

(2016) 06 BOM CK 0085

In the Bombay High Court

Case No : Company Petition No. 3 of 2015

National Securities Clearing Corporation Ltd

APPELLANT

Vs

Prime Broking Company (India) Ltd.

RESPONDENT

Date of Decision : 28-06-2016

Acts Referred:

Companies Act, 1956 — Section 433, 434
Contract Act, 1872 — Section 176

Citation : (2016) 4 AIRBomR 677 : (2016) 197 CompCas 115 : (2016) 4 CompLJ 219

Hon'ble Judges : B.P. Colabawalla, J.

Bench : Single Bench

Advocate : Mr. Virag Tulzapurkar, Senior Counsel a/w Dr. B. Saraf, Sachin Chandarana i/b M. K. Ambalal and Co, for the Appellant; Mr. Zal Andhyarujina a/w Nirav Shah, Rishikesh Soni, Naushar Kohli i/b DSK Legal, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Colabawalla, J.—This Company Petition seeks winding up of the Respondent Company-Prime Broking Company (India) Ltd on the ground that it is unable to pay its debts. It is the case of the Petitioner that the Respondent Company is indebted to the Petitioner in the sum of Rs. 103.73 Crores as on 8th April, 2014 along with interest @12% per annum till payment and/or realization. Out of this, according to the Petitioner, an amount of Rs. 90.90 crores is admitted as due and payable by the Respondent Company to the Petitioner. The obligation of the Respondent Company arises out of various trades executed by the Respondent Company on the platform of National Stock Exchange of India Limited. Since the Respondent Company failed to make payment to the counter parties, the Petitioner had to pay the said counter parties out of its income-cum-profit and earnings, for and on behalf of the Respondent Company, and therefore, the Petitioner is entitled to recover the same from the Respondent Company.

2. The brief facts in the present controversy are as follows :-

(a) The Petitioner is a wholly owned subsidiary of the National Stock Exchange of India Limited ("NSE"). The Petitioner offers clearing and settlement services to any person/organization including any trading member of the NSE or any other recognised stock exchange, subject to the provisions of the Petitioner's Bye-laws, Rules and Regulations. The Respondent Company was enrolled as a trading member of the NSE in the Futures and Options ("F & O") segment (in addition to other segments). As a condition precedent to being a trading member on the NSE in the F & O segment, the Respondent Company executed a Trading Membership Undertaking dated 17th January, 2003. Similarly, being a Trading Member in the F & O segment of the NSE, the Respondent Company was required to clear and settle the deals executed by the Respondent Company either by itself or as a clearing member of the Petitioner and for this purpose also executed a Clearing Membership Undertaking for the F & O segment dated 16th January, 2003. In the normal course of trading on the platform of the NSE in the F & O segment, the Respondent Company sold long dated nifty option contracts since June 2012 with their maturity set for September 2012 and December 2012. These contracts were subsequently partly rolled over to March 2013 and June 2013 respectively.

(b) As a result of the expiry of the contracts rolled over for March 2013, as on 2nd April, 2013, an amount of Rs. 158.04 Crores became due and payable by the Respondent Company to the Petitioner. The Respondent Company vide its letter dated 2nd April, 2013, has in clear and express terms admitted the outstanding amount of Rs. 158.04 Crores as due and payable by the Respondent Company to the Petitioner and requested the Petitioner to adjust the outstanding amount against the Respondent Company's Fixed Deposits and cash collateral etc lying with the Petitioner. Accordingly, the Petitioner, as per the instructions of the Respondent Company, adjusted the deposits/collateral's, the details of which are set out in paragraph 7(h) of the Petition. After the aforesaid adjustment, an amount of Rs. 3.77 Crores was still outstanding as due and payable by the Respondent Company to the Petitioner. This amount has also been expressly admitted by the Respondent Company vide its letter dated 3rd April, 2013. Despite the express admission, the Respondent Company failed and neglected to make the payment of the aforesaid amount of Rs. 3.77 Crores.

(c) In addition to the aforesaid sum (Rs. 3.77 Crores), that was due and payable by the Respondent Company to the Petitioner, on the expiry of the contracts rolled over to June, 2013 an additional amount of Rs. 91.01 Cores became due and payable by the Respondent Company to the Petitioner. Therefore, as on 28th June, 2013 the outstanding amount due and payable by the Respondent Company was Rs. 94.78 Crores. Accordingly, the Petitioner by its letter dated 28th June, 2013 called upon the Respondent Company to make the aforesaid payment failing which suitable action would be initiated.

(d) In reply thereto, the Respondent Company sought to deny its liability on the

grounds set out in its Advocates" letter dated 1st July, 2013 (Exhibit-I). The contentions raised in the said letter were basically two. They were:- (a) that the Petitioner had issued a Circular dated 20th December, 2012 which unilaterally and suddenly removed/reduced certain securities from the permissible list of collaterals to maintain the requisite margins for the F & O segment with effect from 1st January, 2013 which had far reaching consequences; and (b) that a meeting was held on 14th March, 2013 between the representatives of the Petitioner and the Respondent Company wherein the Petitioner conveyed to the Respondent Company that since the Respondent Company had not brought in additional margins in the form of cash, the Petitioner would immediately, offload all pledged securities lying with them to meet the pay-in obligations pertaining to March and June contracts expiry. This would have entailed sale of several securities including Twenty Lakh (20,00,000) shares of a company called "Gitanjali Gems Limited" (hereinafter referred to as "Gitanjali"). Despite this, the Petitioner sold only 2,97,731 shares of Gitanjali between 19th March, 2013 and 22nd March, 2013. The Petitioner ought to have sold all the 20,00,000 shares of Gitanjali, especially in view of the fact that during 19th March, 2013 and 22nd March, 2013 the share price of Gitanjali was approximately Rs. 600/- per share and if all the shares were sold, then nothing would have been due and payable to the Petitioner. In the light of these facts, the Respondent Company called upon the Petitioner to grant them a personal hearing on 2nd July, 2013 to demonstrate that nothing was payable by the Respondent Company to the Petitioner.

(e) Thereafter, the Respondent Company by its Advocates" letter dated 31st July, 2013 for the first time raised a counter claim against the Petitioner in the sum of Rs. 213.02 Crores. What is pertinent to note in this letter is that the Respondent Company has expressly admitted that an amount of Rs. 90.90 Crores was due and payable by the Respondent Company to the Petitioner.

(f) As mentioned earlier, the outstanding of the Petitioner were to the tune of Rs. 94.78 Crores as on 28th June, 2013. Thereafter, certain securities and deposits of the Respondent Company were appropriated towards the dues of the Petitioner bringing the balance outstanding of Rs. 89.65 Crores. The Petitioner also charged interest and penalty as per Bye-law 16 of Chapter VI of the Petitioner's Bye-laws (F & O) segment amounting to Rs. 14.07 Crores, and therefore, the amount claimed in the Petition is Rs. 103.73 Crores. The details of the securities and deposits appropriated by the Petitioner have been set out in paragraph 7(s) of the Petition.

(g) I must mention here that in the interregnum on 18th March, 2013, the Petitioner received two complaints, one from Sarvin Mercantile Pvt. Ltd. ("SARVIN") and another from Trusha Infrastructure Pvt. Ltd. ("TRUSHA") against the Respondent Company alleging non-delivery of 7 Lac and 13 lac shares of Gitanjali respectively. It was the case of SARVIN and TRUSHA that they had bought these shares through the Respondent Company and the said shares had been pledged by the Respondent Company with the NSE without their consent. A

copy of these complaints were marked (amongst others), to the Additional Commissioner of Police, Economic Offences Wing, Mumbai ("EOW"). Be that as it may, as there was a shortfall in the margins maintained by the Respondent Company with the Petitioner [and for which the shares of Gitanjali (amongst others) were pledged], the Petitioner during the period 19th March, 2013 to 22nd March, 2013 sold 2,97,731 shares of Gitanjali. As 23rd March, 2013 and 24th March, 2013 were Saturday and Sunday respectively, no further sale of Gitanjali shares took place. Thereafter on 25th March, 2013 the Petitioner received a letter dated 23rd March, 2013 from the EOW. By this letter, the EOW requested the Petitioner to withhold the shares of Gitanjali till further orders in view of the fact that the said shares were the subject matter of an investigation pursuant to the criminal complaints filed by SARVIN and TRUSHA. Subsequently, on 27th April, 2013 the Petitioners received an order passed by the EOW under Section 102 of the Code of Criminal Procedure, 1973 ("CrPC"). By the said order, the Petitioner was directed to freeze all the shares of Gitanjali pledged with the Petitioner by the Respondent Company. It would be important to note that this order of the EOW was challenged by the Petitioner before this Court by filing Criminal Application No.483 of 2013 under Section 482 of the CrPC. This challenge was ultimately negated by this Court by its order and judgment dated 22nd August, 2013. Being aggrieved thereby, the Petitioner preferred an appeal to the Supreme Court which is pending. I must also mention here that the Supreme Court by its interim order allowed the Petitioner to sell the balance 17.03 Lac shares of Gitanjali and deposit the sale proceeds thereof in the Supreme Court.

(h) Be that as it may, since the Respondent Company failed to make payment of its out standings in accordance with the Rules, Regulations and Bye-Laws of the Petitioner, the Respondent was declared as a defaulter on 15th October, 2013. Subsequently, the Respondent Company was also declared a defaulter by the Bombay Stock Exchange vide its Notification dated 17th October, 2013. Subsequent to this, on 7th March, 2014 the Respondent Company has also been expelled from the trading membership of the NSE in all segments. I must mention here that the Respondent Company challenged the action of the Petitioner in declaring them as a defaulter before the SAT without any success. The Respondent Company thereafter challenged this order of the SAT dated 30th June, 2015 before the Supreme Court, which is pending.

(i) Since no payment was forthcoming, the Petitioner served a statutory notice dated 17th April, 2014 under Sections 433 and 434 of the Companies Act, 1956 on the Respondent Company and called upon the Respondent Company to make payment of a sum of Rs. 103.73 Crores. It is not in dispute that this statutory notice has been served on the registered address of the Respondent Company and the same has been duly received by it.

(j) The Respondent Company through its Advocates letter dated 7th May, 2014 replied to the said statutory notice wherein they sought to refute the contentions

of the Petitioner. The Petitioner by their letter dated 13th June, 2014 refuted the allegations contained in the letter dated 7th May, 2014. It is in these circumstances that the present Petition has been filed.

(k) For the sake of completeness, it would be important to mention here that before the issuance of the statutory notice, the Respondent Company has also filed a Suit being Suit (L) No. 939 of 2013 in this Court against the Petitioner and the National Stock Exchange of India Limited seeking a decree in the sum of Rs. 152.57 Crores together with interest thereon @ Rs. 18% per annum. The particulars of claim of this suit would reveal that the claim made in this suit is entirely on the basis of the alleged loss suffered by the Respondent Company on account of the actions of the Petitioner. Even so, on perusal of the particulars of the claim in the said Suit, it is clear that the Respondent Company has admitted its liability to the Petitioner in the sum of Rs. 90.90 Crores and has sought set off of the said amount against their claim for damages.

3. In this factual backdrop, Mr. Tulzapurkar, the learned Senior Counsel appearing on behalf of the Petitioner, submitted that the dues of the Petitioner at least to the extent of Rs. 90.90 Crores have been duly admitted by the Respondent Company. He submitted that it is not in dispute that since the Respondent Company did not honour the trades that matured/expired in June 2013 with the counter parties, the Petitioner was required to make payment to them. He submitted that it is not in dispute that therefore this payment has to be made by the Respondent company to the Petitioner. It is in this light that the dues of the Petitioner have been duly admitted by the Respondent Company to the Petitioner. Mr. Tulzapurkar, brought to my attention the particulars of claim in the suit filed by the Respondent Company [Suit (L) No. 939 of 2013] wherein an amount of Rs. 90.90 Crores has been admitted as due and payable by the Respondent Company to the Petitioner because the Respondent Company itself has given credit for the same in the particulars of claim, to the Petitioner. Apart from the admission in the aforesaid suit, the learned counsel also brought to my attention a letter dated 31st July, 2013 (Exhibit J, page 55 of the paper book) addressed by the Advocates of the Respondent Company to the Advocates of the Petitioner wherein, after giving a break up of the alleged loss suffered by the Respondent company of Rs. 213.02 Crores, the Petitioner is called upon to pay a sum of Rs. 122.12 Crores as a compensation failing which the Respondent Company would adopt such legal proceedings as may be advised. Mr. Tulzapurkar, submitted that therefore reading this letter as a whole, it is clear that the dues of the Petitioner, at least to the extent of Rs. 90.90 Crores have been expressly admitted by the Respondent Company.

4. Apart from this, Mr. Tulzapurkar submitted that in any event the Respondent Company is shut down, not doing any business and is commercially insolvent. In this regard, he brought to my attention, the statement made by the Respondent Company before this Court on 2nd September, 2014 in Company Application (L) No. 383 of 2014 wherein the statement of the Respondent Company is recorded

that its business is shut down due to the orders of NACL and BSE disconnecting their terminals and declaring them as defaulters. An additional statement was made that the Respondent Company has no assets whatsoever except the trade receivables. He also pointed out that the balance-sheets for the year ending 31st March, 2012 and 30th September, 2013 reflect a loss of Rs. 7.88 Crores and Rs. 3.71 Crores respectively. Looking to all these factors, he submitted that in any event of the matter, the Respondent Company was not doing any business and was commercially insolvent and therefore ought to be wound up by and under the directions of this Court.

5. Mr. Tulzapurkar further submitted that just because the Respondent Company has filed a suit for damages in the sum of Rs. 152.57 Crores against the Petitioner, is no answer to the admitted claim of the Petitioner. He submitted that the claim in damages can never be a defense to a winding up Petition wherein an admitted debt is due to the Petitioner. In this regard, Mr. Tulzapurkar relied upon the following two judgments:

(a) ICICI Bank Ltd v. Sundaram Multi Pap Ltd. (paragraphs 5 and 8) 1 (2010) 153 Comp Cas 424 (Bom)

(b) Union of India v. Raman Iron Foundry (1974) 2 SCC 231

6. For all the aforesaid reasons, the learned Senior Counsel submitted that there is no bona fide dispute raised by the Respondent Company in relation to the admitted dues of the Petitioner, and therefore, this Company Petition be admitted and further directions be given for advertisement etc.

7. On the other hand, Mr. Andhyarujina, the learned counsel appearing on behalf of the Respondent Company submitted that several triable issues arise in the present case. He submitted that this being the case, the Company Petition cannot be entertained and the Petitioner ought to be relegated to file a Civil Suit for recovery of its dues. Mr. Andhyarujina submitted that their claim for damages as more particularly set out in their Suit (L) No. 939 of 2013 is a legitimate claim which has every chance of succeeding when the Suit goes to trial. It would therefore be highly unfair at this stage to seek orders of winding up of the Respondent Company when that Suit is still pending.

8. To elaborate this point further Mr. Andhyarujina was 2 (1974) 2 SCC 231 at pains to point out that the major loss suffered by the Respondent Company was due to the fact that the Petitioner, though holding 20,00,000 shares of Gitanjali and which were pledged to them, did not sell the same between 14th March, 2013 and 27th April, 2013. He submitted that if the 20,00,000 Gitanjali shares were sold during this period, at an average price of approximately Rs. 600/- per share, the Petitioner would have been able to recover approximately Rs. 118 Crores from the sale proceeds thereof and then nothing would be due and payable by the Respondent Company to the Petitioner. He submitted that this loss is directly attributable to the negligence of the Petitioner. He submitted that a meeting was held between the representatives of the Petitioner and the

Respondent Company on 14th March, 2013 wherein the Petitioner clearly conveyed to the Respondent Company that since the Respondent Company had not fulfilled its margin requirements, the Petitioner would offload the securities held by them including the shares of Gitanjali. Despite conveying this to the Respondent Company, the Petitioner offloaded/sold all shares of ABG Shipyards, Alok Industries & Flexistuff Industries, but only sold 2,97,731 shares of Gitanjali. Mr. Andhyarujina was at pains to point out that the 2,97,731 shares of Gitanjali sold between the periods 19th March, 2013 to 22nd March, 2013 were as follows:-

- (a) 19th March, 2013 the Petitioner sold 96,581 shares of Gitanjali;
- (b) 20th March, 2013 the Petitioner sold 83,954 shares of Gitanjali;
- (c) 21st March, 2013 the Petitioner sold 1,07,533 shares of Gitanjali;
- (d) 22nd March, 2013 the Petitioner sold 9,673 shares of Gitanjali.

9. He submitted that there is absolutely no explanation as to why only 9,673 shares of Gitanjali were sold on 22nd March, 2013 especially in view of the fact that during this period i.e. from 19th March, 2013 till 27th April, 2013 (the date of the freezing order passed by the EOW), there was no impediment from selling the said shares. Mr. Andhyarujina submitted that the EOW froze the selling of shares of Gitanjali only but its order dated 27th April, 2013 passed under Section 102 of the Code of Criminal Procedure, 1973 ("CrPC"). Therefore, until this date (i.e. 27th April, 2013), the Petitioner could have and should have sold all 20,00,000 shares of Gitanjali. By not doing this, the Petitioner was guilty of not only negligence but also conducted the sale improperly which has given rise to a legitimate claim in damages.

10. Mr. Andhyarujina fairly submitted that the Respondent Company (as a pledgor) could not compel the Petitioner (as a pledgee) to exercise the power of sale as a means of discharging or satisfying Petitioner's debt. The only rights the Respondent Company had were, (i) in case the Petitioner exercised the power of sale, to insist that it should be honestly and properly done and the sale proceeds applied to the debt; (ii) in case the Petitioner did not exercise the power of sale, to redeem the pledge on payment of the debt or such part of it that remained unpaid; and (iii) in case the sale was improperly done, to get damages caused thereby. He, however submitted that looking to the fact that the Petitioner itself had conveyed to the Respondent Company that it was going to sell all the shares of Gitanjali and thereafter sold only 2,97,731 shares, itself goes to demonstrate that the sale of Gitanjali shares was conducted improperly which has given rise to the claim in damages and which is the subject matter of Suit (L) No. 939 of 2013 filed by the Respondent Company against the Petitioner. He therefore submitted that there is a bona fide dispute raised by the Respondent Company in relation to the debt owed by the Respondent Company to the Petitioner. In support of his propositions, Mr. Andhyarujina relied upon following judgments:-

(a) Vimal Chandra Grover v. Bank of India, (2005) 5 SCC 122

(b) S.L. Ramaswamy Chetty and Another v. M.S. A.P.L. Palaniappa Chettiar, AIR 1930 Mad 364.

11. Mr. Andhyarujina submitted that this claim of damages and which is directly attributable to the negligence of the Petitioner can be set off against the debt owed to the Petitioner notwithstanding the fact that the dues of the Petitioner had been admitted by the Respondent Company. He submitted that a defense in a winding up Petition can be set up by way of set off or as a cross claim. He was at pains to point out the difference between a legal set off as provided under Order 8, Rule 6 of the Code of Civil Procedure, 1908 and an equitable set off. He submitted that a right to set off dealt with by Order 8, Rule 6 of the CPC is a legal set off. It's characteristics are that the sum of money is ascertained and both the parties fill the same character as they fill in the Suit. He submitted that independently of this, the Courts of equity allowed a plea of equitable set off being entertained though the amount was unascertained and there were mutual debits and credits amounting to cross demands arising out of the same transactions or so connected in their nature and circumstances so as to make it inequitable so that the Plaintiff should recover its claim and the Defendant be driven to file a cross Suit. He very fairly stated that though an equitable set off can be entertained, it cannot be raised as a matter of right. It stands on a lower pedestal than the plea of a legal set off. If raised, the Court on being satisfied that the plea may result in protracting or delaying the trial, may refuse to entertain it, leaving it open to the Defendant to raise the same in an independent action. He submitted that in the facts of the present case, the Respondent Company has in fact filed its independent suit claiming damages from the Petitioner.

12. Mr. Andhyarujina submitted that unless this Court comes to a conclusion, at least prima facie, that the claim made in the said Suit is absolutely frivolous, this Court at this stage cannot discard the same. In support of the proposition, that in a winding up Petition a claim for damages can be legitimately set up as a defense, he relied upon the judgment of the Court of Appeal in England in the case of *Re Portman Provincial Cinemas Ltd.*, (1999) 1 WLR 157 (CA) Mr. Andhyarujina submitted that before I reject the claim of the Respondent Company made in the said Suit and which is a claim for damages, I have to prima facie examine whether the said claim is one which is sustainable, and in fact he invited me to do so. In this regard, he has taken me through the averments in the plaint in Suit (L) No. 939 of 2013. According to Mr. Andhyarujina, the plaint raises several triable issues which this Court will be required to go into at the trial of the Suit after evidence is led by both parties. He therefore submitted that the claim of the Respondent Company against the Petitioner cannot be disregarded or discarded at this stage itself and hold that the Respondent Company did not have a bona fide defense to the Company Petition. For all these reasons, Mr. Andhyarujina submitted that the Company

Petition be dismissed and the Petitioner be relegated to file a Civil Suit to recover their dues.

13. In addition to the aforesaid argument, Mr. Andhyarujina also submitted that the Petitioner issued a Circular dated 20th December, 2012 under which certain securities were suddenly removed from the permissible list. Mr. Andhyarujina 5 1999 (1) WLR 157. submitted that by virtue of this Circular many of the securities pledged by the Respondent Company with the Petitioner towards the F & O margins were deemed ineligible for acceptance as collateral and the value of the securities pledged with the Petitioner was reduced drastically to the tune of about 100 Crores. According to him, overnight the said securities all of a sudden became ineligible securities for no reason whatsoever. The Petitioner thereafter required from the Respondent Company replacement of these ineligible securities. By rendering the said securities given by the Respondent Company as ineligible, the margin short fall came to approximately to Rs. 92.08 Crores. By virtue of this, the Respondent Company was required to provide eligible collateral securities as per the new list of the Petitioner at very short notice. During the said time, the Petitioner refused to return to the Respondent Company ineligible securities resulting in the Respondent Company's inability to raise money and replace the said securities. Due to the Respondent's inability to comply with the Petitioner's unilateral and arbitrary action, the F & O terminal of the Respondent Company was disabled by the Petitioner and consequently the Respondent was unable to carry on trade and business on the NSE. This also, according to Mr. Andhyarujina, has caused substantial loss to the Respondent Company which is solely attributable to the actions of the Petitioner. For all the aforesaid reasons, Mr. Andhyarujina submitted that the claim of the Petitioner is bona fide disputed by the Respondent Company and the Company Petition be dismissed with costs.

14. I have heard the learned counsel appearing on behalf of the respective parties, perused the papers and proceedings in the Company Petition as well as the Annexures thereto. Before I deal with the contentions canvassed on behalf of the Respondent Company, it would be pertinent to mention here that the claim made in the Petition, at least to the extent of Rs. 90.90 Crores is undisputed. In fact, this amount of Rs. 90.90 Crores is admittedly due and payable by the Respondent Company to the Petitioner as can be seen not only from the letter dated 31st July, 2013 (Exhibit "J" page 55 of the paper book) but also from the particulars of claim set out in Suit (L) No. 939 of 2013. Even before me, Mr. Andhyarujina, learned counsel appearing on behalf of the Respondent Company, very fairly conceded that this amount of Rs. 90.90 Crores is due and payable by the Respondent Company to the Petitioner. He however submitted that against the admitted claim of the Petitioner, the Respondent Company has a cross claim of approximately Rs. 152.57 Crores which is the subject matter of Suit (L) No. 939 of 2013. It was his submission that the claim made in the said suit, albeit for damages, is a substantial claim, and therefore, would be a good defense to the Company Petition.

15. On a bare perusal of the proceedings in Suit (L) No. 939 of 2013 it is clear that the claim therein is in damages. In a nutshell, this claim mainly arises due to the fact that according to the Respondent Company, even though the Petitioner had informed the Respondent Company that they would sell all 20,00,000 shares of Gitanjali, which were pledged with the Petitioner, the same was not done. If the shares were sold between the period 19th March, 2013 to 27th April, 2013 (the date on which the freezing order was passed by the EOW), the Petitioner would have realised far more than what was due to them. According to Mr. Andhyarujina this was admittedly not done, and therefore, the Respondent Company has suffered a huge loss on that count.

16. In my view, a set off or a counter claim can be considered as a bona fide defense to a winding up Petition if, firstly the defense is in is in good faith and one of substance, secondly, the defense is likely to succeed on the point of law, and thirdly that the Company adduces prima facie proof of the facts on which the defense depends. Where the debt is undisputed, the Court will not act upon a defense that the Company has the ability to pay the debt but it chooses not to pay that particular debt. Where there is no doubt that the Company owes a debt to the creditor entitling him to a winding up order but the exact amount is disputed, the Court will make a winding up order without requiring the creditor to quantify the debt precisely. This proposition has been succinctly laid down by the Supreme Court in the case of *M/s Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt Ltd.* (1971) 3 SCC 632 of the said decision reads thus:-

"21. 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 *Re. A Company.* [(1894) 94 SJ 369] 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 *Re Tweeds Garages Ltd.* [1962 Ch 406] 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."

(emphasis supplied)

17. Applying this test, I will have to examine the defenses raised by the Respondent Company. As far as the present controversy is concerned, the counter claim made by the Respondent Company is one for damages mainly on account of the failure of the Petitioner to sell all 20,00,000 shares of Gitanjali between the period 19th March, 2013 to 27th April, 2013 (the date on which freezing order was passed by the EOW). What is pertinent to note here is that, these shares of Gitanjali were pledged with the Petitioner to meet the margin requirements as per the Circulars issued by the Petitioner from time to time in that regard. Since there was a margin short fall, the Petitioner in a meeting held on 14th March, 2013 informed the Respondent Company that they would

proceed to sell the shares of Gitanjai pledged with them. In contrast to this, the claim made in the present Petition is with reference to the trades that expired/matured in June 2013. The fact that the claim in the Petition is with reference to the trades that expired/matured in June 2013, is undisputed. In fact, the admission of liability by the Respondent Company is also with reference to these very same trades.

18. Section 176 of the Contract Act, 1872 deals with the rights of a Pawnee where the Pawner make default. Section 176 reads as under :-

"176. Pawnee's right where pawnor makes default.-If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor."

19. As the Section clearly stipulates, if the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may (i) bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or (ii) he may sell the goods pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor. What is important to note for the present purpose in Section 176 is that, the Pawnee can only sell the goods pledged once the pawnor makes a default in the payment of the debt. Prior thereto, the pawnee has no right to sell the pledged goods.

20. In the facts of the present case and as rightly submitted by Mr. Tulzapurkar, the shares of Gitanjali that were sold during the period 19th March, 2013 to 22nd March, 2013 were not because the Respondent Company had defaulted in making payment of the debt as claimed in the Company Petition but because there was a short fall in the margin. In fact the debt as claimed in the Company Petition had not even crystallized on the date when part of the Gitanjali shares were sold (2,97,731 shares). In fact, the debt had not crystallized even when the order of the EOW was passed on 27th April, 2013 freezing the sale of all Gitanjali shares. It is not in dispute that after 27th April, 2013 the Petitioners could not sell any shares of Gitanjali due to the freezing order passed by the EOW. This being the case, in law, the Petitioner could never had sold the shares of Gitanjali between 19th March, 2013 to 27th April, 2013 for recovery of the debt that

became due only in June 2013. Mr. Tulzapurkar, in my view, has rightly submitted that the question of maintaining margins as required by the circulars issued by the Petitioner from time to time, and the question of the Respondent Company paying its dues under the trades that expired/matured in June 2013, are totally different and operate in different fields. The requirement of margins is to safeguard the Petitioner against any risk in the event the concerned party who is maintaining the margins fails to honour its commitments to the Petitioner. If the Petitioner chooses not to keep a margin or allows a shortfall in the margins, it does so at its own risk and detriment. If in law, the Petitioner, from 19th March, 2013 to 27th April, 2013, could not have sold 20,00,000 pledged shares of Gitanjali for the recovery of the debt that became due only in June 2013, then, I find, at least prima facie, that the claim made for damages against the Petitioner is not bona fide. What is important to note is that in the meeting of 14th March, 2013, the Petitioner informed the Respondent Company that it would be selling Gitanjali shares to make up the short fall in the margin. It was unilateral decision of the Petitioner. It is not as if there was any agreement between the Respondent Company and the Petitioner that the Petitioner would sell all the Gitanjali shares and because of a breach of the said agreement a claim for damages has been made. In fact, Mr. Andhyarujina very fairly conceded that there was no agreement between the parties that the Petitioner would sell 20,00,000 shares of Gitanjali. Therefore, I find that in law the Petitioner could not have sold 20,00,000 shares of Gitanjali in March ? April 2013 for recovery of the debt that became due only in June 2013. If this be the case, then at least prima facie and in my view, the Respondent Company cannot contend that the Petitioner had caused a loss to the Respondent Company because they did not sell all 20,00,000 shares of Gitanjali between 19th March, 2013 and 27th April, 2013 respectively against the claim of the Petitioner for the trades that expired/matured in June, 2013.

21. Faced with this situation, Mr. Andhyarujina sought to contend that even though the trades expired/matured in the June 2013, the Petitioner ought to have sold all 20,00,000 Gitanjali shares between March and April, 2013 itself towards the margin shortfall, because the margin would have been ultimately used for the purposes of squaring up the trades that expired/matured in June 2013. He, therefore, submitted that the claim made for the damages on account of the alleged loss suffered by the Respondent Company towards the unsold shares of Gitanjali (17.03 lac shares) was a claim made on this basis in the suit filed by them in this Court.

22. I am unable to accept this argument for more than one reason. Firstly, the claim made in the suit, at least as I have noted, does not seem to proceed on this basis. In fact, as initially argued by Mr Andhyarujina, it is the case of the Respondent Company that these 17.03 Lac shares ought to have been sold and the monies recovered to set off the claim of the Petitioner against the trades that expired/matured in June 2013. Secondly, as held by me earlier, the trades of June 2013 had not expired/matured between 19th March, 2013 (the date on

which the Petitioner started selling the Gitanjali shares) and 27th April, 2013 (the date of the freezing order by the EOW). These shares admittedly were being sold not to square off the trades that expired/matured in June 2013 but to make up the margin shortfall that had occurred by virtue of the fact that certain securities were rendered ineligible for the purposes of margin. I, therefore, find that this argument is wholly misconceived and does not carry the case of the Respondent Company any further.

23. Even otherwise, I find, that the law as far as Section 176 is concerned, is quite well settled. The law, as I understand it, is that a pledgor cannot compel a pledgee to exercise the power of sale as a means of discharge or to satisfy the debt. The pledgor's rights are only (i) in case the Pledgee exercised the power of sale, to insist that it should be honestly and properly done and the sale proceeds applied to the debt; (ii) in case the pledgee did not exercise the power of sale, then the Pledgor can redeem the pledge on payment of the debt or such part of it that has remained unpaid; and (iii) in case the sale was improperly exercised, to get damages caused thereby. This proposition of law has been laid down as far back as in the year 1930 in a decision of the Madras High Court in *S.L. Ramaswamy Chetty and Another v. M.S. A.P.L. Palaniappa Chettiar*, AIR 1930 Mad 364. This decision of the Madras High Court has been referred to by the Supreme Court with approval in the case of *Vimal Chandra Grover v. Bank of India*, (2000) 5 SCC 122 (Paragraphs 12 & 16). In fact, a Division Bench of this Court in the case of *State Bank of India v. Neela A. Naik and another*, AIR 200 Bom 151 has also taken the same view. Paragraphs 12 to 16 of the said decision read thus:-

"12. We may notice that in the present appeal there are no disputes on facts. The contentions are purely legal. Now we would consider the first contention regarding applicability of Section 176 of the Contract Act. Section 176 provides for pawnee's right where pawnor makes default. It inter alia stipulates that on pawnor making default in payment of the debt, at the stipulated time, in respect of which the goods are pledged, the pawnee may bring a suit against the pawnor on the debt and retain the goods pledged as a collateral security; or he may sell the goods pledged, on giving the pawnor reasonable notice of the sale and if the sale proceeds are deficient the pawnor would be liable to pay the balance and if more, the surplus amount shall be paid to the pawnor. The contention of Mr. Nadkarni is that the only effect of afore noticed clause 6 is that the Bank can dispose of the security without giving any notice to the respondents. It is only a waiver of the stipulation of right of the respondents to a reasonable notice before the Bank decides to appropriate the security. Learned counsel relies upon a decision of the Delhi High Court in *Bank of Maharashtra v. Racmann Auto (P) Ltd.*, AIR 1991 Delhi 278. In the said decision, the question which came up for consideration was whether there was any legal duty cast on the plaintiff-Bank to take early steps for disposing of the pledged goods. Construing Section 176, it was held that the very wording of the section makes it clear that it is the discretion of the pawnee to sell the goods in case the pawnor makes default but

if the pawnee does not exercise that discretion no blame can be put on the pawnee and pawnee has the right to bring a suit for recovery of the debt and retain the goods pledged as collateral security. Doubt was also expressed whether a defendant as pawnor could force the pawnee to dispose of the pledged goods without defendant clearing the debt. However, on the facts of the present case, we need not go into this latter aspect on which doubt has been expressed. It has been categorically held in the cited decision that it is the discretion of the plaintiff-Bank to have filed the suit for recovery of the debt and retain the pledged goods as collateral security or in the alternative it could resort to selling the pledged goods after giving reasonable notice of sale to the defendants. In that case the plaintiff-Bank had in its wisdom exercised the first option of filing the suit and retaining the collateral security.

13. We are in respectful agreement with the legal proposition propounded in the aforesaid decision and thus there would be no question of judicious or arbitrary exercise of discretion by the Bank as to the time of appropriation of the amount from the collateral security to it in the form of FDRs.

14. In the *Gulamhusain Lalji Sajan v. Clara D'souza*, AIR 1929 Bombay 471, it was held that in cases of a pledge the creditor has two rights which are concurrent and the right to proceed against the property is not merely accessory to the right to proceed against the debtor personally and on the same lines. Reliance in the said decision was also placed on a Full Bench decision of the Madras and Calcutta High Courts. The same principles were held to be applicable to the cases of hypothecation or mortgage of movable property. Section 176 has been held to be mandatory in the Division Bench decision of this Court in *Official Assignee, Bombay v. Madholal Sindhu* (AIR 1947 Bom 217).

15. In view of aforesaid legal position, we are unable to accept the contention that the Bank was obliged to adjust the instalments immediately on amount becoming due from the FDRs. Faced with this position, Mr. Thali, learned counsel for the respondents, contends that Section 176 has no applicability since it applies only to goods and the Fixed Deposit Receipts cannot be construed as goods within the meaning of Section 176 read with Section 2(7) of the Sale of Goods Act. The contention of learned counsel is just stated to be rejected. Clause 6 has to be read in consonance with the interpretation of Section 176 of the Act, which means that the respondents agreed to waive notice to them before appropriation of amount by the Bank. The provisions of Section 126, 148 and 172 of the Contract Act also do not, in any manner, help the respondents in support of their contention that there is a legal obligation on the appellant to adjust the amount due to it every month out of the Fixed Deposit Receipts. The acceptance of such contention may throw open various questions. We may just make mention of one of it. If adjustment from the amount of instalment of Rs. 2775/- was to be made on default being committed every month in payment thereof, what would happen to the remaining amount of FDR? Would it be kept again in fixed deposit? Would it be kept in a saving account or would it be kept in

a suspense account? All this clearly shows that the adjustment as made by learned single Judge cannot be sustained in law.

16. Mr. Thali, learned counsel for the respondents, also contends that the appellant-Bank had earlier appropriated Rs. 9500/- from the Fixed Deposit Receipts and, therefore, it does not how lie in their mouth to plead or contend otherwise. We are unable to accept this contention of learned counsel as well. The fact of the said appropriation will not change the legal position that the Bank is not obliged to make appropriations month by month which is the effect of the impugned judgment. It may be noticed that Mr. Nadkarni explains that earlier appropriation of Rs. 9500/- was made on the maturity of the Fixed Deposit Receipts."

24. It is therefore clear that a pledgee has the discretion to decide whether he wants to sell the pledge security; when to sell it; and how much of it to sell. The pledgor cannot dictate terms to the pledgee on how he is to exercise his right. If this is the correct position in law, and that is how I understand it, then, I find at least prima facie that the claim for damages on account of the Petitioner failing to sell all 20,00,000 Gitanjali shares between 19th March, 2013 and 27th April, 2013, cannot succeed in law. In fact on a perusal of the Complaint filed in Suit (L) No. 939 of 2013, at least to my mind, it is clear that the claim for damages is made on account of the Petitioners' failure to sell all 20,00,000 shares of Gitanjali between the period 19th March, 2013 and 27th April, 2013. It is not the case of the Respondent Company that the sale of the shares of Gitanjali by the Petitioner was conducted in breach of any agreement arrived at between the parties or was done improperly which has given rise to the claim in damages. As laid down in the judgment of the Madras High Court in the case of S. L. Ramaswamy Chetty and Another, AIR 1930 Madras 364. and which has got approval of the Supreme Court in the case of Vimal Chandra Grover, (2000) 5 SCC 122 (paragraphs 12 & 16) the claim for damages can be brought by the pledgor against the pledgee only in the event that the pledgee sells the pledged goods and the same are sold improperly. In the facts of the present case the Respondent Company alleges that the Petitioner (who was the pledgee) ought to have sold all 20,00,000 shares and not only 2,97,731 shares of Gitanjali. This to my mind, does not in any way amount to a sale being conducted improperly as contemplated in the aforesaid two judgments. In fact, the grievance of the Respondent Company in the present case is that the Petitioners have acted improperly by not selling all 20,00,000 shares of Gitanjali. As stated earlier, in law, in the absence of an agreement in that regard, the pledgor cannot compel the pledgee to sell the pledge goods to discharge its debt. That is entirely at the discretion of the pledgee. This being the case, I find at least prima facie that the claim for the damages made by the Respondent Company on account of the Petitioner not selling all 20,00,000 shares of Gitanjali between the period 19th March, 2013 to 27th April, 2013 is unsustainable in law.

25. Even otherwise in the facts of this case, at least prima facie, I do not find

that the Petitioners were in any way wrong in deciding not to sell all 20,00,000 shares of Gitanjali. From the facts narrated above, it is clear that after the meeting that was held on 14th March, 2013, the Petitioner sold 2,97,731 shares of Gitanjali between the period 19th March, 2013 to 22nd March, 2013. 23rd March, 2013 was a Saturday and 24th March, 2013 was a Sunday. The Petitioner received a letter from the EOW on 25th March, 2013 (dated 23rd March, 2013) wherein the EOW informed the Petitioner that it had received a complaint from SARVIN and TRUSHA claiming that they were the owners of the shares and that the Respondent Company had not transferred them to the said SARVIN and TRUSHA. 13,00,000 shares were claimed by TRUSHA and 7,00,000 shares were claimed by SARVIN. Since all 20,00,000 shares were the subject matter of Criminal Complaints that were being enquired into by the EOW, the Petitioners were requested to withhold these shares till further correspondence from the office of the EOW.

26. Faced with this letter, Mr. Andhyarujina submitted that this letter was merely a request from the EOW asking the Petitioners not to dispose of the Gitanjali shares. This letter was not an order by the EOW restraining the Petitioners from disposing of the shares, which order was passed by the EOW only on 27th April, 2013. I am unable to agree with this submission. The EOW, like the Petitioners, is a statutory body. When the Petitioners received this letter from the EOW, which is also another statutory body and which was enquiring into the complaints made by SARVIN and TRUSHA with reference to the very same shares, the Petitioners decided to stay its hands and in my view correctly so. The fact that this was a correct decision is now further borne out by subsequent events because not only on 27th April, 2013 the EOW passed an order under Section 102 of the CrPC freezing the sale of these very same shares, but the Petitioners being aggrieved by this order, challenged the same by way of a Writ Petition in this Court which was ultimately dismissed on 22nd August, 2013. Being aggrieved by the said order, the Petitioners preferred an SLP to the Supreme Court in which an interim order was passed allowing the Petitioners to sell the balance 17.03 Lac shares of Gitanjali and the sale proceeds thereof were ordered to be deposited in the Supreme Court. That SLP is still pending. All these facts clearly bare out the fact that it was not as if the Petitioners unilaterally one day decided not to sell all 20,00,000 shares of Gitanjali that has resulted in a loss to the Respondent Company. They stopped selling the shares of Gitanjali once they received intimation from the EOW that the shares and the title thereto was being investigated by them, and therefore, not to dispose of the same. To my mind, the actions of the Petitioner at least prima facie appear to be bona fide in not selling these shares. In fact, once permission was granted by the Supreme Court to sell these shares, the Petitioners have gone ahead and done so and the sale proceeds thereof (approximately Rs. 6.18 Crores) have been deposited in the Supreme Court. Therefore, even on facts I find, at least prima facie, that the claim of damages as pleaded by the Respondent Company is unlikely to succeed. I therefore have no hesitation in rejecting the defense of the Respondent

Company that it has a bona fide cross claim in damages against the Petitioner on account of the conduct of the Petitioner in not selling all 20,00,000 shares of Gitanjali.

27. Equally, I find the argument canvassed by Mr. Andhyarujina that issuance of the circular dated 20 December, 2012, was done suddenly and, therefore, caused serious loss and prejudice to the Respondent Company, without any merit. The circulars have been issued from time to time by SEBI as well as the Petitioner. In the year 2005, SEBI issued a circular dated 23 February, 2005 whereby a Comprehensive Risk Management Framework for the cash market was announced. By the said circular, stock exchanges were called upon to put in place the necessary systems to ensure the operationalization of the Comprehensive Risk Management Framework. Thereafter, on 31 December, 2010 SEBI issued a master circular on matters relating to Exchange Traded Derivatives. This circular inter alia provided that a list of acceptable equity securities shall be updated on the basis of trading and mean impact cost on the 15th day of each month, and when a security is dropped from the list of acceptable equity securities, the existing deposit of that security shall continue to be counted towards liquid assets till the end of the month. It is not in dispute that these circulars issued by SEBI are binding on the Petitioner as well as the Respondent Company and they are obliged to follow the same.

28. Accordingly, as part of the prudent system of Risk Management, vide circular dated 13th December, 2011, the Petitioner notified the prudential norms relating to acceptance of securities as collateral towards margin requirements. All the members of the Petitioner were notified (including the Respondent Company) that there shall be market wide limits across all segments and member specific limits for each segment. It was stated in this circular that a list of approved securities for the month would be announced and the date of implementation would be intimated subsequently. Further the criteria for member specific limits were expressly provided in the said circular dated 13th December, 2011. In fact the Respondent Company vide its email dated 12th September, 2012 addressed to the Petitioner noted its understanding of the circular dated 13th December, 2011 and the effect of its implementation. Thereafter, several other circulars dated 18th June, 2012; 20th July, 2012; 22nd August, 2012; 26th September, 2012; 19th October, 2012; 20th November, 2012; 20th December, 2012 and 21st January, 2013 were issued by the Petitioner for the purposes of implementing the revised prudential norms in a phase-wise manner.

29. What is important to note is that this was done and applied to all the members of the Petitioner and was not restricted only to the Respondent Company. On going through these circulars, I find, and as correctly submitted by Mr. Tulzapurkar, that the aforementioned circulars (including the circular dated 20th December, 2012) merely implement the norms notified by the circular dated 13th December, 2011. I, therefore, find the argument of Mr. Andhyarujina that issuance of the circular dated 20th December, 2012 was like a bolt from blue and

the Respondent Company was asked to replace the ineligible securities (for making up the margin shortfall) at very short notice, which in turn has caused financial losses to the Respondent Company, without any merit. It is not in dispute before me that the Respondent Company had knowledge of all the earlier circulars. Apart from this, the same was also repeatedly brought to the notice of all the members of the Petitioner. These facts are really undisputed. It is, therefore, today too late in the day for the Respondent Company to contend that by issuing the circular dated 20th December, 2012, the Petitioner has caused any loss to the Respondent Company. At the risk of repetition, this circular was issued only to implement the earlier circular issued by the Petitioner dated 13th December, 2011 and in fact said circular (13th December, 2011) was being implemented in a phase-wise manner as set out earlier. I, therefore, find no merit in this submission either.

30. What is also important to note is the conduct of the Respondent Company. After the circular dated 20th December, 2012 was issued, the Respondent Company by its letters dated 14th January, 2013; 16th January, 2013; 17th January, 2013, 1st February, 2013; 11th February, 2013; 12th February, 2013; 12th March, 2013; and 13th March, 2013 (Exh H-1 to H-8), in compliance of the said circular transferred cash collateral from time to time towards securities which became ineligible pursuant to the said circular. It is also not in dispute that these pledged ineligible securities were released by the Petitioner to the Respondent Company from time to time. In not one of these letters has the contention been raised by the Respondent Company that by issuance of the circular dated 20th December, 2012, and which according to the Respondent Company was "sudden", has caused any loss to the Respondent Company. As can be seen from the said letters, the Respondent Company in fact acted in furtherance of the said circular and also understood it to be binding on the Respondent Company.

31. Lastly, Mr. Andhyarujina submitted that even if I am inclined to admit this Petition, I should not order advertisement of the same. He submitted that in view of the fact that the Respondent Company has huge trade receivables from their clients, the advertisement of the admission of the Company Petition would cause grave prejudice to the Respondent Company.

32. I am unable to accept this submission for the simple reason that the purpose of advertisement of the Petition is to put on notice the public at large that a winding up petition had been entertained by the Court against the Respondent Company and if anybody has a claim against them, they can join in the winding up. It also puts the public at large to notice to be careful in their dealings with the Company. It would be meaningless, at least in the peculiar facts of this case, to simply admit the Petition and not have the same advertised. In this view of the matter, I would have to reject this contention also.

33. This now only leaves me to deal with the Judgment of the Court of Appeal in *Re Portman Provincial Cinemas Ltd.*, 1999 (1) WLR 157. Mr. Andhyarujina relied

upon the aforesaid decision to contend that a claim in damages can be legitimately set up as a cross claim in a winding up petition and that the threshold to see whether the claim is genuine or not, is extremely low. The facts of this case would reveal that the secured creditor's petition for winding up of the Company was for upwards of Rs. 40,000/- due under a legal charge of June, 1961. The Company's defence to the petition was based on a cross claim exceeding the balance due under the charge. That claim, according to the company, arose on an alleged oral agreement made in 1955 at the time of the sale of certain cinemas to the Company for Rs. 175,000/- by the petitioning creditors' then managing director, who died in 1962. The oral agreement alleged was that the creditors would indemnify the company against any losses which the latter might sustain in the future operation of the cinemas. The Company therein had claimed against the petitioning creditors damages for breach of that alleged contract of indemnity. On these facts, the creditors' petition was dismissed. On appeal, Lord Denning M.R. observed that there had to be a genuine cross-claim with substance in it before the petition should be rejected. Lord Denning M. R. further observed that in *re Welsh Brick Industries Ltd.* [(1946) 2 All E.R. 197] it was held that in spite of the fact that unconditional leave to defend had been granted in the King's Bench action, the winding up court could look into the matter and hold that there was no substance in the defence. According to Lord Denning M.R. the oral agreement was far too vague and uncertain to obtain recognition by a court of law and therefore he rejected the cross-claim and allowed the appeal. However, the majority view of Lord Hannan and Lord Russell was whether the trial Judge had rightly exercised his discretion. They were of the opinion that there was at least a chance that the Court would believe the story of the alleged oral agreement. Even though the question of uncertainty had made them pause, they held that the appeal was liable to be dismissed. Mr. Andhyarujina heavily relied upon these observations (Lord Hannan's) and contended that the threshold to see whether his claim in damages would succeed or otherwise is extremely low. He submitted that in the case of *Re Portman Provincial Cinemas Ltd.*, 1999 (1) WLR 157. even though the oral agreement pleaded was vague, the majority was of the view that there can be a chance that the Company could succeed in setting up a claim in damages against the petitioning creditors and, therefore, dismissed the appeal. He submitted that the same test ought to be applied in the present case also.

34. I am unable to agree with the submission of Mr. Andhyarujina for more than one reason. Firstly, the majority view in *Re Portman Provincial Cinemas Ltd.*, 1999 (1) WLR 157. is not binding on me and has only persuasive value. Secondly, as mentioned earlier, the law laid down in India by the decision of the Supreme Court in the case of *M/s Madhusudan Gordhandas and Co.*, (1971) 3 SCC 632 is that the defence in the Company Petition (i) has to be in good faith and one of substance; (ii) that it is likely to succeed on a point of law; and (iii) the company adduces prima facie proof of the facts on which the defence depends. Thirdly, what is important to note is that the courts in India have in fact

consistently followed the view taken by Lord Denning M.R. in the aforesaid decision rather than following the majority view. The observations in this regard by the Karnataka High Court in the case of State Bank of Hyderabad v. Varson Chemicals Pvt. Ltd. & Anr., 1988 SCC OnLine Kar 138 are apposite. Paragraph 30 of the said decision reads thus:

"30. Whatever may be the majority view in the case of Portman Provincial Cinemas Ltd. (Supra) the dissent expressed by Lord Denning, M.R. (as he then was) is the more logical and pragmatic view which the courts in India have generally followed. In almost similar situation in the case of State Bank of India v. Hegde and Golay Ltd. [ILR 1987 KAR 2496] the Court had occasion to examine a similar plea of the respondent company therein. Relying upon the decision of the Supreme Court of India in the case of Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Private Ltd. [(1971) 3 SCC 632 : A.I.R. 1971 S.C. 2600] Court emphasised the view that the Company Court must be satisfied that the Company adduces prima facie proof of the facts on which the defence depended before the matter could be left to the Civil Courts to decide the disputed debt, among other reasons given for recording a finding, preliminary though it was, that the Company Court could proceed with the winding up petition despite a plea of counterclaim. That conclusion reached by the Court was affirmed by a Division Bench of this Court and later Bopanna, J., as Company Judge after considering every aspect of the resistance put up by Hegde and Golay Ltd. passed the winding up order inter alia holding that the Company therein had not proved its substantial counter-claim against the Bank (See ILR 1987 KAR 2364). Therefore what we in India have come to accept falls in line more with the view of Lord Denning, M.R. (as he then was) that there must be substance in the plea of cross-claim or counter-claim. Mr. Sundaraswamy relied upon the decision of the Supreme Court in the case of Union of India v. Raman Iron Foundry [(1974) 2 SCC 231 : A.I.R. 1974 S.C. 1265] to the effect that claims of damages are really not to be taken note of till they are quantified. In the case on hand process of quantification has commenced only during the hearing of the case.

(emphasis supplied)

35. In this view of the matter, I am unable to accept the submissions of Mr. Andhyarujina in this behalf.

36. After having examined the defenses of the Respondent Company, I prima facie find that the same are not bona fide. Applying the test laid down in the case of M/s Madhusudan Gordhandas and Co., (1971) 3 SCC 632 prima facie I find that the defences raised by the Respondent Company are neither one of the substance, likely to succeed in a point of law and nor has the Respondent Company adduced prima facie proof of the facts on which the defense is made. In these circumstances, the following order is passed.

(i) The Company Petition is admitted and made returnable on 8th August, 2016;

(ii) Learned counsel appearing on behalf of the Respondent Company waives service of the notice under Rule 28 of the Companies (Court) Rules, 1959;

(iii) The Company Petition shall be advertised in two local newspapers viz. (i) "Free Press Journal" (in English) and (ii) "Navshakti" (in Marathi) as also in (iii) "Maharashtra Government Gazette". Any delay in publication of the advertisement in the Maharashtra Government Gazette and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959;

(iv) The Petitioner shall, on or before 7th July, 2016 deposit a sum of Rs. 10,000/- towards publication charges with the Prothonotary and Senior Master of this Court under intimation to the Company Registrar, failing which the Company Petition shall stand dismissed for non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the Petitioner;

37. I must clarify that all observations made herein are only prima facie and shall in no way influence the Court hearing Suit (L) No. 939 of 2013, which shall be decided on its own merits and in accordance with law.

38. After the Judgement was pronounced, Mr. Andhyarujina, learned counsel appearing on behalf of the Respondent Company prays for a stay of this order. Dr. Saraf, learned counsel appearing on behalf of the Petitioner, vehemently opposes the said request. In order to enable the Respondent Company to test this order in Appeal, the Petitioner is directed not to advertise the admission of the Company Petition for a period of three weeks from today.