
(1979) 05 DEL CK 0023

In the Delhi High Court

Case No : Company Petition No. 97 of 1978

Ram Bahadur Thakur and Company

APPELLANT

Vs

Sabu Jain Ltd.

RESPONDENT

Date of Decision : 22-05-1979

Acts Referred:

Citation : (1981) 51 CompCas 301

Hon'ble Judges : S. Ranganathan, J

Bench : Single Bench

Advocate : R.P. Bhatt and Kailash Vasudev, for the Appellant; K.K. Jain and S.K. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Ranganathan, J.—The petitioner-firm (referred to hereinafter as " the firm ") seeks an order winding up the respondent-company (hereinafter referred to as "the company") under Sections 433 and 434 of the Companies Act, 1956. The prayer is primarily based on the deemed inability of the respondent-company to pay its debts because of its failure to comply with a demand made on it by the petitioner-firm u/s 434 of the Act, though the petition also contains a general averment that the respondent-company is commercially insolvent and also a prayer that it is just and equitable to wind up the company. It may also be mentioned that the petitioner had earlier presented C.P. No. 49/78 for the same relief but, as the respondent-company pointed out a technical defect therein, the petitioner, at its request, was permitted to withdraw the said petition with liberty to file a fresh petition and that is how this petition has come to be filed.

2. I may at once say that there is no force in the contentions that the company is commercially insolvent or that it is otherwise just and equitable to wind up the company. In para. 12 of the petition it has been alleged:

(a) that the company had not filed its balance-sheet for the year ended on March 31, 1977, even up to the third week of May, 1978 ; and

(b) that from the balance-sheet of the company as at March 31, 1976, it appeared that it had huge liabilities to the tune of about Rs. 50 lakhs by way of loans and tax liabilities. As against this, its movable assets were only of the book value of Rs. 34 lakhs and market value of about Rs. 24 lakhs and even the market value of these assets was dwindling from year to year; the value of its immovable assets were also dwindling and amounted only to Rs. 4'85 lakhs in 1976 ; the resources of the company had also dwindled from about Rs. 27 lakhs in 1971 to about Rs. 10'54 lakhs in 1978 and this figure was further drastically reduced in the next year by the withdrawal of a sum of Rs. 10'23 lakhs for distribution as dividend ; and

(c) that the contingent liabilities of the company for the guarantees given by it was extremely large and had increased from about Rs. 16 crores in 1971 to about Rs. 20 crores in 1976 and, Therefore, exceeded the issued limits of the guarantees.

3. The company has effectively met these points. It has been stated that the balance-sheet of the company for the year ended on March 31, 1977, had been duly filed in time with the Registrar of Companies. It has been clarified with reference to the balance-sheet that the sum of Rs. 21.52 lakhs referred to by the petitioner as tax liabilities due actually represented the amount of Income Tax paid in advance and deducted at source. Regarding the value of movable assets, it has been pointed out that the figures given by the petitioner do not include for some of the years the value of shares held by the company as stock-in-trade and, moreover, the shares held by the company are in public limited companies some of which yield very lucrative dividends but the values of which fluctuate widely from year to year depending upon market conditions and the investment climate. Again, by reference to the balance-sheet, it has been clarified that the company had declared a dividend of only Rs. 30,000 for the year 1973-74 and it is wrong to state that about Rs. 10,30,000 was withdrawn from the reserves for that purpose. It is further pointed out that the figure of contingent liabilities is not relevant in determining the financial position of the company as a good portion of this contingent liability may not crystallise at all into an actual debt due by the company.

4. In my opinion, the petitioner has not been able to make out even a prima facie case that this company is commercially insolvent. The company has given figures to show that it is carrying on its business profitably and declaring a reasonable dividend year after year and this has not been denied. The value of the assets is more than adequate to meet the liabilities and the position of the reserves is quite satisfactory. It is no doubt true, as pointed out by Sri Bhatt, that the contingent liabilities of a company have also to be kept in mind while assessing the sources of the company [vide cl. (c) of Section 434(1)] but the nature and extent of these liabilities has to be considered in the context of the debt due to the petitioning-creditor. The contingent liabilities as on March 31, 1976, were Rs. 20'42 crores as against the issued limit of Rs. 28.23 crores; in

other words they stood fully secured and there is no material to show that the company will not be in a position to pay off these liabilities if, as and when they mature for payment. I, Therefore, find myself unable to find that the company is commercially insolvent and hence deserves to be wound up.

5. The principal ground on which the winding-up is sought is very short. The company, it is said, had entered into a deed of guarantee on December 21, 1973, by which it stood guarantor for the payment to the firm, by the Thakur Paper Mills Ltd. (hereinafter referred to as " the mills for short), of a sum of Rs, 7,35,047 (which was the amount due to the firm by the mills as per the balance-sheet of the letter dated March 31, 1972, and such further sums as may be certified by the mills and to be due from the mills to the firm as on December 12, 1973. The mills had to pay the amount in three Installments:

(a) 25% of the amount due as per the balance-sheet of December 31, 1972, at the time of change-over in the management of the mills (which took place at about that time) ;

(b) 50% of the balance due on December 12, 1973, as per auditor's certificate within 12 months from the date the paper plant of the mills went into production or two years from the date of the first payment of 25%, whichever is earlier ; and

(c) the balance amount of 25% of the amount found due as on December 12, 1973, within the next twelve months.

6. The mills was also to pay interest at 7 1/2% per annum from " the date of production of the paper plant or from after a month of the date of take-over of management, whichever was earlier ". By the said deed of guarantee, the company agreed and undertook to pay to the firm the above amounts in case of default by the Mills-

(i) in respect of the first Installment of 25%, on the request of the board of directors of the mills; and

(ii) in respect of the balance, " immediately on notice by the petitioners to the company ".

7. It is common ground that on December 22, 1973, at the request of the board of directors of the mills, the company paid the petitioners a sum of Rs. 1,83,761.75, being 25% of the sum of Rs. 7,35,047 earlier referred to. The petitioners' case is that the amount due to the petitioners from the mills as on December 12, 1973, was Rs. 7,43,755.75 ; that giving credit for Rs. 1,83,761.75 on December 22, 1973, the balance of Rs. 5,59,994 became payable to the petitioners in two Installments on December 21, 1975, and December 21, 1976, respectively " that the mills and the company had, in spite of repeated demands, failed and neglected to pay the aforesaid amounts or any part thereof; that under the deed of guarantee the company was bound and liable to pay the firm a sum of Rs. 7,03,713 as on February 23, 1978, with further interest at 7- 1/2% per annum thereafter; that in response to a notice

issued by the petitioners on March 13, 1978, u/s 434 of the Companies Act, the company only sent a reply dated April 5, 1978, raising frivolous disputes; and that, in these circumstances, the respondent-company should be ordered to be wound up. It is this case which Sri R.P. Bhatt, appearing for the firm, elaborated.

8. Sri K. K. Jain, who appeared for the company, resisted the admission of the petition on several grounds which require to be dealt with at some length.

9. The first argument on behalf of the company is that the transactions between the firm, mills and company on December, 1973, were embodied in an agreement of December 12, 1973. The surety deed had also been entered into in pursuance of the said agreement. The present petition is not maintainable since the agreement dated December 12, 1973, envisages an arbitration of the disputes between the parties arising out of the agreement, and that also embraces the present dispute. This contention is without force. The agreement dated December 12, 1973, has not been placed before me though it is common ground that it contained an arbitration clause regarding the disputes arising there under. All that is relied upon are the recitals in the preamble to the deed of guarantee dated December 21, 1973, from which it appears ;

(i) that the firm had been the managing agents of the mills and had advanced unsecured loans to the company which amounted to Rs. 7,35,047 as on December 31, 1972, but the amount of which as on December 12, 1973, was required to be ascertained and certified by the auditors of the mills ;

(ii) that by an agreement dated December 12, 1973, one Shri M.M. Sharma had agreed to procure and sell 33,775 shares in the mills to the company and its friends on certain terms and conditions; and

(iii) that cl. 4 of the above agreement provided that the company should execute a guarantee in favor of the firm, guaranteeing the payment of the amounts due from the mills to the firm.

10. I agree with the argument of Shri Bhatt, for the petitioners, that the existence of the arbitration clause in the agreement dated December 12, 1973 is of no relevance at all here. The present petition is based on the deed of guarantee dated December 21, 1973, which is an independent document standing by itself though it was executed in pursuance of one of the terms of the agreement dated December 12, 1973. The arbitration clause in the agreement does not apply to disputes, if any, in regard to the liability under the deed of guarantee. At best all that can be said is that since the guarantee deed is closely related to the agreement, the arbitration clause could be invoked by the parties if the company is denying liabilities under the guarantee on the ground that the firm or the mills had not complied with some of the terms of the agreement and there was some dispute between the parties in relation to the agreement. But, as Sri Bhatt has rightly pointed out, neither in the pleadings nor in the argument has it been stated that there is some dispute between the parties arising out of the agreement which required to be referred to arbitration. For example, it is not

the case of the company that it executed the guarantee because it had been promised 33,775 shares in the mills but this term had not been kept up. No other specific term of the agreement has also been referred to in relation to which there is any dispute or disagreement between the parties consequent on which the liability under the deed of guarantee is disputed. The arbitration clause has no relevance at all to the issue of non-performance of the guarantee which is totally unconnected with any of the rights or obligations under the agreement dated December 12, 1973. I am, Therefore, unable to accept the plea that the presence of the arbitration clause in the agreement dated December 12, 1973 is a bar to the maintainability of the present petition.

11. The second contention of Sri Jain is that the provisions of Section 433(e) read with Section 434(1)(a) of the Companies Act have no application to the present case. He pointed out that the above provisions are attracted only where there is a " debt " owed by the company to a creditor and the contention is that in the present case there was no " debt " owed by the company to the firm. According to him, no such debt could arise until the amount thereof is ascertained and a decree, on the basis of the deed of guarantee, is obtained against the company. He submits that the term " debt " is not defined in the Act but it should be understood in a practical and pragmatic sense as observed on *Shadiram & Sons v. Southern Aviation P. Ltd.* [1978] 48 Comp Cas 570 . In this context, he relied on *Khunni Lal Vs. Bankey Lal and Others* . There, one Khunni Lal had obtained in 1928 a decree for Rs. 20,375 and, in 1930, the judgment debtors executed a possessory mortgage in favor of Bankey Lal for Rs. 65,000. Khunni Lal's plea was that Bankey Lal had actually advanced only Rs. 40,000; the balance of Rs. 25,000 had been, according to the deed of mortgage, left with the mortgagee for payment to one Nandlal. According to the decree-holder, this amount was neither due to Nandlal nor paid to him and so constituted a " debt " due by Bankey Lal to the judgment debtors and so he sought to attach this amount in execution of his decree. This attempt failed, the court holding that, even assuming that Bankey Lal had failed to pay the mortgagors the sum of Rs. 25,000, that was not an obligation which could have been specifically enforced. It was held, Therefore, that the unpaid portion of the mortgage money was not a debt due to the mortgagors. On the other hand, Sri Bhatt referred to two decisions, one of the Punjab High Court and another of the Supreme Court. In *First National Bank Ltd. (in Liqn.) Vs. Seth Sant Lal* , it was held that it was possible to describe call moneys as still "owing " to a company even though the remedy to enforce the calls may be barred by limitation. The decision was based on the principle that the efflux of the period of limitation does not extinguish a debt but only bars a remedy and is not of much help here. The Supreme Court had, however, to consider in *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, the precise import of the expression "debt owed". The decision was rendered under the Wealth-tax Act and the question was whether the liability of the appellant to Income Tax for the previous year ending on the valuation date which had not been quantified by an

assessment order could be described as a "debt owed" on the valuation date. After a review of the English and Indian decisions, the court observed (p. 780) :

" There is no conflict on the definition of the word " debt". All the decisions agree that the meaning of the expression " debt" may take colour from the provisions of the concerned Act; it may have different shades of meaning. But the following definition is unanimously accepted :

" A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation : debitum in praesenti, solvendum in futuro."

The said decisions also accept the legal position that a liability depending upon a contingency is not a debt in praesenti or in futuro till the contingency happened. But if there is a debt the fact that the amount is to be ascertained does not make it any the less a debt if the liability is certain and what remains is only a quantification of the amount."

12. Applying this test, it is clear that a " debt " from the company to the firm has come into existence in the present case. Under the deed of guarantee, the company has undertaken an obligation to pay to the firm the amounts due to it by the mills. But no " debt " came into existence merely on the execution of the deed of guarantee because it was not a present liability but a contingent liability. The liability of the company to pay did not arise unless, (a) the mills defaulted in making the payments as scheduled, and (b) there was a request/notice calling upon the company to pay the amounts due. But the moment these contingencies happened, a present obligation arose resulting in the accrual of a " debt ". Sri Jain argued that the firm had neither given any notice to the company till March 13, 1978, (which was the date of the statutory notice u/s 434 nor had taken any steps against the mills till February 23, 1978, and he took me through the petition and the notices-issued by the firm to the mills and the company to contend that the first notice issued by the firm was to the mills on February 23, 1978, followed by the company on March 13, 1978. If this had been really so, there would have been great force in the contention of Sri Jain for, as pointed out by me earlier, the contingent liability under the guarantee would get crystallised into a debt only on notice to the company under the agreement and if thus the " debt " arose only by the notice dated March 13, 1978, that cannot perhaps also constitute a valid statutory notice u/s 434 of the Act. However, this does not appear to be correct. The firm had stated in para. 8 of the petition that the mills and the company had failed and neglected to pay the aforesaid amount or any part thereof in spite of repeated demands. This was not denied in the reply filed by the company which only averred " want of knowledge " regarding notices issued to the mills, denied that any amount was due from the company and alleged that any demand for payment from the company " could not arise ". There was no specific denial of having received any notices from the firm. Sri Bhatt, in the course of his reply, referred to one such notice to the company dated August 26, 1977. It is not necessary for the firm to let in all the evidence

in support of its claim at the present stage. It must, Therefore, be taken prima facie at least for the purpose of admission that demands have been made on the mills and on the company and that the obligation to pay has arisen under the agreement, giving rise to a " debt " in respect of which proceedings are permissible u/s 433. The correct position can be determined only after the parties lead evidence in support of the petition but, at the present stage, it prima facie appears that there is a debt in respect of which the petition is maintainable.

13. Sri Jain next contended that, even assuming that there was a " debt" in favor of the firm, it was a debt which was bona fide in dispute between the parties and cited a large number of authorities in support of the proposition that the company court will refuse to base a winding-up order on a claim of debt which is disputed on bona fide and contentious grounds. As a general proposition this is indeed well settled and it is enough merely to mention the citations given by Sri Jain : Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami [1965] 35 Comp Case 456 --a case where a declared dividend was recalled by the company, Aluminium Corporation of India Ltd. v. Lakshmi Ratan Cotton Mills Co. Ltd. [1970] 40 Comp Cas 259 --a case of a decree debt, where the validity of the decree was questioned, British India General Insurance Co. Ltd., In re [1970] 40 Comp Cas 554 --a case of a claim of a liquidated amount under a special contingency policy. However, a perusal of these authorities shows that the conclusion in each of these cases was arrived at on a consideration of the facts and circumstances of a particular case before the court. Decisions have held that while a petition for winding up can be utilised even as " a form of equitable execution " and " a perfectly proper remedy for enforcing payment of a just debt " (See Harinagar Sugar Mills Co, Ltd. v. Court Receiver [1966] 36 Comp Cas 426, it "is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company " (vide Amalgamated Commercial Traders (P.) Ltd. v. Krishnaswami [1965] 35 Comp Case 456 . The question, Therefore, is whether, in this case, the company has any bona fide and arguable ground of defense against the firm's claim or whether it is a case where the company has failed and neglected to pay a debt which is admitted or clearly due for no ostensible or justifiable reason. And, while on this point, it is necessary to emphasise that we are at the stage of admission of the winding-up petition and what is called for is only a prima facie assessment based on the tentative pleas now put forward without prejudice to the final decision that may be arrived at after the consideration of the full evidence in support of the petition or defense that would be later on adduced.

14. Sri Jain tried to contend in several ways that the debt in this case--if it was one--was not a clear and undisputed debt. He submitted that, in a contract of suretyship, it was always implied that the money would be sought to be recovered from the principal debtor and that the guarantor would come in only if the money cannot be recovered from the principal debtor. Sri Jain referred in this context to the following observations of the Madras High Court at p. 124 of the report of Brahmayya and Co. Official Liquidators Vs. K. Srinivasan Thangirayar

and Others, :

" It is, no doubt, true that there is no express statement in the document that the liability of S. was to arise on the default of payment by M., but in our opinion, such a clause must be necessarily implied on the terms of the bond in the circumstances of the case. On a fair reading of the document, it is clear that the principal obligation of indebtedness was that of M., and that the obligation of S. was only a collateral or secondary engagement to perform the promise or discharge the liability which was essentially and primarily that of M. "

15. The above observations were made in the context of an argument that, on a proper construction of the bond in the case, S was not a mere surety but had undertaken the original liability itself. They cannot be understood as requiring that the surety can be proceeded against only after the creditor has exhausted his remedies against the principal debtor. All that has to be seen is whether the principal debtor has committed default in his obligation and whether, on a construction of the surety bond, the guarantor's liability has crystallised or not. Sri Jain contends--and I agree --that in answering these questions, we have to bear in mind the principle that " a surety bond should be strictly construed in favor of the surety ", and that if there is any ambiguity in the language of the bond, it should be construed in favor of the surety". (Vide Pannaji Devichand Vs. Basappa Virappa Bellary, . I, however, see no ambiguity in the terms of the present document. It is quite clear that the liability of the mills to make the payment has arisen and, as I have already stated, the liability of the company also arose on the notice given by the firm. It is then argued that the mere allegation of non-payment of the debt by the mills on the stipulated date would not suffice and that the liability of the guarantor should be strictly proved. Reference is made to the decision of the Bombay High Court in Shree Meenakshi Mills Ltd. Vs. Ratilal Tribhovandas Thakar, , where it has been held:

"The liability of a guarantor must depend on the true construction of the guarantee which he has given. A guarantor is prima facie entitled to have the debt proved as against him. The fact that the principal debtor has admitted the debt, or that a judgment or award has been given against him for the debt, does not bind the guarantor, unless he was a party to the proceedings in which the judgment or the award was given, or was party to the admission of the principal debtor. If the guarantor merely guarantees payment of the debt of the principal debtor, then he is entitled to require the debt to be proved as against him in accordance with the ordinary law, that is, in this case, under the Evidence Act. If, on the other hand, the principal debtor has agreed that as against him the debt shall be proved in a particular way, and the guarantor has guaranteed the debt, so to be proved, then the guarantor would be bound by the particular method of proof agreed to by the principal debtor and accepted by himself."

16. These observations have no relevance here, as they relate to a case where the principal debtor and guarantor had agreed to a special mode of proof of the debt. It is no doubt necessary that before the firm can be entitled to a winding-

up order they should prove the debt as against the guarantor but at the present stage of admission all that has to be seen is whether they have a prima facie case and the answer to this question is clearly in the affirmative. Shri Jain next contends that the company is disputing its liabilities under the guarantee on the following grounds ;

(a) The amount payable by the mills was the balance of the dues to the firm as on December 12, 1973, as per the auditor's certificate but in the present case the auditor's certificate dated January 22, 1976, gives the amounts as on December 31, 1973;

(b) the first time the company received notice from the firm was on March 13, 1978, and according to the said notice the second Installment was due from the mills only on December 21, 1975, but a demand is stated to have been made from the mills even on November 6, 1975, and there is no reference to any demand after December 21, 1976, when the third Installment became due; and

(c) there is evidence to show that the firm had colluded with the mills and agreed not to proceed against them for recovery and this discharged the company from its liabilities under the agreement.

17. It appears to me that there is no force in these contentions and that they are merely vague and unsatisfactory pleas put forward to raise a cloud of controversy to be able to claim that no undisputed debt exists. So far as the first item is concerned, this is not a point taken in the company's reply to the notice or the petition. The amount due as on December 31, 1973, as per the auditor's certificate is Rs. 7,47,260 and the claim as on December 12, 1973, is stated to be Rs. 7,03,713. This amount as such has not been disputed either by the mills or the company. Even assuming that there is some controversy regarding the actual amount, there can be no doubt that a debt is clearly due and a mere dispute regarding the actual amount cannot disentitle the petitioner to a winding-up order at least at the stage of admission. Regarding the second point, I have already pointed out that the petitioner has alleged that it has sent repeatedly notices of demand to the mills and the company and that this allegation remains uncontroverted. So far as the third point is concerned, it is well settled that mere forbearance on the part of the creditor to sue the principal debtor will not discharge the surety. In regard to this plea, Sri Bhatt referred to a term of the guarantee deed which is in the following terms :

"Any alteration of the terms of repayment or other consideration given by the beneficiaries to the company shall not be considered to act in any manner prejudicial to the right or interest of the guarantors and this guarantee shall have full force notwithstanding any such consideration or alteration of the terms aforesaid. "

18. This clause is no doubt of limited scope but it covers the present argument that the liabilities of the surety is discharged because of the " consideration given " by the firm to the mills in the sense of the postponement of action by the firm

against the mills. According to the petitioner, the financial position of the mills is none too good and it will be impossible for them to proceed against the mills. There can be no doubt that the firm is entitled to ignore the principal debtor and seek payment from the surety and it is not open to the surety to ask the firm to first exhaust his remedy against the firm and then come to him. These contentions are, Therefore, untenable and are rejected.

19. Sri Jain's next attempt was to argue that the firm's proper remedy was to sue the mills and the company simultaneously so that the surety and the principal debtor could combine together and put forward their joint defense. He submitted that the firm was deliberately trying to proceed against the company alone so as to deprive it of the benefit of knowing the mills' stand. He argued that the company did not know whether the mills had paid off the amount or any part thereof, whether there was any agreement between the firm and the mills that would discharge the surety and whether the claim of the firm was time-barred or not. He pointed out that, if the debt was really time-barred and the company paid it off, then it would lose all rights of getting reimbursed by the mills. In these circumstances, he urged, the court should refuse to exercise its discretionary power of winding up a company and refer the petitioner to a suit. Interesting as these arguments are, I am unable to accept them. I see no justification for directing the petitioner to proceed jointly against the mills and the company by way of suit. As I have pointed out, the company has not taken any precise tangible defense-such as for, e.g., that the debt has been paid off wholly or in part or that the claim is time barred for any specific reason or that the firm has collusively or behind the back of the company entered into some agreement with the mills giving it further time or concessions in regard to the debt. The company could have ascertained the necessary facts from the mills and put forward clear grounds of defense in which case, certainly, no winding up can be ordered. But as pointed out by Sri Bhatt, the company's reply is very vague. A perusal of the company's reply to the firm's notice makes unsatisfactory reading. Apart from denying that Rs. 5,59,954 or any other amount is due, no effort is made to say why this is so and how the company claims the debt to be non-existent or discharged. The reply merely extracts the language of Section 135 of the Contract Act and alleges vaguely that the contract is discharged because the firm promised to give or had given time to the mills for payment and by its subsequent conduct. Sri Jain referred to a reply sent by the mills on September 22, 1978, to the firm's notice, alleging that the claim was "even not legally enforceable in so far as the same was barred by limitation and estoppel." This itself is very vague and does not even spell out a specific plea of limitation or estoppel. The company has also not further alleged any collusion between the firm and the mills or any agreement between them which would discharge the terms of the surety. All that is said is that the firm had agreed not to enforce the claim against the mills ; the mills in their reply is equally vague and alleges that the firm "had agreed long ago" not to enforce payment. There is, in my opinion, no force in the contention that this court should not exercise its

powers of winding up (except where a guarantee debt is crystallised into a decree) because in a suit, the creditor would be obliged to make the principal debtor and surety, parties and that would facilitate a more satisfactory disposal of all the issues between the parties. In the first place, the law does not compel the creditor to proceed against the principal debtor, before proceeding against the surety--Vide Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, . The contention would have some force where at least prima facie the surety has some valid and tangible defense. In fact, it will be appreciated that, in most cases, the guarantor enters into the picture at the request of the principal debtor and, in the absence of charge of collusion or the like, he should have no handicap at all in putting forward a clear defense to the creditor's petition, had there been one. If there is a plausible and clear ground of defense, as already stated, no winding up would be ordered. But where, as here, one is unable to see any grounds at all on which the debt is disputed, I see no reason why the creditor should be driven to a suit and not granted relief in a winding-up petition. In the present case, it appears that the firm has also instituted a winding-up petition in the Patna High Court against the mills subsequently on November 10, 1978, perhaps in view of the objection taken by the company here, and that is pending. The allegation that the firm is not taking steps against the mills cannot, Therefore, be any longer maintained. There is no prima facie case to show that the claim of the firm is time-barred. It is not the case of the company that the production contemplated in the guarantee deed had started even much earlier than December, 1974, or that, for some reason the claim or any part thereof had become time-barred against the mills on the date of the winding-up petition. Further, the company's liability under the guarantee would arise only much later--only on notice by the firm to the company --and, whether the claim is time-barred against the principal debtor or not, no question of limitation appears available to the company. Moreover, the contention that the surety will stand discharged if the remedy against the principal debtor becomes time-barred is of doubtful acceptability in view of the decision of the Privy Council in AIR 1939 110 (Privy Council) , In these circumstances, I am unable to accept the plea that this is a case of a debt disputed bona fide.

20. After the main company petition was heard and orders reserved, the company filed C.A. No. 36 of 1979. It was stated therein that the firm had since filed a suit (Suit No. 5/79) against the mills and the company in this court for realisation of the debts alleged to be due under the deed of guarantee. In view of this development it was submitted that the company petition deserved to be dismissed. It was contended that this showed that there was a bona fide dispute between the parties and it was urged that two parallel proceedings on the same issues should not be encouraged. It was further argued that all the issues between the three parties could be satisfactorily disposed of in the suit while if this petition were admitted and eventually the suit was decided in the company's favor it would have suffered irreparable injury. There was also a possibility that the suit may be decreed but the winding-up petition dismissed or vice versa and

such a situation of conflicting decisions of the same court in the same matter should be avoided. Sri Jain referred to the decisions in Rajasthan Spinning and Weaving Mills Ltd. v. Textool Company Ltd. [1971] 41 Comp Cas 66 and in Aluminium Corporation of India Ltd. v. Lakshmi Ratan Cotton Mitts Co. Ltd. [1970] 40 Comp Cas 259 . I have considered these arguments but I have come to the conclusion that the filing of the suit would not make any material difference to the disposal of the company petition. Even in a case where there is a clear and undisputed debt justifying a winding-up petition, a suit may have to be filed to avoid a plea of limitation and to hold that, in all such cases, the winding-up petition should be dismissed would frustrate the object and purpose of Sections 433 and 434. Moreover, as has been pointed out by Sri Bhatt, even assuming that the suit does succeed and the firm gets a decree, it may have to proceed to execute the decree by resorting to Sections 433 and 434. In fact, as earlier noticed, one of the points urged by Sri Jain in the petition was that it would have been maintainable only after the firm had obtained a decree against the company on the guarantee deed. Further, there will be no difficulties or confusion caused because of a possibility of conflicting decisions because once a petition for winding-up is presented, a suit against the company can and will be got stayed u/s 442 of the Act. The cases cited by Mr. Jain were cases where there were real and serious disputes between the parties. But such is not the position in the present case.

21. It is true that u/s 443, the court is not bound to order a winding-up and that it is a matter of discretion with the court whether the company is to be wound up or not but this is a judicial discretion to be exercised on the facts of each case. The petition is still only at the stage of admission and I have been unable to spell out any specific or concrete pleas in defense. I am, Therefore, unable to accept the plea that the petition should be dismissed in liming. I need hardly add, however, that it will-be open to the company, when the petition is heard, to set out its case in greater detail and to show that there is no case for winding up.

22. In these circumstances, the winding-up petition is admitted. Sri Jain had made a request that, in case, I decided to admit the petition, I may hold up the publication of citation by a short time to enable the company, if so advised, to file an appeal against my order. I accept this request and direct that the petitioner-firm should take no steps for publication of the citation regarding the admission of the petition for a period of three months from today. Let the petition be listed for directions as to publication on 21st August, 1979.

23. C.P. No. 97/79 is admitted. C.A. No. 36 of 1969 stands dismissed. C.A. No. 472 of 1978 which is a petition for appointment of a provisional liquidator will stand adjourned to August 21, 1979.