1) of the Companies Act. The order of the Learned Company Judge, admitting C.P. No. 169 of 2014, does not suffer from any illegality necessitating interference by us in appeal. O.S.A. No. 22 of 2015, preferred by the respondent-company in C.P. No. 169 of 2014, is accordingly dismissed.

58. The order of the Learned Company Judge, to the limited extent advertisement of admission of the Company Petition was deferred by six months, is, for reasons mentioned hereinabove, set aside. As required under Rule 24 read with Rule 99 of the Companies Court Rules, 1959, admission of the Company Petition is required to be advertised in two daily newspapers. The petitioner shall cause advertisement in THE HINDU (English daily) and EENADU (Telugu daily) in both Andhra Pradesh and Telangana State editions on or before 07.09.2015. C.P. No. 169 of 2014 shall be listed before the Learned Company Judge on 10.09.2015 for proof of publication. O.S.A. No. 16 of 2015 is disposed of accordingly. Miscellaneous Petitions pending, if any, in both O.S.A. Nos. 16 and 22 of 2015 shall also stand disposed of.