
(2010) 07 BOM CK 0198
In the Bombay High Court
Case No : Company Petition No.6 Of 2007

Putzmeister Concrete Pumps Gmbh Max-Eyth Strasselo, APPELLANT
D-72631 Aichtal, Germany

Vs

Putzmeister India Pvt. Ltd.115, Kamat Towers, Patto Plaza, RESPONDENT
Panaji, Goa (India) 403 001

Date of Decision : 30-07-2010

Acts Referred:

Companies Act, 1956 — Section 433, 434
Contract Act, 1872 — Section 140, 145

Citation : (2010) 07 BOM CK 0198

Hon'ble Judges : A.S. Oka, J

Bench : Single Bench

Advocate : M.S. Sonak and Mr. P.S. Rao, for the Appellant; A.N.S. Nadkarni and Mr. H.D. Naik, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Oka, J.—This is a petition under clauses (e) and (f) of section 433 the Companies Act, 1956 (hereinafter referred to as "the said Act"). The petition is for winding up of the respondent company the Putzmeister India Pvt Ltd (hereinafter referred to as "the respondent company"). The petitioner company has been incorporated in Germany. The respondent company has been incorporated in India on 23rd January 1998 under the said Act. According to the case of the petitioner, the respondent company is indebted to the petitioner for the sum of Rs. 28,705,165.61, which corresponds to EURO 507,427.36 being the amount payable on account of invocation of the corporate guarantee allegedly furnished by the petitioner to the Deutsche Bank (hereinafter referred to as "the said Bank") as a security for the outstanding credit amounts advanced by the said Bank to the respondent company.

2. According to the case of the petitioner, it had long standing commercial relationship with the said Bank wherein the petitioner and its group companies

are able to avail credit facilities from the said Bank for their operations. In order to secure such trade facilities sanctioned by the Said Bank to various group companies of the petitioner, an irrevocable and unconditional corporate guarantee dated 20th December 2004 amounting to Euro 48,000,000/-to and in favour of the said Bank was furnished by the petitioner. It is contended that this guarantee furnished by the petitioner in favour of the said Bank is an overriding and comprehensive security for all the monies that are advanced by the said Bank to the petitioner or its group companies all over the world.

3. According to the case of the petitioner, in January 2005, the respondent company approached the said Bank for credit facilities. Accordingly facility letter dated January 10, 2005 was issued by the branch of the said Bank at Mumbai to the respondent company by which the said Bank has sanctioned credit facilities in the sum of Rs.60,000,000/-. According to the petitioner, the facility letter specifically mentions that the credit facilities are secured by the guarantee of the petitioner. It is alleged that the credit facilities came to be sanctioned and disbursed to the respondent company only on the security of guarantee by the petitioner. It is stated that the fact that the credit facilities granted to the respondent company were secured by the guarantee furnished by the petitioner has been duly recorded in the balance sheet and accounts of the respondent company. The petitioner has relied upon the balance sheet and accounts of the respondent company for the financial year 2004 -2005. It is contended that the said debt has been duly admitted by the respondent company. It is stated that the said Bank vide communication dated the 6th July 2006 terminated the credit facilities granted to the respondent company and called upon the respondent company to remit a sum of Rs.60,439,699.30 along with interest thereon to the said Bank up to 19th July 2006. As the respondent company failed to comply with the demand, another communication was issued by the said Bank to the respondent company requesting payment of outstanding amount up to 21st August 2006. It is stated in the petition that on account of failure of the respondent company to pay the amount, the said bank on 4th September 2006 issued a notice of demand u/s 434 of the said Act to the Respondent Company. It is stated that the respondent company failed to comply with the said demand. It is stated that the respondent company made certain part payment towards the outstanding credit facilities to the said Bank. It is stated that the respondent company offered to repay the balance outstanding by installments. However, said proposal was not accepted by the said Bank. Therefore, the said Bank issued another communication to the respondent company on 22nd December, 2006 calling upon the respondent company to pay the outstanding amount with interest. However the respondent company did not comply with the requisition. It is alleged that the default on the part of the respondent company was deliberate and willful and with the sole object of encouraging the invocation of corporate guarantee furnished by the petitioner to the said Bank.

4. In view of consistent defaults on the part of the respondent company, the said Bank issued communication dated January 22, 2007 to the petitioner. In terms of

the said communication, the said bank invoked the corporate guarantee and demanded a sum of Rs. 28,620,477.61 from the petitioner towards the repayment of the outstanding trade facilities advanced to the respondent company. It is stated that on January 29, 2007, the said Bank finally invoked and encashed the guarantee furnished by the petitioner and collected the entire amount as demanded. Reliance is placed on the communication issued to that effect by the said Bank. The Petitioner served upon the respondent company, a statutory notice of demand u/s 434 of the Said Act demanding payment of a sum of Rs. 28,620,477.61. The said notice was duly served to the respondent company. By communication dated April 3, 2007 the respondent company alleged that the petitioner has never rendered any corporate guarantee for the respondent company. It is stated that the respondent company failed to comply with the notice of demand and to pay the debt due within three weeks. It is contended that as the respondent company has failed and neglected to pay the said debt, the respondent company shall be deemed to be unable to pay its debt thereby rendering itself to be wound up under the provisions of clauses (e) and (f) of section 434 of the said Act. It is contended that the defences raised by the said company in the reply to the statutory notice are false and frivolous. Therefore, the present petition has been filed by the petitioner for winding up of the respondent company.

5. A reply was filed by the respondent company. It was contended in the reply that the purported guarantee annexed to the petition refers to Enclosure 1 which has not been annexed to the copy of guarantee annexed to the petition. It is stated that the respondent company by its Advocates letter dated 7th June 2007 called upon the Advocate for the petitioner to furnish a copy of the said enclosure. It is stated that till the date of filing a reply, a copy of the said enclosure was not supplied by the petitioner. It was contended that a copy of the bank guarantee which is annexed to the petition does not in any manner show that it has any relevance or connection to the credit facilities granted by the said Bank to the respondent company. It is submitted that the purported corporate guarantee is dated December 20, 2004 and the credit facilities were offered by the said Bank to the respondent company by letter dated 10th January 2005. It is contended that the liability of the petitioner under the purported corporate guarantee is not collateral but an original liability. It is submitted that the purported corporate guarantee is void as having been given without consideration. It is contended that the statutory notice of demand has been addressed jointly to the respondent company and two of its directors. It is stated that the amounts have been claimed from them jointly. Therefore it cannot be treated as a statutory notice u/s 434 of the said Act. It is therefore submitted that the company petition is misconceived.

6. It is submitted that the petitioner has suppressed material facts. Reliance is placed on Joint-Venture Agreements executed between the petitioner company and the two directors of the respondent company. It is stated that there is a dispute between the petitioner and the said directors of the respondent company.

It is stated that ultimately the said dispute has been referred to arbitration. It is submitted that the petitioner company being a company incorporated in Germany, in conspiracy and collusion with the said Bank, sought to terminate the credit facilities granted to the respondent company though the account of the respondent company was in order. It is contended that as a result of the dispute as regards Joint Ventures, the said Bank acting in collusion with the petitioner, demanded the amount from the respondent company in order to pressurise the respondent company. It is contended that the respondent company has a good turn over and was having number of employees. It is submitted that looking to the nature of the alleged corporate guarantee, it is not a guarantee at all.

7. The petitioner filed a rejoinder. It was contended that the credit facilities advanced by the said Bank to the respondent company have nothing to do with the Joint-Venture Agreements. It is contended that the credit facilities have been acknowledged and recorded in the balance sheet and accounts of the respondent company for the financial year 2004-2005. It was admitted that the date of the corporate guarantee is prior to the facility later dated January 10, 2005. It is submitted that the respondent company was fully aware about the bank guarantee. As regards the Enclosure annexed to the corporate guarantee, it was submitted that it was confidential in nature and cannot be produced in the interests of the business of the petitioner. It was submitted that the said document was not relevant for the present proceedings. However, it must be stated here that along with additional affidavit dated 8th October 2007, the petitioner has placed on record an alleged copy of the said Enclosure alongwith its English translation. There is an additional affidavit filed on behalf of the respondent company. In the said affidavit reliance is placed on the proposal submitted by the petitioner to the Foreign Investment Promotion Board in which it is stated by the petitioner that the respondent company is commercially solvent. He submitted that in view of the admission of the petitioner that the respondent company is commercially solvent, it cannot be said that the respondent company is unable to pay its debts.

8. The learned counsel appearing for the petitioner has made detailed submissions. He has invited attention of the Court to the documents placed on record of the company petition. He submitted that the documents on record show that the petitioner had business relationship with the respondent company right from the year 1998. He submitted that the loans availed of by the respondent company were secured by the guarantees furnished by the petitioner. He submitted that such arrangements were arrived at from the year 1998 itself in respect of the credit facilities availed by the respondent company from the said Bank. He relied upon the Agreement dated 25th March 2004 which is produced along with additional affidavit of the petitioner. He submitted that under the said agreement it was agreed that the future financing of the said respondent company shall be secured by way of an umbrella guarantee of the petitioner. He submitted that in order to secure the future credit facility required by the respondent company, the petitioner furnished an umbrella guarantee to the said

Bank on December 20, 2004. He submitted that only on the basis of the said guarantee that the respondent company was able to secure credit facility in the sum of Rs. six crores from the said Bank vide sanction letter dated January 10, 2005. He submitted that by accepting the terms of the said letter and by utilising the credit facility, the respondent company acted on the said bank guarantee which was already furnished by the petitioner. He placed reliance on the balance sheets of this respondent company for the years 2004 --2005 and 2005 --2006. He submitted that the fact that the respondent company had been sanctioned the credit facility and that the same was secured by the guarantee of the petitioner has been recorded, admitted and acknowledged in balance sheets of the respondent company of the aforesaid years. He submitted that vide letters dated July 19, 2006 and September 25, 2006 the respondent company wrote to the said Bank admitting that the credit facilities were secured by the guarantee of the petitioner. He submitted that in legal notice of September 4, 2006, the said Bank noted a that a part of the amount was repaid by the respondent company and the remaining amount was offered to be paid by installments. Only because the respondent company failed to pay the amount to the said bank, after issuing notice of demand, the said bank invoked and encashed the bank guarantee. In fact said Bank Informed the Petitioner vide its letter dated March 5, 2007 that the corporate guarantee furnished by the respondent has been cashed. He submitted that after having paid the amount to the said bank, the statutory notice of demand was issued by the petitioner. He pointed out that the defences raised by the respondent company in the reply are utterly false. He submitted that the balance sheets of the respondent company clearly acknowledge the fact that the credit facilities availed by the respondent company were secured by the guarantee furnished by the petitioner. He submitted that the respondent company in its letter dated March 20, 2006 addressed of the petitioner specifically admitted that the petitioner had, by way of corporate guarantee, secured the credit facilities availed by the respondent company from the said Bank.

9. The learned counsel appearing for the petitioner relied upon section 140 of the Indian Contract Act, 1872. He submitted that the surety upon payment of guaranteed debt is invested with all such rights which the creditor has against the principal debtor. Relying upon section 145 of the Contract Act, he submitted that in every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety and that the surety is entitled to recover the amount which has been rightfully paid under the Guarantee.

10. The learned senior counsel appearing for the respondent company submitted that even according to the case of the petitioner, the alleged corporate guarantee was given by the petitioner for securing the credit facilities granted by the said Bank to the respondent company under letter dated January 10, 2005. He submitted that apart from the fact that the respondent company is denying the alleged corporate guarantee, the said corporate guarantee dated December 20, 2004 could not be for securing the credit facilities sanctioned to the respondent

company subsequently. He submitted that even by way of reply to the statutory notice, the respondent company had called upon the petitioner to give inspection of the alleged corporate guarantee as well as all correspondence regarding the purported invocation of the said Guarantee. He submitted that inspection of the corporate guarantee was never given by the petitioner. He submitted that even while annexing a copy of the alleged guarantee to the petition, a copy of "Enclosure 1" of the said guarantee was not annexed. The alleged Enclosure was produced belatedly only along with an additional affidavit. He submitted that the reference in the balance sheet of the respondent company to the Guarantee cannot be to the alleged corporate guarantee of December 20, 2004. He submitted that in fact there was a guarantee furnished by the petitioner pursuant to joint-venture agreements between the petitioner and the directors of the respondent company. He submitted that the dispute between the parties as regards the joint-venture agreements has been already referred to arbitration. Relying upon several decisions and in particular the decision of a division bench of this Court in the case of Ramchandra B. Loyalka Vs. Shapurji N. Bhowndagree, , he submitted that the creditor, the surety and the principal debtor have to be parties to the guarantee. He submitted that there has to be a contract between the surety and a creditor by which the surety guarantees the debt. He submitted that consideration for the contract may move either from the creditor or from the principal debtor or both. He submitted that in absence of such contract, the document relied upon by the petitioner is one of indemnity. He submitted that the right u/s 145 of the Contract Act is not available unless the principal debtor has authorised the contract of suretyship. He submitted that in the circumstances the so-called guarantee relied upon by the petitioner is merely an indemnity inasmuch as it is a contract only between the creditor and the surety and the respondent company is not a party to it and the respondent company has not authorised the contract of Guarantee. Apart from this, he submitted that for various reasons, the alleged corporate guarantee is doubtful and in any case it has no co-relation or connection with the credit facilities granted by the said Bank to the Respondent Company vide letter of January 10, 2005.

11. He invited the attention of the Court to the statutory notice of demand issued by the petitioner. He submitted that the notice is not addressed only to the respondent company but the same has been addressed also to the managing director and a director of the respondent company. He submitted that by the said notice the respondent company and its directors have been jointly and severally called upon to pay the amount. He submitted that such notice cannot be a statutory notice as contemplated by section 434 of the said Act. Moreover, he pointed out that the notice itself records that the same is sent by the petitioner without prejudice to the rights of the petitioner. He stated that surprisingly the notice states that nothing stated therein shall constitute an admission of whatever description in respect of the contents of the notice. He, therefore, submitted that the petitioner is not admitting what is set out in the notice. He submitted that the respondent company has bone fide dispute regarding the

alleged debt and that the respondent company has a substantial defence. He submitted that a company petition cannot be used as a machinery for recovering the disputed debts from the respondent company. He submitted that the company petition be dismissed.

12. The learned counsel appearing for the petitioner submitted that the letter of sanction refers to the corporate guarantee. He submitted that even the loan amount of Rs. six crores is referred in the corporate guarantee as well as the letter of sanction. He submitted that the guarantee furnished by the petitioner was to operate as security for all the existing as well as future banking relations between the said Bank and the respondent company. He submitted that the guarantee was to be provided as a condition precedent in terms of the sanction letter. Since the condition of providing guarantee was satisfied by the guarantee dated December 20, 2004, the respondent company was able to utilise the credit facilities pursuant to the sanction letter. He submitted that in the letter of sanction it was not necessary for the said Bank to mention that the condition precedent was already satisfied. He submitted that the sanction letter does not prohibit the bank guarantee being submitted before the date of sanction letter. He submitted that it is not the case of the respondent company that the credit facility sanctioned under the later of January 10, 2005 was secured by any other the guarantee. He submitted that the corporate guarantee has been admitted in the balance sheets of the respondent company and in the letter dated September 25, 2006 addressed to the said Bank and in the letter dated March 20, 2006 addressed by the respondent bank to the petitioner. He submitted that the corporate guarantee was actually invoked and encashed by the said Bank. He relied upon various decisions in support of the proposition that the acknowledgments recorded in the balance sheets amount to admission of liability. He submitted that when the corporate guarantee was issued by the petitioner, there was a subsisting creditor --debtor relationship between the said Bank and the Respondent Company. He submitted that the credit facilities were enhanced in January 2005 on the basis of the corporate guarantee already issued. He submitted that the fact that corporate guarantee was issued prior to letter of sanction is irrelevant. He submitted that the Enclosure 1 annexed to the guarantee has been produced by the petitioner along with an additional affidavit. He stated that the said document refers to credit facility of Rs. six crores extended by the said Bank to the respondent company which was secured by the umbrella Guarantee. He submitted that in the rejoinder filed by the petitioner, it was specifically stated that the Enclosure 1 was a document of confidential nature as it contained financial and other information pertaining to the other global subsidiaries and affiliates of the petitioner. He submitted that the Enclosure 1 produced along with the affidavit forms part of the corporate guarantee. He submitted that there is no merit in the submission that the invocation of the corporate Guarantee was motivated. He submitted that merely because statutory notice was addressed to the directors of the respondent company, it does not become bad. He submitted that in the bank guarantee, the

word borrower is referred throughout and it provides that only upon the default of the borrower i.e. the respondent company, the Guarantee can be invoked. He submitted that liability of the surety is coexistent with that of the principal debtor and the bank is entitled to proceed against the guarantor without proceeding against the borrower. He submitted that a Guarantee can be construed from more than one document and the sanction letter and a Guarantee considered together make out a case of existence of a tripartite agreement. He, therefore, submitted that the argument that the transaction is of indemnity cannot be accepted. He submitted that the so-called defence is not at all bone fide and the petition needs to be allowed.

13. I have given careful consideration to the submissions. In the case of *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, , the Apex Court while dealing with the disposal of winding up petitions based on disputed claims held thus:

20. 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 Corporation*) 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 properly done was not allowed. (See *Re. Brighton Club and Horfold Hotel Co. Ltd.*)

(emphasis added)

The case of the petitioner is based on the liability arising out of the alleged corporate guarantee dated December 20, 2004. According to the petitioner, the said corporate Guarantee was invoked by the said Bank and therefore, in view of section 145 of the Contract Act, the petitioner being a surety is entitled to recover from the respondent company which is the principal debtor, the amount which is duly recovered from the petitioner under the said corporate Guarantee. Thus, according to the petitioner the liability to pay the debt arises u/s 145 of the Contract Act. As narrated earlier, the Guarantee is dated December 20, 2004. The document of Guarantee does not even make a reference to the name of the respondent company. However, it states that the companies specified in enclosure 1 to the Guarantee are the borrowers. The guarantee amount is of Euro 48,000,00/-. It is pertinent to note that even according to the case of the petitioner, the said guarantee is for securing the credit facilities granted to the respondent company under the letter of sanction dated January 10, 2005. Clause (f) of paragraph 2 of the said letter provides that the petitioner was required to secure the entire facility by a Guarantee in the format acceptable to the said Bank. Thus, the letter of sanction proceeds on the footing that there was no guarantee furnished by the Petitioner and that the guarantee was to be furnished in future. The letter of demand dated July 6, 2006 issued by the said Bank refers

to credit facilities granted to the respondent company in terms of the letter dated January 10, 2005.

14. By reply to the notice of demand u/s 434 of the said Act, the respondent called upon the petitioner to give inspection of the corporate Guarantee and to furnish copies of the correspondence. It was specifically contended in the reply that the alleged corporate Guarantee of the petitioner was not in respect of any facility given by the said Bank to the respondent company. It was stated that it is inconceivable that a Guarantee in the sum of approximately Rs. 276 crores was given by the petitioner for a facility in the sum of about Rs. 60 crores. It was contended that if at all the corporate Guarantee would have been given in terms of the sanction letter dated January 10, 2005, the same would have been issued after the date of sanction letter. What most material to note is that the corporate guarantee dated December 20, 2004 does not refer to the respondent company. It states that the names of the borrowers have been incorporated in enclosure 1. It is pertinent to note that the said enclosure is not annexed to the copy of Guarantee annexed to the petition. In fact a specific grievance has been made by the respondent company in its reply to the petition about the failure of the petitioner to annex the "enclosure 1". The reply was filed by the respondent on June 15, 2007. A rejoinder was filed by the petitioner on July 20, 2007. It is pertinent to note that a stand was specifically taken in the rejoinder that the alleged enclosure is confidential in nature and cannot be produced in the interest of the petitioner's business. It was specifically contended that the said enclosure was not relevant for the present proceedings. To show that the Guarantee was in respect of borrowings made by the respondent company, it was essential for the petitioner to annex the said "enclosure 1". It was allegedly a part of the guarantee. All this becomes relevant in the light of the fact that even in response to statutory notice, the petitioner was called upon to give inspection of the corporate Guarantee and to furnish copies thereof to the respondent company. However, neither the inspection was given nor a copy thereof was supplied to the respondent company before filing of the petition. It is pertinent to note that after filing of the present petition, the learned advocate for the respondent company issued a letter dated June 7, 2007 and called upon the advocate for petitioner to furnish the "enclosure 1" to the Guarantee. However, the enclosure was not furnished. Surprisingly, along with additional affidavit dated October 10, 2007 the petitioner enclosed alleged true copy of the said "enclosure 1". It is pertinent to note that in clause (a) of paragraph 3 of the said additional affidavit, the petitioner stated that "The Petitioner has now been able to locate and is tendering the said Enclosure 1 to the corporate Guarantee, wherein it is clearly stated that.....". It is pertinent to note that the stand taken in the reply by the petitioner was that the enclosure was of confidential nature. Not only that the said stand has been given up but the petitioner came out with the new case that the enclosure "has now been located". It is pertinent to note that the guarantee annexed to the petition is in English language. However, the copy of alleged enclosure 1 is in German language. The petitioner has annexed a true translation

thereof to the said additional affidavit. The alleged enclosure refers to the respondent company and the amount of Rs. 60 crores under account No.512111. The top portion of the said alleged enclosure refers to "loan dated December 20, 2004". It is pertinent to note that the enclosure is the only document which even according to the petitioner connects the bank guarantee to the credit facilities extended by the said Bank to the respondent company inasmuch as the name of the respondent company does not figure in the said corporate Guarantee and it appeared only in the enclosure. The said enclosure has not seen the light of the day till October 2007, though after filing of the petition, the respondent company called upon the petitioner to give the inspection of the same. Not only that the inspection was not given but a specific grievance regarding the failure to annex the said enclosure was made in the reply to the petition. Even to the rejoinder of the petitioner, the said enclosure was not annexed and the case was made out that it was confidential. Therefore, in view of what is stated above, the said alleged enclosure annexed to the additional affidavit appears to be suspicious. This is not only reason why the enclosure becomes suspicious. If the enclosure is genuine, it must have been in existence on December 20, 2004 when the corporate Guarantee was executed. It must be noted here that as on that date there could not have been any reference to the facility granted to the respondent company of Rs. 60 crores as the facilities were granted admittedly under a letter of sanction of January 10, 2005. Moreover, as pointed out earlier, the enclosure makes a reference to "loan dated December 20, 2004".

15. It must be noted that the claim of the petitioner in the present petition regarding non-discharge of debt by the respondent company is based only on the said corporate Guarantee. In fact according to the petitioner, the debt arises out of the invocation of the said bank guarantee which according to the petitioner was furnished for securing the credit facilities granted under letter of sanction of January 10, 2005. Firstly there is a serious doubt about the genuineness of "enclosure 1" which has been produced belatedly by the petitioner. Secondly, if the Guarantee dated December 20, 2004 was the Guarantee for securing the facility granted under letter of January 10, 2005, the said letter would have specifically referred to the existing Guarantee. However, the letter of sanction incorporates a condition of a Guarantee to be submitted by the petitioner in the format acceptable to the said Bank. Importantly, the document of Guarantee by itself makes no reference whatsoever to the respondent company. Thus, there is a serious doubt as to whether the counter Guarantee annexed to the petition was a Guarantee given for securing the facilities granted subsequently in January 2005.

16. The petitioner is relying upon so-called admissions in the balance sheet of the respondent company. The schedule to the balance sheet for the year ended on the 31st March, 2005 gives figures of the year ended on the 31st March, 2005 and the year ended on 31st March, 2004. Against cash credit from Deutsche bank, a sum of Rs. 31,672,743.75 is shown for the year ended on 31st March, 2004 and a lesser amount is shown for the year ended on 31st March, 2005.

There is a reference to Guarantee given by the petitioner. This Reference is also to the Guarantee given by the petitioner even for the cash credit amount due shown for the year ended on 31st March, 2004. Thus the balance sheet of the respondent company does not contain any admission as regards the counter Guarantee dated December 20, 2004. The learned counsel appearing for the petitioner has relied upon the memorandum of understanding dated March 25, 2004 executed by and between the petitioner and the directors of the respondent company. The memorandum refers to meeting held on March 25, 2004 concerning joint-venture agreement. The said memorandum refers to the fact that future finance will be under umbrella Guarantee. The said document relates to joint-venture agreement. The learned counsel appearing for the petitioner relied upon the letter dated March 20, 2006 sent by the respondent company to the petitioner. The said letter relates to joint ventured agreements and the reference to the guarantee in paragraph 7 appears to be in the context of the joint-venture agreements.

17. Thus it appears that the defence of the respondent company that the corporate Guarantee dated December 20, 2004 has no connection to the credit facilities granted under the letter of sanction dated January 10, 2005 appears to be a bona fide defence. Considering the conduct of the petitioner of not annexing the "enclosure 1" to the copy of the alleged Guarantee annexed to the petition and considering the fact that the genuineness of the copy of "enclosure 1" which was belatedly produced creates a serious doubt about its genuineness, it cannot be said that the defence is a moonshine defence. The document of counter Guarantee by itself makes no reference to the name of the respondent company. If the genuineness of the "enclosure 1" is in doubt, it cannot be said that the counter Guarantee was for securing the credit facility which was subsequently granted to the respondent company. The balance sheets of the respondent company show that there was a Guarantee in existence. But, the same do not prove that the guarantee is of December 20, 2004. On the contrary, the balance sheets indicate that there may be a guarantee in existence as of March 31, 2004. Hence the defence of the respondent is not only a bona fide defence but is of a substantial nature. In the circumstances, it is not necessary to go into the aspect of legality and validity of the statutory notice. In the circumstances, winding up order cannot be passed on the ground that the respondent company is unable to pay debts. Hence the petition is rejected. However, it is clarified that observations made herein are only for a limited purpose of considering the merits of the winding up petition.