

(2015) 04 AP CK 0049

In the Andhra Pradesh High Court

Case No : Company Petition No. 169 of 2014

Mauritius Commercial Bank Ltd.

APPELLANT

Vs

Sujana Universal Industries Limited

RESPONDENT

Date of Decision : 21-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
Companies Act, 1956 — Section 433, 433(e), 434, 434(1)(a), 434(1)(b)
Companies Act, 2013 — Section 1(3), 465

Citation : (2015) 128 CLA 287 : (2015) 192 CompCas 164

Hon'ble Judges : A. Rajasekhar Reddy, J

Bench : Single Bench

Advocate : S. Niranjan Reddy, for the Appellant; A. Sudershan Reddy, Senior Advocate, Advocates for the Respondent

Final Decision : Allowed

Judgement

A. Rajasekhar Reddy, J.—This Company Petition is filed by the petitioner, viz., M/s. Mauritius Commercial Bank Ltd., under Section 433(e), 434(1)(b) and 439 of the Companies Act, 1956 for winding up of the respondent company-M/s. Sujana Universal Industries Limited, a company incorporated under the Indian Companies Act, 1956.

2. Facts which are necessary for disposal of the Company Petition are as follows:

The petitioner-Bank is a limited company organized under the laws of the Republic of Mauritius, having its registered office at 9-15 of Sir William Newton Street, Port-Louis, Mauritius and this petition is being filed by its Authorized Signatory Mr. Soham Kumar. The respondent-company was incorporated on 08.10.2003, having its registered office at 41, Nagarjuna Hills, Panjagutta, Hyderabad.

3. M/s. Hestia Holding Ltd., (hereinafter referred to as Hestia) is a company incorporated under the laws of Mauritius and has its registered office in the

Republic of Mauritius, which is a wholly owned subsidiary of respondent-company. Hestia entered into a Facility Agreement dated 09.11.2010 with the petitioner Bank under which the petitioner established a Trade Finance Banking Facility in favour of Hestia up to a limit of USD 10 million (for short Facility). On 09.12.2010, the respondent company executed a deed of guarantee to guarantee the obligations of Hestia under this Facility Agreement for up to USD 10 million. On 12.07.2011, the petitioner and Hestia agreed to amend the Facility Agreement dated 09.11.2010 by increasing the limit of the facility there under to USD 20 million (both together known as the Original Facility Agreement). The respondent company executed another deed of guarantee dated 03.08.2011 to guarantee the obligations of Hestia under the Original Facility Agreement. It is stated that as on 22.06.2012, Hestia had drawn around USD 19,997,102/- on various dates between 13.02.2012 and 22.06.2012 being almost the full amount of USD 20 million available under the Amended Facility Agreement.

4. While being so, on 11.08.2012, Hestia defaulted for the first time on its repayment obligation, constituting an Event of Default under clause 2(ii) of the Original Facility Agreement. Petitioner made several demands against respondent for payment as per agreement and respondent went on seeking time for payment which was agreed to. The original facility agreement was amended several times granting extension of time for payment, but respondent never complied with the same. The details of same will be discussed in later part of judgment to avoid repetition of same. Mr. Justice Males of the Commercial Court, Queens Bench, on the application of the petitioner on 08.11.2013, directed that Hestia and respondent company to pay an amount of USD 15,390,115.53 being the principal sum, an amount of USD 1,198,024.28 as interest thereon and a sum of GBP 60,000 to the petitioner towards costs of the legal proceedings, within two weeks from the date of judgment i.e., 08.11.2013. However, Hestia and respondent company failed to pay the same till date. The respondent company owes the petitioner an amount of USD 16,987,493.39 plus GBP 70,000 value in Rs. 1,06,66,61,390.18 ps (Indian Rupees One Hundred and Six Crore Sixty Six lakh Sixty One Thousand Three Hundred Ninety and Paise Eighteen only). As the respondent company as well as Hestia failed to honour their obligations, the petitioner has filed two separate execution petitions bearing E.P. Nos. 3 of 2014 and E.P. No. 4 of 2014 before the City Civil Court, Hyderabad for recovery of the decretal amounts, USD 16,987,493.39 value in Rs. 1,05,94,26,123.88 and GBP 70,000 value in INR 72,35,200.00 respectively and same are pending.

5. On 20.05.2014, the petitioner served the statutory notice under sections 433 and 434 of the Companies Act, 1956 on the respondent company and its directors through courier and registered post, which was duly served on them on 21.05.2014 and the same was responded by the respondent vide letter dated 10.06.2014 alleging certain untenable legal grounds but not denied on the merits of the claim. That despite repeated requests, reminders, notices, waivers and orders of both English and Indian Courts, the respondent company has failed to

pay the total outstanding amount to the petitioner and therefore, sought for an order and decree for winding up the respondent company.

6. Counter affidavit is filed by one of the Director of the respondent company denying the averments in the affidavit filed in support of the company petition stating that the company petition is not maintainable on facts or on law and that it is liable to be dismissed for non-joinder of necessary parties. That present petition is filed with a motive to recover the alleged loan amount under the guise of winding up petition. That the claim made by the petitioner has been challenged on the point of jurisdiction before the Commercial Court, Queens Bench Division, High Court of Justice, London, U.K. wherein the alleged debt has not been admitted. That the Queens Bench Division, erroneously decided the liability of respondent company without any evidence in a summary manner. That the petitioner, basing on order dated 24.05.2013, filed an application seeking summary judgment along with an application to dispense with service of notice to the borrower and the guarantor/respondent herein and the learned Justice Males allowed both the applications on 08.11.2013 without issuing notice to the respondent company and that the summary nature of adjudication by the Court without any evidence and notice to the respondent is unjustified and contrary to the established principles of law in India. That there is no participation by the borrower or the guarantor as the petitioner did not choose to serve notice in the summary judgment obtained by him wherein the alleged claim made by the petitioner was allowed. The judgment obtained in a summary nature without evidence does not fructify the liability of the respondent as claimed by the petitioner company. That the petitioner filed the present company petition seeking the self-same relief which is covered in E.P. Nos. 3 and 4 of 2014 on the file of XI Addl. Chief Judge, City Civil Court, Hyderabad and that for recovery of money for the same relief two parallel proceedings are not maintainable. That the company petition is filed under Sections 433 and 434 of the Companies Act on 28.05.2014 without mentioning the exact amount due from the respondent company. That the petitioners alleged claim is based on the judgments passed by the Queens Bench Division, High Court of Justice, London, U.K., which cannot be executed in India and that there is no admission of default. That the alleged debt is totally consequential action of the Judgments passed by London Courts without jurisdiction and which are not complying with the provisions of Section 13 CPC. It is stated that the company petition filed under Sections 433(e), 434(1)(b) and 439 of the Companies Act, 1956 is not maintainable since the Companies Act, 1956 is repealed by Section 465 of the Companies Act, 2013 and that the provisions relating to winding up of companies have not yet been brought into force by Notification issued by the Government of India as required under Section 1(3) of the Companies Act, 2013. It is stated that the orders passed in W.P. No. 13828 of 2014 in proceedings arising out of recovery initiated by the petitioner for execution in E.P. Nos. 3 and 4 of 2014 on the file of XI Addl. Chief Judge, City Civil Court, Hyderabad amply protects the interest of the petitioner and therefore, sought for dismissal of the company petition.

7. Sri S. Niranjan Reddy, learned counsel for the petitioner reiterating the contentions made in the petition contended that winding up proceedings under the Companies Act and the Execution Proceedings pending before the City Civil Court, Hyderabad are two completely distinct proceedings which are not alternative to each other and the respondent company may be wound up on account of its inability to pay admitted debt exceeding an amount of Rs. 1,00,000/- while the execution proceeding are for recovery of the sums due. In support of his contention he relied on the judgment reported in *Intesa Sanpaolo S.P.A. v. Videocon Industries Limited*, *Krishna Kilaru and another v. Maytas Properties Limited* rep. by its Managing Director, Hyderabad, *Enernorth Industries Inc. v. VBC Ferro Alloys Ltd.*, He further submits that despite repeated requests, reminders, notices, waivers and orders of both English and Indian Courts as alleged in Company Petition, the respondent company has failed to pay the total outstanding amount and that it has never opposed the claim made by the petitioner. He would further submits that the respondent company is unable to pay its admitted debt, as such, the amounts due to petitioner from the respondent company are not disputed and the defence set up is not bona fide and it is only a moonshine and is liable to be wound up. In support of his contention, he relied on the judgment reported in *Fibex Inc. v. A.B.K. Publications Ltd.*

8. On the other hand, Sri A. Sudarshan Reddy, learned Senior Counsel for the respondent reiterating the contentions made in counter affidavit contended that the company petition is liable to be dismissed for non-joinder of necessary parties and that it is filed with an intention to recover the alleged loan amount which is not permissible. He would further contend that the company petition is filed without mentioning the exact amount due from the respondent company and that a company can be wound up only when it is proved that the debt claimed against it is ascertained, definite and undisputed and that the Company has failed to pay the same and winding up cannot be ordered if there is bona fide and substantial defence denying the liability. In support of his contention, he relied on the judgment reported in *M/s. Multimetals Limited v. M/s. Suryatronics Private Limited* and *Pradeshia Industrial and Investment Corporation of U.P. v. North India Petrochemicals Ltd.*, and another. He further submits that Section 443(2) of the Companies Act, 1956 empowers Court to refuse to make an order of winding up, if it is of opinion that some other remedy is available to petitioner and that petitioner is acting unreasonably in seeking to have the company wound up instead of pursuing other remedy. In support of his contention, he relied on the judgment reported in *Kitti Steels Ltd., Hyderabad v. Sanghi Industries Ltd., Hyderabad*.

9. In view of above rival contentions and pleadings, the points that arise for consideration are:

a) Whether respondent company is due any amount to the petitioner within the meaning of Section 433(e) of the Companies Act?

b) Whether the defence raised by respondent company is bona fide, substantial and not moonshine?

c) Whether the respondent company is unable to pay its dues within the meaning of Section 434 of Companies Act?

d) Whether Company Petition and parallel proceeding for recovery of the debt in respect of same issue can be maintained by the petitioner against respondent company?

e) Whether the Company Petition is liable to be admitted?

10. I shall first deal with Points (a), (b) and (c): Before considering the rival contentions of parties, certain admitted facts need to be noted. The correspondence placed on record between the parties, especially the deed of guarantees dated 09.12.2010, 03.08.2011 and Amendment and Restatement Agreement dated 11.10.2012 have not been denied. The default committed by Hestia and the respondent company is admitted by the respondent company in the correspondence especially letter dated 17.11.2014 which was addressed to the law office of the petitioner. The letter issued by Hestia on 10.10.2012 for restructuring Original Facility Agreement has also been admitted by the respondent company. It is also an admitted fact that the petitioner issued statutory notice to the respondent company on 20.05.2014 and respondent company replied vide letter dated 10.06.2014 wherein there was no denial on the merits of the claim. In the statutory notice a reference has been made with regard to availment of trade facility under facility agreement dated 09.11.2010 as amended and supplemented on 12.07.2011. 11. Admittedly, Hestia entered into a facility agreement dated 09.11.2010 with the petitioner and established a Trade Finance Banking Facility in favour of Hestia up to a limit of USD 10 million. On 09.12.2010, a guarantee was executed by Sri S. Hanumantha Rao, on behalf of the respondent company to guarantee the obligations of Hestia under the facility agreement for up to USD 10 million. On 12.07.2011, the petitioner and Hestia agreed to amend the Facility Agreement dated 09.11.2010 by increasing the limit of the facility thereunder to USD 20 million. The respondent company has also executed another deed of guarantee on 03.08.2011 to guarantee the obligations of Hestia under the Original Facility Agreement, after amending the original facility agreement by increasing the limit of facility there under to USD 20 million. It is also an admitted fact that Hestia had withdrawn around USD 19,997,102/- on various dates between 13.02.2012 and 22.06.2012, being almost the full amount of USD 20 million available under the Amended Facility Agreement.

12. On 11.08.2012, for the first time, Hestia committed default on its repayment obligation, constituting an event of default under clause 2(ii) of the Original Facility Agreement and the petitioner demanded for repayment of all sums drawn down together with accrued interest vide letter dated 06.09.2012. However, at the request of the respondent company, the petitioner has agreed to waive its

right to enforce the corporate guarantees against the respondent by a notice of default and Waiver and Consent dated 06.09.2012 for seven (7) business days on condition of the repayment of the outstanding amounts under the Original Facility Agreement by Hestia by 13.09.2012, but still Hestia defaulted in payment of amounts due. Again, the respondent company requested the petitioner to hold in abeyance its right to enforce the corporate guarantees. By letter dated 21.09.2012, the petitioner agreed to waive its right to take enforcement action under the corporate guarantees on the conditions set out in the Second Waiver Letter dated 21.09.2012 including Hestia agreeing to adhere to the repayment schedule set out therein. Thereafter, Hestia by letter dated 10.10.2012, requested the petitioner for restructuring the Original Facility Agreement for repayment schedule for principal and interest to be agreed with a new corporate guarantee from the respondent company. Considering the request of Hestia, the petitioner company got executed a new schedule for payment of principal and interest by the Hestia and a new corporate guarantee by the respondent company of Hestias obligations under Amendment and Restatement Agreement dated 11.10.2012, made between the petitioner as lender, Hestia as borrower and respondent company as guarantor. Clause 7.1 of the agreement which provides for guarantee and indemnity, which is pressed into service by petitioner in respect of claim in Company Petition, is reproduced as follows:

Clause 7-Guarantee and Indemnity:

7.1 Guarantee and Indemnity

The Guarantor irrevocably and unconditionally:

- a) Guarantees to the lender, punctual performance by the Borrower of all the Borrowers obligations under this Agreement;
- b) Undertakes to the Lender that whenever the Borrower does not pay any amount when due, under or in connection with this Agreement, the Guarantor shall immediately on demand pay that amount as it was the principal obligor; and
- c) Agrees to indemnify the Lender immediately on demand against costs, loss or liability suffered by the Lender if any obligation guaranteed by it, is or becomes unenforceable, invalid or illegal. The amount of the costs, loss or liability shall be equal to the amount which the Lender would otherwise have been entitled to recover.

13. Schedule 2 of the Amendment and Restatement Agreement contained the agreed terms to restate the Original Facility Agreement and sets out a new and more favourable schedule for repayment of the principal and interest. The above agreement has been signed by one Mr. Ramesh Venkateswaran, in the capacity of Director of Hestia Holdings Limited, the Borrower and by Sri S. Hanumantha Rao, in the capacity of Director of Sujana Universal Industries Limited, the Guarantor and also by Sri N. Ravikiran, Company Secretary of the Guarantor, who have signed these presents in token thereof. By subscribing his signature,

the Director of respondent company has agreed to indemnify the obligations of Hestia to the petitioner. However, Hestia again failed to make payment which constituted an event of default under Clause 13.1 of the Restated Facility Agreement. Though it is specifically pleaded by the petitioner in the legal notice dated 20.05.2014 under Sections 433 and 434 of the Companies Act, 1956 issued to the respondent company, that Hestia being principal borrower and the respondent company as the guarantor, the respondent company has neither denied specifically about the default committed by Hestia nor the guarantee offered by it to the petitioner on behalf of Hestia in reply to the legal notice issued by the petitioner, on 10.06.2014 and never denied the debt on the merits of the claim of the petitioner, except making vague denial. It is not the case of the respondent company that any of its Director has not signed on behalf of the respondent company to the Amendment and Restated Agreement dated 11.10.2012. Even from the averments in the counter affidavit also, the respondent company has not denied specifically that Hestia has not defaulted. When once the respondent company stood as guarantor and agrees to indemnify, which was agreed upon by way of clause 7.1 of Amendment and Restatement Agreement dated 11.10.2012, the respondent company cannot turn around and baldly deny that they are not liable to pay the amount due under the said agreement. The company petition is based on the admissions of the respondent company in the correspondence and there are series of admissions in the correspondence exchanged between the parties which have been placed on record and that the correspondence has also not been denied.

14. When once the respondent company has not denied the execution of Amendment and Restatement Agreement dated 11.10.2012 in which they have agreed to guarantee and indemnify the petitioner in respect of defaults committed by Hestia, it is not open for the respondent company to say so. Moreover, S. Hanumantha Rao, who is Director of the respondent Company, has addressed letter dated 17.11.2014 to Mr. Sanjeev Kumar, Partner of Luthra and Luthra, Law Officer, who has issued legal notice to the respondent company, wherein the respondent company has admitted the liability towards Hestia. Since this letter is relevant document for settling these issues, it will be useful to reproduce same in its entirety as under:

Sujana Universal Industries Limited Regd. and amp; Corp. Office:

41, Nagarjuna Hills, Panjagutta, Hyderabad-500 082.

CIN: L29309TG1986PLC006714

17th November, 2014

Mr. Sanjeev Kumar

Partner

Luthra and Luthra Law Offices

103-A, Ashoka Estate, Barakhamba Road
New Delhi-110 001.

Dear Sirs,

This has reference to the Original Facility Agreement dated 9th day of November 2010 and subsequent amendment thereto dated 12th July 2011 entered by Hestia Holdings Limited and Mauritius Commercial Bank Limited, Corporate Guarantee was executed by Sujana Universal Industries Limited.

The Facility was regular for more than 18 months and that there were no delays, of whatever nature. However, in August 2012, due to the economic slowdown in India (where most of our Subsidiarys buyers are located), the buyers did not meet payment on the due dates and hence Hestia could not honour its commitment to the Bank.

Further in October 2012, Hestia Holdings Limited and the Bank have entered into an amended and restated agreement, Hestia Holdings Limited consequently paid about USD 1.31 Million under the facility, later on, due to continued strained cash flow position of Hestia Holding Limited the Parent Company, the Bank triggered under the restructuring agreement through a Demand Notice dated 30th November 2012, without prejudice to our contentions before various courts on law and facts.

As the situation in India is on wheels of improvement and with the economic activity looking upwards due to the political stability and the initiatives by the new Government, which has given the much needed push to the till now a sluggish and slow Indian economy, the reviving of the economy would generate the much needed liquidity in the 3-6 months. Hence, we have stepped up all our efforts and using good offices to recover the amount due from the Customers and getting positive signals.

Subject to reconciliation of the principal amount due by Hestia Holdings Limited to the Bank is US \$ 15.39 mn and interest thereon. On the basis of the assurances received from the Customers, they would discharge their liability towards Hestia Holdings Limited in a phased manner, over the next 2.5 year commencing from January, 2015. This letter is issued for settlement of all issues pending before the Courts of Law in India.

We, as Guarantor propose the repayment of the Facility in the manner as below:

Particulars % of Outstanding Principal Amount and interest due thereon Payable at the end of January 2015 to March 2015

15% of the due amount [subject to reconciliation] payable in 3 equal monthly installments on 31st January, 2015, 28th February, 2015 and 31st March 2015
Payable at the end of June 2015 to March 2017

85% of the due amount [subject to reconciliation] payable in 8 equal quarterly

installments payable at the end of each quarter commencing from April 2015.

We further request you to kindly waive off all the future interest on the proposed payments to be made.

We are confident that the Bank would accept this proposed repayment plan in the mutual interest, so that the entire outstanding is discharged to the full satisfaction of the parties concerned.

Thanking you,

Yours faithfully, For M/s. Sujana Universal Industries Limited Sd/-

S. Hanumantha Rao

Director

The aforesaid letter is in the letter head of the respondent company, which is to be considered as one of the triggers for invocation of the guarantee contained therein. In short loan was advanced to Hestia Holdings Limited primarily because the respondent company stood guarantee. All the events contemplated in the aforesaid letter have come into effect is a fact which can be seen from the admitted correspondence. The default committed by Hestia is the factual foundation for invocation of addressing the aforesaid letter is not in dispute. Thus, the petitioner has come to this Court, seeking winding up of the respondent-company stating that the respondent-company had given a solemn guarantee under the Amendment and Restatement Agreement dated 11.10.2012 and that events for invocation of the guarantee have admittedly occurred and there is a clear liability on the part of the respondent company to pay and that in spite of the notice the respondent company has not paid, thus presumption be drawn against the respondent under Section 434(1)(a) of the Act.

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

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

In the present case on hand also, during the pendency of winding up petition, one of the Director of the respondent-company by name S. Hanumantha Rao, has addressed letter dated 14.12.2012 to Mr. Sanjeev Kumar, Partner, Luthra and Luthra-Law Offices, admitting the liability and proposed to pay the amounts in

installments as mentioned therein.

15. It is pertinent to mention here that the respondent company has never pleaded that it has not stood as guarantor for Hestia Holdings Limited and that it has never undertook to indemnify the petitioner for the defaults committed by Hestia. The respondent company has executed guarantee deeds at various points of time agreeing to indemnify the petitioner in respect of obligations of Hestia as and when the financial limits have been raised and same is also not denied in the counter and that a bald denial that they are not liable to pay the debt cannot be said as a bona fide dispute. It is also an admitted fact that the respondent company went on executing indemnity bonds to indemnify the petitioner for the defaults of Hestia, which goes to show that they never disputed the debt and the execution of the guarantee deeds. When the respondent company stood as guarantor and agreed to indemnify the obligation of Hestia to the petitioner and executed two guarantee deeds on 09.12.2010 and 03.08.2011 it is clear that the respondent is liable to pay the amounts to the petitioner in case Hestia defaulted. Since the respondent company has not specifically denied that Hestia defaulted in repayment of amounts to the petitioner, as such, it cannot be said that the respondent company is not debtor and has any obligation to pay in case of default committed by Hestia to the petitioner shows that there exists creditor, debtor and guarantor relationship and also debt comes into existence when Hestia defaulted in payment of amounts. It is settled principle of law that any creditor has a right to approach the company court pointing out that its admitted debt is not paid. The company Court then considers whether the company needs to continue, or be wound up and the assets be distributed. The petitioner, being creditor has a right to approach the company court pointing out that its admitted debt is not paid by Hestia, being the debtor and respondent company being guarantor has to pay admitted debt to the petitioner.

16. In addition to the above, it is relevant to point out that the subject debt has also been admitted by Mr. Yalamanchili Satyanarayana Chowdary, Chairman of the respondent company by way of sms sent by him to Pratik Ghosh, ex-head of Global Business, Mauritius Commercial Bank on 16.10.2012, which is reproduced as follows:

I am extremely sorry for happenings. I am told one of our major expected cash flow got differed. Whatever the reason the bottom line is we have defaulted. My people are working for it and only thing I can promise you is we will be settling ASAP though we are delaying which is beyond our control. Presently traveling in U.S. I will talk to the bankers also upon my return on Sunday. With best wishes.

The above communication of the Chairman of the respondent Company to the employee of the petitioner amply shows that Hestia has defaulted in payment of dues to the petitioner company.

17. A perusal of the Statutory Notice dated 20.05.2014 issued by the petitioner and the petition shows that the petition is not only based on the decree of High

Court of Justice, London, U.K. dated 08.11.2013 but also on admissions made by the respondent company. It is the case of the petitioner that there is a clear admission of liability by the respondent company and that the guarantee offered by the respondent company came into effect on certain events having been occurred and that the respondent company has not paid the amount in spite of the demand. Moreover, the total outstanding amount, as on the date of issuance of statutory notice was duly reflected in the books of account of the petitioner as well as in the statutory Auditors Report of the respondent company for the financial year ending March, 2013, which shows that Hestia has defaulted of the facility secured by the corporate guarantee issued by the respondent company. Therefore, the contention of learned counsel for the respondent company that exact debt amount is not reflected in the statutory notice cannot be accepted. Even otherwise, when the petitioner proved about existence of debt, the Company Petition cannot be thrown out on the ground of exact amount is not ascertained.

18. Neither the respondent company nor Hestia never put forward defence of any sort to the claims made by the petitioner for their failure to pay the admitted debt. None of the contentions raised by the learned counsel for the respondent company constitute a bona fide dispute necessitating dismissal of the company petition at the stage of admission. The respondent company has also not adduced prima facie proof of the facts on which defence depended. Consequent to the default committed by Hestia in payment of amount, the respondent company, being the guarantor, is liable to pay the amount to the petitioner. On the other hand, Mr. Y.S. Chowdary, Chairman of the respondent company has clearly admitted default on 16.10.2012 and Mr. S. Hanumantha Rao, Director of respondent company has likewise reiterated such admission by letters dated 14.12.2012 and 17.11.2014. Admissions of defaults in payment of installments, the frivolous and vexatious actions and prolonged silence in payment of the decretal amount on the part of the respondent company makes it clear that there is actually no dispute with regard to the sum outstanding and payable by the respondent company as on date.

19. From the correspondence which is referred to above, the existence of debt is not disputed. The fact that there has been default on the part of Hestia, which is a ground for invocation of the guarantee against the respondent company is also not disputed. Therefore, it can safely be concluded that despite repeated requests, reminders, notices, waivers and multiple orders of both English and Indian Courts, the respondent company has failed to pay the total outstanding amount and the entire debt remains unpaid by the respondent company to the petitioner. The defence of the respondent is neither valid nor is it bona fide and is a mere moonshine. A presumption under Section 434(1)(a) arises that the respondent company is unable to pay its debts and such a presumption has not been satisfactorily rebutted by the respondent company. 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. Therefore, the points (a), (b) and (c) are decided in favour of the petitioner.

20. Points (d) and (e):

In *Intesa Sanpaolo S.P.A. Vs. Videocon Industries Limited*, (2014) 120 CLA 389 : (2014) 183 CompCas 395 , wherein it is held that Winding up proceedings and a suit for recovery of money are not one and the same. It is also established that the right to move a petition for winding up is a statutory right of a creditor. The position that when a suit is filed for recovery of the amount a petition for winding up is also simultaneously maintainable is well-settled. Merely because a decree is obtained by the creditor it does not cease to be a creditor of a company.

21. In *Seethai Mills Ltd. Vs. N. Perumalsamy and Another*, (1980) ILR (Mad) 143 : (1980) 1 MLJ 443 it is observed that any creditor has a right to approach the company court pointing out that its admitted debt is not paid. The company court then considers whether the company needs to continue, or should be wound up and the assets distributed. The considerations for entertaining a petition for winding up are thus different from those for entertaining a suit. The jurisdiction is also different. Merely because the creditor is a decree holder it does not change its character as a creditor for the purpose of maintaining a petition for winding up. There is no warrant to make a distinction between creditors on the basis of the court from which they hold a decree. Any creditor entitled to bring a petition for winding up.

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. Vs. Shree Rama-Multitech Ltd.*, (2005) 126 CompCas 15 : (2005) 58 SCL 328 .

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. (see *IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd.*, (2010) 159 CompCas 369 : (2010) 4 CompLJ 481 : (2010) 10 SCALE 151 : (2010) 10 SCC 553 : (2010) 9 UJ 4729

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 bona fide 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. (see S.M. Patel Iron Traders Private Limited Vs. Sugam Construction Private Ltd., (2011) 162 CompCas 298 .

22. In the present case on hand, admittedly, the petitioner has filed two separate execution petitions bearing E.P. Nos. 3 of 2014 and 4 of 2014 in the City Civil Court, Hyderabad for recovery of the decretal amounts. However, the respondent company has not filed any appeal against the decree obtained by petitioner. In the present case, the basis for filing the Company Petition is not only decree but also admission of debt by respondent company. Therefore, the decision relied on by the respondent company in Kitti Steels Ltd., Hyderabad v. Sanghi Industries Ltd., Hyderabad (supra) wherein it is held as follows:

7. Section 443(2) of the Act empowers Court to refuse to make an order of winding up, if it is of opinion that some other remedy is available to petitioner and that petitioner is acting unreasonably in seeking to have the company wound up in response to pursuing other remedy. In this case, no doubt petitioner obtained a decree from Civil Court and no doubt it is a basis for filing winding up petition. There is no dispute that the decree is in appeal. In such a situation, winding up the respondent company under Section 433(e) of the Act would not lie has no application to the facts of the present case on hand.

23. Except a bald denial by the learned counsel for the respondent company that it is not liable and except the defence that the petitioner cannot execute the ex parte foreign Court decree, and no substantial ground is made on what basis they are denying liability under the guarantee agreement dated 11.10.2012 when there exists tripartite agreement between the petitioner as a creditor, Hestia as a debtor and respondent company as guarantor and the defence that the petitioner cannot maintain parallel proceedings, also cannot be sustained as it is already decided by this Court that the petition for winding up can be maintained simultaneously. Merely, a creditor is a decree holder, it does not lose its character as creditor for the purpose of maintaining the petition for winding up. No justifiable reason is stated in the counter affidavit for non payment of the amounts due by Hestia in respect of which, the respondent company stood as guarantor. The petitioner has established that the Hestia has failed to fulfill its obligations under the agreement dated 11.10.2012 and also proved that the respondent company guaranteed the obligation of Hestia, then respondent company has to fulfill its obligations under the guarantee deed and indemnify the petitioner. After repeatedly requesting for restructuring and time for repayment, once notice for winding up was received the respondent has conjured up all sorts of defences. Before the notice for winding up, the response from the respondent company was only of acknowledging the debts, acknowledging the default, seeking time giving fresh proposals. There seems to be a clear attempt on the part of the respondent company to create as many hurdles in the way of the petitioner from recovering its money. It is to be noted that before commencement of litigation, absolutely there was no issues with the respondent

company. However, after litigation has commenced, all sorts of stands are being taken by the respondent company, which itself raises doubts about the veracity of the defence. Since the petitioner *prima facie* is able to prove that the respondent company failed to fulfill its obligation, it can be presumed that the respondent company is unable to pay its admitted debt.

24. The contention of the respondent company that the *exparte* decree obtained in U.K., with regard to jurisdiction of foreign court; that it has not participated in the proceedings before London Court, U.K., and that it has not admitted any liability does not merit consideration. It is to be noted here that admissions as regard the liability in the correspondence by the respondent company is sufficient to form basis of the petition for winding up. Even assuming that there is an Execution Petition filed for enforcement of a foreign decree, it cannot be said that the petitioner has ceased to become a creditor of the company. Thus even otherwise, the defence taken by the respondent company that the *exparte* decree is fraudulently obtained, without serving any notice, and therefore, the petition should not proceed, has no merit.

25. However, it has not been whispered in the counter affidavit that it is commercially solvent and on that ground this Court should not exercise its jurisdiction for winding up and also larger public interest be kept in mind. Even assuming that the respondent company is commercially solvent, it is no doubt true that the Court will keep in mind the commercial solvency of a company, larger public interest and repercussions of the order of admission.

26. Commercial solvency, however, cannot be a stand alone ground. If that be so, then every company which is commercially solvent while refusing to pay the admitted debts can take up the ground of defence of commercial solvency. A company cannot take a defence that it is commercially solvent and has the ability to pay the debts, but will not pay the debt, putting forward commercial solvency as a defence to a winding up petition. If such defence is accepted it will mean that any company which is commercially solvent can choose which creditor it will pay with complete impunity, and if an unsatisfied creditor chooses to exercise its statutory right for winding up the company will put forward commercial solvency and repercussions of winding up petition as a defence to a winding up petition. If the repercussions of admission of a winding up petition are serious the company must also act with equal seriousness and pay the debts which are not disputed so as to avoid any order leading to winding up of the company. [see *Rajah of Vizianagaram v. Official Receiver and Official Liquidator of Vizianagaram Mining Co. Ltd.* [1962] 32 Comp Cas 1 (SC)].

27. A determination of examination of the companys insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the companys liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434(1)(a), meaning thereby, 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. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under section 434(1)(a) that the company is unable to pay its debts.

28. However, the Company Court may in appropriate cases consider the larger public interest. But equally important considerations are of commercial morality, national prestige and need to instill confidence in international commercial transactions. Post liberalization Indian companies have engaged in large sale commerce and financial dealings with the banks and companies abroad. Finances are advanced to the Indian companies by foreign investors. If the conduct such as the one exhibited by the respondent company, is condoned purely on the ground of public interest, it may protect this company but will send a wrong signal to the investors and lenders all over the world. Investors will be reluctant to advance capital even to commercial solvent and honest companies [See *Intesa Sanpaolo S.P.A. v. Videocon Industries Ltd.*] (supra).

29. In view of the above discussion, there is no manner of doubt that amounts were guaranteed to be repaid to the petitioner by the respondent company. The respondent company has resolutely refused to pay it back in spite of assuring to do so many times earlier. Absolutely nothing is placed on record to even hint that the respondent-company does not owe the money to the petitioner. Any other creditor would be as a right entitled to ask for admission of the petition against such a company. If so, then why the petitioner be kept away from this right, its only fault being that it lent the monies to the subsidiary of the respondent company outside India and filed a suit for recovery of the same in the court where the transaction took place. To deprive the petitioner will encourage the Indian companies to be dishonest in their international dealings. In view of the above facts and circumstances, Company Petition is liable to be admitted.

Accordingly, Company Petition is admitted. However, in order to give one more opportunity to respondent Company, the advertisement of admission of Company Petition is deferred for a period of six months.