

(2012) 02 AHC CK 0274
In the Allahabad High Court
Case No : Special Appeal No. 1802 of 2011

M/s Elgin Mills Co. Ltd.

APPELLANT

Vs

M/s Kotak Mahindra Bank Limited And Another

RESPONDENT

Date of Decision : 14-02-2012

Acts Referred:

Companies (Court) Rules, 1959 — Rule 24, 5, 9
Companies Act, 1956 — Section 390, 391, 391(1), 433, 434

Citation : (2012) 3 ADJ 558 : (2012) 3 BC 744

Hon'ble Judges : Sunita Agarwal, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hon"ble Ashok Bhushan, J.—This special appeal No. 1802 of 2011 u/s 483 of the Companies Act, 1956 read with Rule 9 of the Company Court Rules, 1959 and Chapter VIII Rule 5 of Rules of the Court has been filed against the judgment and order dated 6.9.2011, passed by Hon"ble Company Judge in Company Petition No. 24 of 2009, filed by respondent M/s Kotak Mahindra Bank Limited (hereinafter referred as "petitioner"). The appellant M/s Elgin Mills Co. Ltd. has been hereinafter referred as "company".

2. The facts giving rise to this appeal briefly noted are; the company had taken financial assistance of Rs. 40 lacs from ICICI Bank in the year 1980. The company had taken financial assistance from several other financial institutions and banks. The company consists of two cotton mills namely; Elgin Mills No. 1 and 2, which are the subsidiaries of British India Corporation Ltd. The British India Corporation Ltd. was taken over by the Central Government under The British India Corporation Ltd. (Acquisition of Shares) Act 1981. The operation of the company are laying closed since the year 1994 and 1996 respectively. The Company became a sick company and the matter was referred to BIFR in the year 1992. There has been proceedings before the BIFR in which winding up was recommended, which ultimately came to this court wherein this court directed

the AAIFR to give opportunity to Government of India to submit a detail revival proposal which was approved by the Cabinet. However, after remand from AAIFR, the BIFR de-registered the reference on 3.7.2007. The Government of India Ministry of Textiles by letter dated 18.1.2008 reconsidered the matter and the revival scheme was submitted before the Cabinet for consideration. The matter was also considered by the Board of Reconstruction of Public Sector Enterprises (BRPSE) which had approved the revival plan on principle and the Ministry of Textiles submitted the proposal approved by BRPSE dated 18.2.2009 for approval of the Cabinet. In the meantime, ICICI Bank filed recovery proceedings before the Debt Recovery Tribunal, New Delhi by filing an application and Debt Recovery Tribunal, New Delhi passed the order dated 25.7.2002 for recovery of Rs. 3,46,40,259/-along with interest. Against the order of Debt Recovery Tribunal, New Delhi, an appeal is claimed to have been filed by the Company which is pending. On a letter written by Ministry of Textiles Government of India, the ICICI Bank vide its letter dated 17.1.2006 communicated the company that ICICI Bank is in principle agreeable to the proposal of the Government of India Ministry of Textiles envisaging payment of one time settlement amount of Rs. 16.7 million to ICICI Bank and the date for payment be indicated. The ICICI Bank by an assignment deed dated 31.3.2006 assigned its debt (principal amount of Rs. 40 lacs along with several other debts) to the petitioner M/s Kotak Mahindra Bank. After assignment M/s Kotak Mahindra moved an application before the Debt Recovery Tribunal, New Delhi for its transposition, which was allowed. The petitioner, who is assignee of ICICI Bank gave a notice claiming dues of Rs. 8,29,63,420/-. The petitioner thereafter filed a Company Petition No. 24 of 2009 for winding up in this Court. Hon''ble Company Judge vide its order dated 25.10.2010 directed for winding up of the Company under sections 433 and 434 of the Companies Act, 1956. An application for recall of the order dated 25.10.2010 was filed by the company and the order dated 25.10.2010 was recalled by order dated 18.2.2011. The petitioner M/s Kotak Mahindra filed Special (Company) appeal before the Division Bench against the order dated 18.2.2011. The Division Bench of this Court passed an interim order on 24.3.2011 staying the order dated 18.2.2011 and a direction was issued to the Official Liquidator to proceed in accordance with the Company Court Rules, 1959. The Company filed a special leave to appeal against the order dated 24.3.2011 and 26.3.2011, which special leave to appeal was disposed of by the apex Court vide its order dated 2.5.2011.

Learned Additional Solicitor General has furnished letter dated 7th April, 2011, from Controller of Accounts to the Chairman and Managing Director of BIC Limited. We direct the petitioner herein to place this letter before the Division Bench of the High Court, particularly in view of the fact that the Ministry has taken a decision to clear all outstanding dues of the Financial Institutions/ Nationalised Banks which, if cleared, would obviously avoid winding up of the Company. In the meantime, even if the liquidator takes charge of the assets, he will not proceed further to dispose them off pending appeal before the Division

Bench.

We request the Division to expeditiously hear and decide the appeal within six weeks. The special leave petitions, accordingly, stand disposed of.

3. After the order of the apex Court dated 2.5.2011, the Special (Company) Appeal No. 439 of 2011 has been decided by judgment and order of this Court dated 15.7.2011. The Division Bench set aside the order dated 18.2.2011 and remanded the matter to the learned Company Judge.

4. Before the learned Company Judge, the company filed its counter affidavit as well as detailed application stating that Government of India has now decided to rehabilitate the company and also settle the dues with other banks and financial institutions as such the winding up petition does not survive. Hon"ble Company Judge by the judgment and order dated 6.9.2011 refused to recall the order dated 25.10.2010 or to keep the order dated 25.10.2010 in abeyance. The application dated 5.9.2011 filed by the company was also rejected. Official Liquidator has been directed to take possession of the properties against which order, the present appeal has been filed.

5. This appeal was heard by this Court on 9.11.2010 on which date following order was passed:

Sri V.B.Singh, learned Senior Advocate assisted by Kirtika Singh appearing for the appellant. Sri Naveen Sinha appears for the respondent no.1, M/ s Kotak Mahindra Bank Limited and an application for impleadment has been filed by IFICI to be impleaded as respondent no.3, which is allowed.

Learned Counsel for the appellant contends that apart from M/s Kotak Mahindra Bank Limited, which is assignee of ICICI Bank, other Nationalised Banks, have accepted one time settlement and on the terms of principal amount plus 25/20% of the interest Eight Creditors have settled their dues out of Nine and it is only M/ s Kotak Mahindra Bank, which has not accepted one time settlement. It has been submitted that the Government of India has considered and allocated money for revival of the appellant-company out of which other settlements have been made.

Learned Counsel for the appellant as per our earlier order has produced Bank drafts of Rs. 1.67 crores and Rs. 25.3 lacs, which have been handed over to the counsel appearing for M/s Kotak Mahindra Bank Limited. Learned Counsel appearing for M/s Kotak Mahindra Bank Limited seeks time to obtain instructions as to whether M/s Kotak Mahindra Bank Limited is ready to negotiate. He submits that the Bank drafts are only conditionally taken subject to further settlement as he submits that the Bank drafts are being accepted without prejudice to their rights.

Respondents are allowed four weeks" time to obtain instructions.

It shall be open to the appellant to enter into negotiation with M/s Kotak Mahindra Bank, if any.

List after four weeks.

Till the next date of listing the order of winding up shall be kept in abeyance.

Sri O.P. Mishra, learned Counsel appearing for IFCI submits that other creditors have not settled, he may also file an affidavit by the next date and give the details.

6. We have heard Sri V. B. Singh, learned Senior Advocate, assisted by Ms. Kritika Singh for the appellant and Sri Om Prakash Mishra, learned Counsel for M/s Kotak Mahindra, the petitioner as well as for IFCI, who had been impleaded as respondent no. 3 in the appeal.

7. Learned counsel for the appellant in support of the appeal contended that Hon'ble Company Judge erred in rejecting the prayer of the appellant to recall the order dated 25.10.2010 as well as rejecting the prayer of the appellant to keep the winding up order in abeyance. It is submitted that observation of Hon'ble Company Judge that till date the Government of India has not taken any decision to rehabilitate the company or to pay the debt of the creditor like Kotak Mahindra was incorrect. Sufficient materials were brought on record to indicate that the Government of India had already taken decision to rehabilitate the company and pay the debts and out of nine secured creditors, the one time settlement was reached with regard to 8 other creditors. It was only the petitioner, assignee of ICICI Bank, which was avoiding to inter into one time settlement, whereas ICICI bank had earlier communicated its acceptance in principle of the one time settlement in the year 2006. It is submitted that in the counter affidavit as well as the application dated 5.9.2011 filed by the Company, the details of the settlement arrived at with other creditors and banks were brought on record. Reference has been made to the counter affidavit specially paragraph 45 and the documents brought on record along with counter affidavit. It is submitted by learned counsel for the appellant that all financial institutions and banks including Punjab National Bank, Bank of Baroda, Canara Bank, Standard Chartered Bank, IDBI have accepted one time settlement which consisted payment of principal amount plus interest between 10% and 25%. It is submitted that Hon'ble Company Judge committed error in observing that application made by the company was only an eyewash to prolong the agony of creditors by not making the payment. Learned counsel for the appellant submitted that appellant as per one time settlement, which was communicated in principle by the ICICI Bank had handed over the bank draft of Rs. 1.67 crores and 25.3 lacs to the counsel for the petitioner on 9.11.2011, which clearly shows the bonafide of the company and it is the petitioner, who is creating hindrance in revival of the company, whereas other banks and financial institutions have agreed. It is submitted that the decision of the Government of India to revive the company is in public interest to generate employment, production and when majority of financial institutions have agreed for settlement, at the instance of the petitioner, appellant company cannot be wound up. It is submitted that the company is fully capable of making payment of its dues and there is no ground

for winding up of the company and the winding up order deserves to be recalled and the petition dismissed. It is further submitted that before the Debt Recovery Tribunal, New Delhi in the application filed by ICICI Bank for recovery, where the petitioners have been also been transposed, the amount was Rs. 3.46 crores as on 15.4.2011 along with interest, whereas a different amount is being claimed in the company petition, which is not admitted. It is submitted that proceedings of winding up cannot be initiated for recovery of dues for which appropriate proceedings have already been initiated by the ICICI Bank/assignee.

8. Sri O.P. Mishra, learned counsel appearing for the petitioner as well as for IFCI refuting the submissions of learned counsel for the appellant, contends that the offer which was issued by the ICICI Bank communicating in principle the acceptance of one time settlement dated 17.1.2006, is no longer in operation since no payment was made in the financial year 2005-06 and the one time settlement, if any came to an end. It is submitted that the petitioner has been assigned the debt by ICICI Bank due on the company, and it has every right to file winding up petition and Hon"ble Company Judge has rightly issued direction dated 25.10.2010 for winding up of the company. The order dated 25.10.2010 was recalled on 18.2.2011, which order has already been set aside in special (Company) Appeal No. 439 of 2011. No appeal having been filed against the Division Bench judgment dated 15.7.2011, now it is not open for the appellant to contend that the order dated 25.10.2010 is incorrect or illegal. It is further submitted that IFCI has never accepted the one time settlement and the dues of the IFCI are more than 100 crores, which have not been paid by the company and thus, the allegations of the appellant that all secured creditors have been paid of except Kotak Mahindra, is incorrect and misleading. Learned counsel for the IFCI also referred to the affidavit filed on its behalf in support of its submission. Sri O.P. Mishra further submits that the company cannot force one time settlement on the petitioner to which the petitioner is not agreeable. It is submitted that counter affidavit and the affidavit on behalf of the company have been filed by one Mr. Bhadauria, claiming himself to be the Law Officer of the British India Corporation Ltd., who is not authorised to represent the company. It is further submitted that the dues of the petitioner having not been paid, the company has been rightly directed to be wound up and the appeal be dismissed. Learned Counsel for the petitioner further submitted that the petitioner is not agreeable to accept the bank draft of Rs. 1.67 crores and 25.3 lacs given to it and the same may be permitted to be returned.

9. Learned counsel for the parties have referred to and relied several judgements of the apex Court, this Court and other High Courts, which shall be referred to while considering the submissions in detail.

10. We have considered the submissions of learned counsel for the parties and have perused the record.

11. As noted above, the present appeal arises out of Company Petition No. 24 of 2009 M/s Kotak Mahindra Vs. M/s Elgin Mills Company Ltd. The petitioner

initiated winding up proceedings for dues of Rs. 8,29,63,420/-from the company. The winding up order was passed on 25.10.2010, which was recalled on 18.2.2011, against which the petitioner filed Special (Company) Appeal No. 439 of 2011. In Special (Company) Appeal No. 439 of 2011 initially the order dated 18.2.2011 was stayed by interim order dated 24.3.2011, against which company filed Special Leave to Appeal in the Hon''ble Supreme Court, which has been disposed of by following order dated 2.5.2011:

Learned Additional Solicitor General has furnished letter dated 7th April, 2011, from Controller of Accounts to the Chairman and Managing Director of BIC Limited. We direct the petitioner herein to place this letter before the Division Bench of the High Court, particularly in view of the fact that the Ministry has taken a decision to clear all outstanding dues of the Financial Institutions/Nationalised Banks which, if cleared, would obviously avoid winding up of the Company. In the meantime, even if the liquidator takes charge of the assets, he will not proceed further to dispose them off pending appeal before the Division Bench.

We request the Division Bench to expeditiously hear and decide the appeal within six weeks. The special leave petitions, accordingly, stand disposed of.

12. The apex Court in its judgment has specifically referred to the letter dated 7.4.2011 of Controller of Accounts to the Managing Director of BIC Ltd. The letter dated 7.4.2011 which was specifically referred has been filed as Annexure-6 to the counter affidavit filed by the company in Company Petition. The letter of the Government of India Ministry of Textile dated 7.4.2011 issued by the Controller of Accounts to the Managing Director BIC is to the following effect:

I am directed to refer to BIC's letter No Nil dated 3rd April, 2011 on the subject mentioned above.

The Ministry has taken a decision to revive/rehabilitate Elgin Mill Co. Ltd. And has also decided to clear outstanding dues of the Financial Institutions/Nationalised Banks and as such to complete the process for revival.

Accordingly, BIC may request to Hon''ble High Court, Allahabad for appropriate direction for not to initiate liquidation proceedings in order to complete the entire process of revival/rehabilitation of Elgin Mills Co. Ltd.

13. The above letter clearly indicates the decision of the Ministry of Textiles to revive/rehabilitate the company and to clear outstanding dues of financial institutions/nationalised Banks.

14. In the counter affidavit filed in the Company petition, the appellant has brought on record the details of one time settlement entered into with other financial institutions/banks. The details mentioned in the counter affidavit clearly indicate that there were nine secured creditors including M/s ICICI Bank and IFCI. It is useful to refer to paragraph 31 of the counter affidavit which contains a chart giving details of amount of one time settlement. Paragraph 31 of the

counter affidavit is quoted as below:

31. That it is stated that the full facts regarding rehabilitation/revival process have been stated in the above mentioned application. However, it is stated that in persuasion made by the company the other creditors/financial institutions have settled their dues under OTS scheme such as the Punjab National Bank, Bank of Baroda, IFCI, Canara Bank, Chartered Bank of India and IDBI except M/s. Kotak Mahindra Bank assignee of ICICI Bank. Copies of the settlements along with the chart are already enclosed as Annexure No. 12 in the counter affidavit. For convenience of the Court the statement of settlement is given hereunder:

S.N.

Name of FI/

Principa

Interest

Total

OTS

%age

Bank

I Amount

upto 31.6.201

Amount (Prin.

Amount (in Cr.)

(in Cr.)

1 (in Cr.)

+Int.) (in Cr.)

1

PNB

0.80

6.04

6.84

1.11

Prin.+5.30% of total interest

2

BOB

02.76

68.84

71.60

19.97

Prin.+25% of total interest

3

IFCI

00.90

20.75

21.65

6.09

Prin.+25% of total interest

4.

CANARA

00.00

1.34

1.34

8

Prin.+0.06% of

BANK

thousand

total interest

only

5.

STANDARD

00.42

4.51

4.93

1.32

Prin.+20% of total

CHARTERE

interest

D

6.

IDBI

01.60

30.90

32.50

4.68

Prin.+10% of total interest

7.

IIBI

01.50

42.96

44.46

6.89

Principal

8.

CCI

06.64

00.00

6.64

00.00

Principal

9

ICICI

00.40

8.49

8.89

Not settled

Total

15.02

183.83

190.85

48.04

In pursuance of the one time settlement entered into with the Ministry of Textiles and various financial institutions, payments have also been made to some of the financial institutions details of which have also been brought on record along with the counter affidavit. In this context, it is useful to refer to Annexure CA-12 to the counter affidavit filed in the company petition, which is a certificate dated 24.6.2011. It is useful to quote the said certificate :

PUNJAB NATIONAL BANK SARC. BIRHANA ROAD, KANPUR

ARMB 24.06.2011

TO WHOM SO EVER IT MAY CONCERN

This is to certify that Ms. Elgin Mills Company Ltd. Had availed credit facilities from our Bank and as per OTS approved by the authorities, The Company has today deposited the entire OTS amount of Rs. 111.71 lac and no other dues are outstanding with us.

15. From the facts mentioned in the counter affidavit and the materials brought on record, it is clear that one time settlements entered into with the financial institutions were also given effect to and amounts were also paid by the Ministry of Textiles. With regard to one time settlement with the petitioner, sincere efforts were being made. Letter written to M/s Kotak Mahindra inviting to participate for settlement of dues has also been brought on record as Annexure C.A.-7 which letter is also addressed to M/s Kotak Mahindra as well as IFCI fixing 18.4.2011, followed by letter dated 13.5.2011. The aforesaid letters were on the record before Hon"ble Company Judge. Appellant has pleaded that Company has settled dues with other financial institutions and has referred to its affidavit filed before the Company Judge. Hon"ble Company Judge has made following observations:

On a simple reading of the aforesaid paragraphs, it is apparently clear that till date the Government of India has not taken any decision to rehabilitate the Elgin Mills Company Ltd. or to pay of the debts of the creditors like Kotak Mahindra Bank Ltd. Any agreement with other financial institutions is of no legal consequence so far as the claim of the Kotak Mahindra Bank Ltd. is concerned nor this Court can insist upon the creditor to accept the settlement as proposed by the Company and thereby forgo part of its claim.

This Court is, therefore, of the firm opinion that the application made by the

Company is only an eye wash to somehow or the other prolong the agony of the creditors by not making the payment.

The Company has grown wiser today. For the first time it has filed a counter affidavit in the Company Petition and that too without any application explaining the reasons for the same being not filed even after due publication of the proceedings under Rule 24 of the Company Court Rules. This Court holds that such attitude of the Company is unfair.

On examination of the counter affidavit, this Court finds that except for repeating what had been stated in the application dated 05.09.2011, no other relevant fact has been mentioned in the counter affidavit which could disclose any sincere attempt on the part of the Company to liquidate the outstanding dues of the present creditors i.e. Kotak Mahindra Bank Ltd.

16. The observation of Hon"ble Company Judge that application made by the Company was only an eyewash to prolong the agony of the creditors, cannot be said to be correct. The observations of Hon"ble Company Judge further that Government of India has not taken any decision to rehabilitate the Elgin Mills or to pay the debt of the creditors, is also incorrect. The letter dated 7.4.2011 of the Ministry of Textiles clearly contains the decision of the Government of India to revive the company and to pay the debts, which letter was specifically noted by the apex Court, while disposing of the Special Leave to Appeal vide its judgment dated 2.5.2011 and the said letter was directed to be considered by the apex Court. Hon"ble Company Judge without referring to the said letter has observed that Government of India has not taken any decision to rehabilitate the Elgin Mills. The said observations of the Hon"ble Company Judge are incorrect and cannot be approved. There were sufficient materials brought along with the counter affidavit as well as along with the application, to indicate that Government of India has taken decision in several meetings, which were participated by financial institutions including Kotak Mahindra and IFCI, the Hon"ble Company Judge erred in observing that Government of India has not taken any decision to rehabilitate the company or to pay its debt. After making the said observation, Hon"ble Company Judge proceeded to observe that no case has been made out to recall the winding up order or to keep the same in abeyance. As far as dues of the petitioner M/s Kotak Mahindra are concerned, its predecessor-in-interest ICICI Bank had indicated its acceptance to proposal of one time settlement as submitted by the Ministry of Textiles, which is evident from the letter dated 17.1.2006 filed as Annexure-C.A.5 to the counter affidavit. ICICI Bank stated following in the said letter:

January 17, 2006 Mr. K.C. Bajpai Officer-in-Charge Elgin Mills Company Limited
11/6, Parvati Bangla Road Kanpur -208001

Dear Sir,

One Time Settlement (OTS)

Please refer your letter dated august 24, 2005 onthe subject.

In this connection, we wish to inform you that ICICIBank is "in principle" agreeable to the proposal ofthe Government of India, (Ministry of Textiles)envisaging payment of the OTS amount of Rs. 16.7 million to ICICI Bank.

Since it is mentioned in your aforesaid letter that the payment would be made during the current financial year, we request you to kindly indicate the date for payment of the OTS amount to ICICI Bank.

Yours faithfully, L Govind Chief Manager

17. It is true that no payments were made by the Ministry of Textiles in pursuance of the aforesaid proposal and on 31.3.2006, the ICICI Bank had assigned its principal debt of Rs. 40 lacs to M/s Kotak Mahindra, who thereafter filed the winding up petition. The letters of the Ministry of Textiles written to the Kotak Mahindra subsequent to 7.4.2011 have been brought on record. The officials of M/s Kotak Mahindra had also participated in the meeting held in the Ministry of Textiles, which facts were relevant for the learned Company Judge to consider as to whether due to those subsequent events, the winding up order had to be kept in abeyance or be recalled.

18. The submissions made by Sri O.P. Mishra on behalf of IFCI, the newly impleaded respondents now need to be considered. Outstanding principal of ICICI was Rs. 90 lacs and it is claimed by the respondents that at present dues of more than Rs. 95 crores of IFCI are against the company. An affidavit has been filed on behalf of IFCI by Sri S.G. Kundu bringing on record the letter dated 10.6.2011, informing that Rs. 95,22,28,804/-are due against the company upto 30.6.2011. Reply affidavit sworn by Heerak Upadhyaya, CMD, BIC/Chairman, M/s Elgin Mill Ltd. has been filed, wherein copy of the letter dated 10.6.2011 of the IFCI has been brought on the record, which was with respect to one time settlement of dues in respect of M/s Cawnpore Textiles Ltd. and M/ s Elgin Mills Co. Ltd. (appellant). The letter refers to discussions made regarding settlement of outstanding dues. IFCI indicated its agreement in principle to accept the proposal of settlement of dues envisaging payment of principal plus 25% interest. The letter asked the British India Corporation Ltd. to furnish the acceptance to obtain approval of the competent authority. The stand taken by the IFCI that since no acceptance has been communicated on behalf of the appellant, the one time settlement could not be arrived. After the letter dated 10.6.2011 on behalf of the appellant subsequent efforts were made including the letter dated 2.9.2011. A copy of the cheque dated 22.12.2011 for Rs. 5,74,22,276/-has also been annexed along with the reply affidavit as Annexure-6 and also produced by the appellant in the Court in favour of IFCI. The aforesaid indicates sincere efforts on behalf of the company to settle the dues of IFCI. It is relevant to note that letter dated 10.6.2011 was already on record before the Hon''ble Company Judge filed along with the counter affidavit. The Company Petition filed by M/s Kotak Mahindra was u/s 433(e) and (f) and 433 of the

Companies Act, 1956. The provisions of Section 433 and the scope of winding up came for consideration before the apex Court in *Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, . Following was laid down by the apex Court in paragraphs 27 to 29:

27. What then is inability when the section says "unable to pay its dues"? That should be taken in the commercial sense. In that, it is unable to meet current demands. As stated by William James, V.C. it is "plainly and commercially insolvent that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain as to make the Court feel satisfied that the existing and probable assets would be insufficient to meet the existing liabilities". (*In European Life Assurance Society, Re2; V. V. Krishna Iyer & Sons v. New Era Mfg. Co. Ltd.* 3)

28. While dealing with the scope of Section 433(e) this Court had occasion to hold the following [at page 131 in *Madhusudan Gordhandas*¹ [the case relied on by learned Solicitor General]]: (SCC pp. 638-39, paras 20-22) "Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding-up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See *London and Paris Banking Corpn., Re4*. Again, a petition for winding-up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See *Brighton Club and Horfold Hotel Co. Ltd., Re5.*)

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. (See *A Company, Re6.*) Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding-up order but the exact amount of the debt is disputed the court will make a winding-up order without requiring the creditor to quantify the debt precisely. (See *Tweeds Garages Ltd., Re7.*) The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding-up order by the creditors the court will consider their wishes and may decline to make the winding-up order. u/s 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in *Palmer's Company Law*, 21st Edn., page 742, as follows:

This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding-up order, the court in its discretion may refuse the order.

The wishes of the creditors will however be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding-up order is made. It is also well-settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding-up will have an important bearing on the reasonableness of the case. (See *P. & J. Macrae Ltd., Re8*)"

29. It is beyond dispute that the machinery for winding-up will not be allowed to be utilized merely as a means for realising its debts due from a company. In *Amalgamated Commercial Traders (P) Ltd. v. A.C.K. rishnaswami*⁹ this Court quoted with approval the following passage from Buckley on the Companies Acts, (1 3th Edn., p. 451):

It is well-settled that "a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court".

19. Even if a winding up order has been passed by learned Company Judge, the same is not culmination of the proceedings pending before the Company judge but in effect is the commencement of the process as has been laid down by the apex Court in *M/s. Rishabh Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd.*, wherein following was laid down in paragraph 11:

11. It may also be noticed that winding up order passed under the Companies Act is not the culmination of the proceedings pending before the Company Judge but is in effect the commencement of the process. The ultimate order to be passed in such a petition is the dissolution of the company in terms of Section 481 of the Companies Act. The words "shall be deemed to commence" in Section 441 of the Companies Act clearly show the intention of the legislature that although the winding up of a petition does not in fact commence at the time of presentation of the petition itself but it shall be presumed to commence from that stage. The word "deemed" used in the Section would thus mean, "supposed", "considered", "construed", "thought", "taken to be" or "presumed".

20. Learned Company Judge under the Companies Act has wide powers to consider the materials brought on record and has to determine as to whether the company be wound up or any such arrangement be made which may revive the company. The apex Court has observed in *Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girni K.K. Samiti and Others*, that attempt must be made to ensure that

rather dissolving a company, it be allowed to revive. There is ample jurisdiction u/s 391 of the Companies Act. Following was laid down in paragraph 33:

33. The argument that Section 391 would not apply to a Company, which has already been ordered to be wound up cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a Company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a Company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a Company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application.

21. It is useful to note that the Division Bench while deciding the Special (Company) Appeal No. 439 of 2010 had set aside the order dated 18.2.2011 by which winding up was recalled. However, the application for recall was not dismissed and the matter was remanded. The Division Bench further permitted the company to file an application before the learned Company Judge. Following was held by the Division Bench in its order dated 15.7.2011:

Where an application is filed to recall the winding up order, it is necessary for the Company Court to issue notice to all concerned including those, who have not put in appearance, either by advertisement, or by issuing notices to hear the objections to the recall of the winding up order. The order to recall the winding up cannot be passed casually by accepting the explanation of the absence of the counsel for the company.

In view of the aforesaid, we find substance in the grounds taken in the appeal and set aside the impugned order dated 18.2.2011 by which winding up order dated 25.10.2010 was recalled. The matter is remanded to the learned Company Judge to consider the application of M/s Elgin Mills Company Ltd.-respondent No. 1 to consider the effect of winding up order and to keep it in abeyance. In view of the order of the Supreme Court dated 2.5.2011 we direct that until the decision of the application to be filed by M/s Elgin Mills Company Ltd.-respondent No. 1 to keep winding up order in abeyance, the Official Liquidator will not take steps to take over possession, to advertise or sell its assets.

The matter will come up before the learned Company Judge on 29th July, 2011.

Both the parties have taken note of the date fixed by the Court.

22. Subsequent to the order of the Division Bench dated 15.7.2011, the Company filed an application dated 5.9.2011 before the learned Company Judge, wherein the following prayer was made:

It is, therefore, most respectfully prayed that this Hon''ble Court may graciously be pleased to allow the present application as the Government of India has decided to rehabilitate the Elgin Mill Company and have also settled the dues with all the other banks/financial institutions as such the winding up petition does not survive because the company is neither unable to pay its debts nor it is just and equitable that the company may be wound up.

23. Sri O.P. Mishra, learned counsel for the petitioner has submitted that one time settlement cannot be forced on the petitioner M/s Kotak Mahindra. Learned Counsel for the petitioner has also placed reliance on a Division Bench judgment of this Court in 2004 AWC (5) 4127 Sardar Prem Singh Vs. Bank of Baroda, 2004 All C.J. (2) 1244 Maria Plasto Pack (P) Ltd. Vs. Managing Director, U.P. Financial Corporation, Kanpur and 2007 All. L.J. (3) 344 Mahesh Chand Agarwal Vs. Union of India. The aforesaid judgements relied by learned counsel for the petitioner were the cases, where recovery proceedings were challenged by the debtors. In the aforesaid context, Division Bench of this Court held that there is no legal obligation to reach on such one time settlement and the debtor has no right to get one time settlement. The aforesaid judgements were not considering any proceedings pertaining to winding up or the proceedings under the Companies Act. The said judgements do not help the petitioner in the present case.

24. One more submission raised by learned Counsel for the petitioner needs to be noted. It is submitted by learned counsel for the petitioner that affidavit has been filed in support of the appeal by S.B. Bhadauria, who claims to be Law Officer of the British India Corporation Ltd., who has no authority to represent the Company. Replying the aforesaid objection, it has been submitted by learned counsel for the appellant that appellant is subsidiary of British India Corporation Ltd. and it is the British India Corporation, which is looking the affairs of the company and S.B. Bhadauria has been authorised by the Chairman and Managing Director of British India Corporation to do the needful. Affidavit in the present appeal has also been filed by Heerak Upadhyay, Chairman and Managing Director of British India Corporation Ltd. describing as CMD,BTC/Chairman, Elgin Mills Company Ltd. Thus, the objection of the respondents that appeal has not been properly filed, cannot be accepted.

25. In view of the foregoing discussions, we are of the view that learned Company Judge committed error in holding that no case is made out to recall the order dated 25.10.2010 or to keep the same in abeyance as noted above, the Hon''ble Company Judge has not adverted to the materials brought on record by means of the counter affidavit and application dated 5.9.2011. The order of Hon''ble Company Judge dated 6.9.2011 thus, cannot be sustained and is hereby

set aside. The Division Bench, while deciding the Special (Company) appeal No. 439 of 2011 directed the order of winding up to be kept in abeyance and Official Liquidator was directed not to take steps to take over possession or to advertise or to sell its assets. We accordingly, direct that until the learned Company Judge decides both the aforesaid applications i.e. applications dated 2.11.2010 and 5.9.2011 afresh taking into consideration all relevant materials including the direction of the apex Court dated 2.5.2011. The winding up order be kept in abeyance and Official Liquidator will not take steps to take over possession or to advertise or sell its assets.

26. The appeal is allowed accordingly. The order dated 6.9.2011 is set aside.

27. Learned Counsel for the petitioner has submitted that he may be permitted to return the bank drafts of amount of Rs. 1.67 crores and 25.3 lacs, which were received from the appellant on 9.11.2011. We make it clear that bank draft having already been given to the petitioner, which according to the appellant is amount as per the one time settlement as indicated in the letter dated 17.1.2006, it is open for the respondents either to encash or not to encash the said bank drafts and even the said drafts are encashed, the same shall be without any prejudice to the rights of the petitioner.

28. The parties shall bear their own costs.