

(2014) 12 BOM CK 0113

In the Bombay High Court

Case No : Company Petition No. 857 of 2004

Severn Trent Water Purification Inc.

APPELLANT

Vs

Capital Controls India Private Limited

RESPONDENT

Date of Decision : 18-12-2014

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 433(f), 434, 434(1)(a)

Citation : (2015) 6 BomCR 772

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : Z.T. Andhyarujina, Neerav Merchant, Chakrapani Misra and Meghna Rajadhyaksha, i/by Khaitan and Co, Advocate for the Appellant; M.R. Khandeparkar and Gauraj Shah i/by Kanga and Co, Advocate for the Respondent

Judgement

G.S. Patel, J.—In the ten years since disputes began, the litigations between the parties have already, though in separate proceedings, twice reached the Supreme Court. The first of these was in relation to this Company Petition itself. The second arose out of parallel proceedings in a suit and under the Arbitration and Conciliation Act, 1996. In that time, this petition has undergone a metamorphosis of sorts: originally filed as a winding up petition by a contributory, it was admitted on that basis. That order of admission was set aside. The question whether the petition was maintainable as one brought by a creditor was left open. The petition was amended. It has remained pending admission in that state. The result, today, is that there are a large number of issues raised, many of which travel well beyond those common in a petition under sections 433 and 434 of the Companies Act, 1956 by a petitioning-creditor.

2. In this judgment, I have divided the discussion into several parts. This preliminary section (Part I) provides an overview, and a short statement of my final conclusion. Part II traces the history of the litigation till 2008, when the first round of litigation reached the Supreme Court. Here, I also deal with the subsequent amendment of mid-2008 and consider the petition as it stands after

that amendment, and the affidavit in reply. Part III outlines the four issues that remain for consideration. In Part IV, I have noted the rival submissions under distinct heads of Mr. Andhyarujina, learned counsel for the Petitioner, and Mr. Khandeparkar, learned counsel for the Respondent, respectively. My conclusions are in Part V.

Summary of Final Conclusion

3. For the reasons that follow, and despite the most valiant efforts by Mr. Khandeparkar, I am not convinced that the petition is not maintainable, or that no ground has been made out for admission at the instance of the Petitioner qua a creditor of the 1st Respondent. There is, I think, an admitted debt due. The admissions on which Mr. Andhyarujina relies are clear, unequivocal and unqualified. They are not general. They refer to a very specific amount said to be due to the Petitioner. I must in particular note the emphasis on a statement made by Senior Counsel on behalf of the 1st Respondent before the Supreme Court offering to deposit that specific amount in court. As I have noted later, counsel are often instructed to make a statement of this kind. Sometimes, it is to dislodge the argument that the company in question has a deemed inability to pay its debts, or that it is commercially insolvent. Often, a statement of this kind is made only to establish the company's bona fides. But that seems not to have been the case here, especially when that statement is read with the clear admissions of liability in legal correspondence and, in particular, the 1st Respondent's advocates' reply to the Petitioners' advocates' statutory notice. There are, too, categorical statements even in the Affidavit in Reply. On an overall assessment, I have not found it possible to agree with Mr. Khandeparkar when he says that there is a bona fide and substantial defence. There are, in my view, sufficient grounds to warrant an order of admission.

II. BACKGROUND & HISTORY OF THE PETITION

A. The Original Petition

4. The Petitioner, Severn Trent Water Purification Inc. ("Severn Trent"), is a US-based corporation. It is incorporated under American Law. It has its headquarters in Delaware, USA. Severn Trent was formerly Capital Controls (Delaware) Company Inc. Sometime in 1990, Severn Trent's group acquired another company called Capital Controls Company Inc. The name of that company was then changed to Severn Trent Water Purification Inc. with effect from 1st April 2002. On 31st March 2003, Capital Controls (Delaware) Company Inc. amalgamated with Severn Trent. Thus, Severn Trent, the present Petitioner, has all the rights and benefits of both Capital Controls Company Inc. as also Capital Controls (Delaware) Company Inc.

5. Chloro Controls (India) Private Limited, the 2nd Respondent, is controlled by one M.B. Kocha ("Kocha"). The 2nd Respondent ("Chloro Controls") and Capital Controls (Delaware) Company Inc. formed a joint venture, the 1st Respondent, Capital Controls (India) Private Limited ("Capital Controls India"). The joint

venture was set up in Mumbai. Its purpose was to manufacture in India and distribute within India, Nepal, Bhutan and Afghanistan certain gas chlorination water treatment systems, and a single product line of brine electrochlorination systems. Component parts for these systems were to be supplied by Severn Trent. A joint venture agreement was executed on 16th November 1995.

6. The authorised capital of Capital Controls India is Rs. 75 lakhs divided into 7,50,000 shares each. Chloro Controls holds 50% of the equity shareholding of Capital Controls India. There was once a dispute about the remaining 50%: Severn Trent claimed that it was the holder of that balance equity; the Respondents and Kocha claimed that it is not, and that the remaining 50% of Capital Controls India's equity was registered to Capital Controls (Delaware) Company Inc, not Severn Trent.

7. In 2004, Chloro Controls filed Suit No. 233 of 2004 in this Court against Severn Trent. There was, by then, it seems a complete deadlock in the management of the joint venture. Several meetings and attempts at a resolution of the disputes between Severn Trent and Chloro Controls in relation to the management and affairs of Capital Controls India were unsuccessful. The business relations between the parties grew even more strained and embittered.

8. On 21st July 2004, Severn Trent terminated the joint venture. It did so by a letter of that date, alleging breaches by Chloro Controls and by Kocha. That termination letter demanded that Kocha take steps to wind up Capital Controls India. Severn Trent's allegation was that should Kocha be allowed to continue to run Capital Controls India, the substratum of that company would be eroded and it would be saddled with liabilities leading to a depletion of its net worth. It was on this basis that Severn Trent filed the present Company Petition No. 857 of 2004 on 22nd September 2004 under Section 433(f) of the Companies Act, 1956. It sought the winding-up of Capital Controls India on the just and equitable ground, the appointment of an Official Liquidator and various interim relief's.

9. Capital Controls India and Chloro Controls both opposed the admission of Severn Trent's winding-up petition. Both Capital Controls India and Chloro Controls were represented by Kocha. Capital Controls India contended that the petition was itself not maintainable. It alleged that since Severn Trent was not itself a shareholder on the register of Capital Controls India, it had no locus to maintain this petition for winding-up. The registered holder of 50% of the equity share capital of the joint venture, Capital Controls India, was not Severn Trent but was Capital Controls (Delaware) Corporation Inc. The merger of Capital Controls (Delaware) Company Inc. into Severn Trent had never been intimated to Capital Controls India before Severn Trent filed an Arbitration Petition No. 121 of 2004 invoking the dispute resolution provisions of the Joint Venture Agreement. Capital Controls India also contended that there was no application at any time for transfer of the share certificates or further substitution of the name of Severn Trent as an equity share holder of Capital Controls India. Finally, it alleged that

the purported assignment of shares by Capital Controls (Delaware) Company Inc. to Severn Trent was without the consent of the other 50% equity shareholder in the joint venture, viz., Chloro Controls, or of Kocha, and that this was contrary to the Shareholders' Agreement and could not be effected.

10. Severn Trent filed a rejoinder disputing the contentions raised by Capital Controls and Chloro Controls. It produced documents that, according to Severn Trent, showed that Capital Controls (Delaware) Company Inc. had merged into Severn Trent; that both Capital Controls India and Chloro Controls knew about this; and that Kocha as also Chloro Controls had accepted Severn Trent as the other 50% equity shareholder in Capital Controls India. Severn Trent maintained that Chloro Controls' consent, or the consent of Kocha, was entirely unnecessary. Severn Trent alleged that on account of the merger, acquisition and amalgamation, it had stepped into the shoes of Capital Controls (Delaware) Company Inc., an entity that no longer existed. It was inconceivable, Severn Trent contended, that equity shareholding could continue to be shown in the name of a non-existent corporate entity. Logically, that shareholding could only exist in the name of Severn Trent itself. Severn Trent therefore contended that the petition, under Section 433(f) on the just and equitable ground, as a contributory, was maintainable.

11. Capital Controls India and Chloro Controls filed a sur-rejoinder. They denied Severn Trent's contentions. They questioned the legality and authenticity of the merger documents on which Severn Trent relied. They also contended--and this assumes significance for the purposes of the present petition in view of a later decision of the Supreme Court, one to which I will presently turn--that the petition ought to be dismissed in any case because there was an abuse of the process of the Court by Severn Trent in publishing a premature advertisement of the Company Petition.

12. On this last matter, i.e., the issue of a premature advertisement, I must note at the very beginning that although this is one of the questions that falls for determination before me, the advertisement itself is not on record. The only reference to it is in the 2008 decision of the Supreme Court.

B. Admission of the Petition, and appeals

13. On 21st April 2005, a learned Single Judge of this Court admitted the Company Petition. On a prima facie assessment of the petition, the learned Single Judge held:

(a) that the shareholding of Capital Controls (Delaware) Company Inc. in Capital Controls India vested in Severn Trent pursuant to the amalgamation/merger of those two companies;

(b) that there was no breach of the Shareholders' Agreement since the agreement did not prevent the merger of the two equity shareholding corporations;

(c) that the provisions of Section 439(iv)(b) of the Companies Act pertaining to devolution through debt of a former holder were applicable to a case of merger or amalgamation; and finally

(d) that there was a complete deadlock in the functioning of the business of Capital Controls India as there were only two shareholders, each with an equal equity shareholding, and that since those shareholders evidently could not agree in the manner in which the business of Capital Controls India was to be conducted, the Company could not do any business, nor should it be allowed to function and continue in that way.

14. The petition was, therefore, admitted, made returnable, and ordered to be advertised. Both Chloro Controls and Capital Controls India appealed. Both appeals were heard by a Division Bench of this Court and disposed of by a common judgment and order dated 20th/21st February 2006. The order of the learned Single Judge was set aside. The Division Bench held that the petition was not maintainable by Severn Trent in its capacity as a contributory of Capital Controls India, unless it was shown to be registered as a member of Capital Controls India in the register of members. The Division Bench remitted the matter on the question of maintainability of the petition by Severn Trent in its capacity as a creditor of Capital Controls India. The Respondents were at liberty to oppose the admission of the petition on all grounds, including that of premature advertisement by Severn Trent.

15. Aggrieved by this appellate order, Severn Trent filed Special Leave Petition (Civil) No. 6161 of 2006 before the Supreme Court. Notice was issued on 13th April 2006. A second Special Leave Petition (Civil) No. 9530 of 2006 was also filed by Chloro Controls assailing that part of the appellate order which left open the issue of whether Severn Trent could maintain the winding up petition as a creditor and the order of remission for fresh consideration to the learned Company Judge. Chloro Controls also contended in its SLP that the Division Bench of this Court was in error in not dismissing the petition on the ground of premature advertisement. Notice was also issued in Chloro Controls' Special Leave Petition.

C. The Supreme Court Judgment of 2008

16. Both petitions were then taken up together by the Supreme Court. They resulted in a decision reported in *Severn Trent Water Purification, Inc. Vs. Chloro Controls (India) Private Ltd. and Another*, The Supreme Court framed three questions for consideration:

(a) Whether the winding up petition filed by Severn Trent was maintainable in its capacity as a contributory?

(b) Whether the winding up petition filed by Severn Trent was maintainable in its capacity as a creditor? and

(c) Whether the winding up petition filed by Severn Trent was liable to be

dismissed in limine on the ground of premature advertisement by Severn Trent without an order of the Court as required by law?

17. In its decision, the Supreme Court held that the petition, as filed, was not maintainable by Severn Trent as a contributory (paras 43 to 52 of the SCC report). The first question, noted above, was thus answered in the negative and against Severn Trent. However, the Supreme Court left open the question of whether the petition was maintainable by Severn Trent in its capacity as a creditor of the 1st Respondent-Company, Capital Controls India. The second question was, therefore, answered in the affirmative. Paragraphs 73 and 74 of the order of the Supreme Court read as follows:

"73. It is thus clear that though the case put forward by Severn Trent in the winding-up petition was as a "contributory", the factum of the Company being debtor and Severn Trent being creditor and in spite of dues being admitted by the Company, there was non-payment on the part of the Company had been mentioned in the petition. The learned counsel for Severn Trent appears to be right that in view of the finding by the learned Company Judge that the petition instituted by Severn Trent as a "contributory" was maintainable, it was no more necessary for the learned Company Judge to consider the question whether the company petition filed by Severn Trent was maintainable in the capacity as a creditor.

74. It was then contended by the learned counsel for the Company that the ground for winding up of the Company under Clause (f) of Section 433 was not available to Severn Trent in case it had presented a petition as a creditor of the Company. In this connection, our attention was invited to certain decisions. In our opinion, it would not be appropriate to express any opinion one way or the other since we are of the view that the Division Bench of the High Court was not wrong in allowing Severn Trent to argue that point before the learned Company Judge as that point did not arise before him earlier. We may, however, hasten to add that we may not be understood to have recorded a finding that the petition presented by Severn Trent is maintainable. We clarify that as and when the matter will be taken up by the learned Company Judge, it will be open to the Company to raise a contention that no such petition as presented is maintainable in the capacity as a creditor."

As regards the question of premature advertisement, that matter was left open without the expression of any opinion one way or the other (paragraph 78 of the SCC report).

D. The amendment of 2008

18. Following the 2008 decision of the Supreme Court, therefore, the position was that the petition remained pending for admission, the original order of admission having been set aside. In its original form filed as a contributory, the petition had already been held to be not maintainable. The only question was whether that petition was maintainable as one brought by a creditor. Severn

Trent applied for an amendment of the petition. That application was contested. It was decided and disposed of by an elaborately reasoned order dated 28th June 2008.¹ The discussion in that order is addressed to the merits of the amendment application. Dharmadhikari J considered the 2008 decision of the Supreme Court. He allowed in part the company application for amendment, permitting the introduction of proposed paragraph 16A and a consequential amendment to the main prayer.

19. Following that amendment, the relevant portion of the petition, para 16A, now reads:

"16A. The Petitioner therefore states that it is a creditor of the Company. According to the Petitioner, as set out hereinabove, the Company is indebted to the Petitioner in the sum USD 575,113.29 as on 31.07.2004 as per the particulars of claim, hereto annexed and marked as "Exhibit XX". The Petitioner states that the notice demanding payment of outstanding amounts dated August 4, 2004 was issued by the Petitioner's advocates under Sections 433 and 434 of the Companies Act, 1956. The Company replied to the winding up notice vide its letter dated September 1, 2004 and admitted and acknowledged therein that the Company indeed owed monies to the Petitioner, however disputed the total amount that was due and payable to the Petitioner. The Petitioner further states that in the minutes of the various meetings of the Board of Directors, the Company was acknowledged that monies are due and payable to the Petitioner against equipment supplied by the Petitioner to the Company. The details of the same are as under:

- (i) Minutes of board of directions meeting held on 28 and 29.9.2002;
- (ii) Minutes of board of directors meeting held on 27.6.2003 (Kocha's Version);
- (iii) Minutes of board of directors meeting held on 27.6.2003 (Severn Trent Version);
- (iv) Minutes of board of directors meeting held on 9.10.2003 (Kocha's Version);
- (v) Minutes of board of directors meeting held on 9.10.2003 (Severn Trent Version);

The Petitioner states that the Company has clearly admitted its indebtedness to the Petitioner but has failed and neglected to pay the amounts legitimately due to the Petitioner."

20. There is also a consequential amendment to the first prayer in the petition which now reads:

"(a) That the Company viz., Capital Controls India Private Limited, be wound up for inability to pay its debts and under the just and equitable ground by and pursuant to the orders and directions of this Hon"ble Court;"

III. QUESTIONS FOR DETERMINATION

21. The following four questions thus arise for determination:-

(a) Whether the petition is maintainable by Severn Trent as a creditor of the company, Capital Controls India?

(b) Whether the petition is barred by limitation?

(c) If the petition is maintainable by Severn Trent as creditor, whether any case has been made out for winding-up on the ground of the inability of Capital Controls India to pay its debts within the meaning of Section 434(1)(a) of the Companies Act, 1956?

(d) Whether the petition is liable to be dismissed in limine on the ground of premature publication, Severn Trent having published an advertisement about the filing of the petition before any order was made on it?

IV. RIVAL SUBMISSIONS & FINDINGS

A. Maintainability & Sufficiency of Pleadings

22. Mr. Andhyarujina's submission is that no question arises of the petition not being maintainable. On a plain reading of the averments made, especially in the newly introduced paragraph 16A, he submits, the petition is ex-facie maintainable. Further, the fact that there is non-compliance with the demand made in the statutory notice is, Mr. Andhyarujina submits, sufficient to answer the first question of maintainability.

23. In response, Mr. Khandeparkar invites a second look at the amended pleading in paragraph 16A. There is no averment, he says, of the 1st Respondent being deemed to be unable to pay its debts. A refusal to admit a claim, or a denial of a claim made by a creditor, is not, Mr. Khandeparkar says, the same as the deeming fiction. This was not a plea taken earlier, and it cannot be reopened now. In any case, there is in Severn Trent's notice a claim for interest at 18% per annum (1.5% per month), a rate that is without disclosed basis. The Petition was filed on 22nd September 2004. What it did not disclose was the Respondents' reply of 1st September 2004 to Severn Trent's statutory notice dated 4th August 2004. It is Severn Trent that has not dealt with the response to the statutory notice.

24. Paragraph 16 of the original, unamended petition reads thus:

16. One of the other reasons for discord between the parties in the non-payment of admitted sums owed by the Company to the Petitioner. Pursuant to the Joint Venture Agreements, the Petitioner supplied water purification and filtration products, components and equipments [sic] to the Company. The Petitioner has till date not paid for the same. The Board of Directors of the Company and the Managing Director have acknowledged the Company's liability to the Petitioner in various communications and in various Board Meetings. In the circumstances, the Petitioner was constrained to issue a legal notice dated August 4, 2004 to the Company demanding payment of all outstanding dues. A copy of the demand

letter is annexed hereto and marked EXHIBIT "H". The Petitioner states that the total principal amount due as per the invoices is US\$ 339,162.10. As per the terms of the contract, all outstanding payments carry an interest of 1.5% per month. Mr. Kocha has been wrongfully withholding payment to the Petitioner and is refusing to provide reasonable payment terms. The Petitioner states that interest at 1.5% per month on the unpaid balance upto 31 July, 2004 is US\$ 235,951.19. The total amount due from the Company to the Petitioner is therefore US\$ 575,11.29 as on July 31, 2004.

25. Mr. Khandeparkar submits that this entire paragraph was in support of a ground for winding up under the just and equitable clause, Section 433(f) of the Companies Act, 1956. It was never a ground in support of a plea that Capital Controls India is unable to pay its debts within the meaning of Section 433(e) of the Companies Act, 1956. Without, therefore, the necessary pleadings that the company is "deemed to be unable to pay its debts", the petition is not maintainable, submits Mr. Khandeparkar.

26. Mr. Andhyarujina counters this by saying that there is no prescribed form either in the Act or in the Rules for the pleadings. In the petition as it now lies, the necessary particulars have been set out. Essential averments have been made. There is, therefore, no question of the petition being not maintainable.

27. I believe it is necessary to read both paragraphs 16 and 16A of the petition and, too, the amended prayer. That prayer makes it clear that the claim is on the ground that the company is unable to pay its debts; and these debts are the ones stated not only in the amended paragraph 16A but also those in the original para 16 of the petition. The claim is, clearly, that Capital Controls India has, through Kocha and its Board of Directors, admitted its liability to Severn Trent. This is an amount that is due to Severn Trent as a creditor, not a contributory. The failure to comply with the notice is clearly stated. Severn Trent relies on admissions of liability by Capital Controls India and says that despite these the company has "failed and neglected to pay the amounts legitimately due" to the Petitioner. I believe this is a sufficient pleading.

28. Mr. Khandeparkar relies on the decision of the Supreme Court in *Badat & Co., Bombay v. East India Trading Co.* 1963(66) Bom. L.R. 402 and that of a learned single Judge of this Court in *M. Gordhandas and Co. Vs. D. Arvind Mills*, to say that pleadings on the original side of this Court must be strictly construed. First, those observations in *Badat & Co.* were by Subba Rao J in his dissenting judgment, and though they were nonetheless approved by Vimadalal J in *M. Gordhandas*, they must, I think, be viewed in context. In both cases, the courts were concerned with pleadings in civil actions, i.e., suits governed entirely by the Code of Civil Procedure, 1908. Those are matters that are subjected to the rigour of a trial. A petition for winding up is not. It is decided on affidavit, not evidence properly so-called. The reason for the insistence on strictness in pleadings is plain: to ensure that there is no impermissible divergence between pleadings and proof. Only what is pleaded can be proved, and there can be no proof without a

supporting pleading. Although Rule 6 of the Companies (Court) Rules 1959 ("the Rules") says that the provisions of the Code of Civil Procedure, 1908 ("CPC") are "so far as applicable", I do not believe that the rigour of proof vis-a-vis pleadings is something that can be imported to a petition under the Companies Act. A certain amount of latitude in assessing the averments is undoubtedly necessary;² the consequences, if not, are potentially catastrophic. What Mr. Khandeparkar seems to suggest is that the words "inability to pay" or "unable to pay" must occur in a fixed place in the petition and that it is insufficient if they are clearly imputed or find place only in the prayer. I cannot accept so strict a view. This is quite apart from the fact that, in my view, the averments are themselves sufficient.

29. In any case, Mr. Andhyarujina says, this is no longer a requirement of law following the decision of the Supreme Court in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., ; also: In Re: Cairn India Limited, A substantial compliance is sufficient; a technicality, especially one taken belatedly, should not be permitted to defeat the substance of the matter, as the Supreme Court said in Associated Journals Ltd. Vs. The Mysore Paper Mills Ltd., Mr. Khandeparkar attempts to distinguish the present matter from Associated Journals by saying that there the petition was proper, but not the supporting affidavit; while the position is reversed in the present case. I do not believe that is correct, and I also do not think that the averment of "inability to pay debts" can be equated with the requirement of, say, a pleading in a suit for specific performance that the plaintiff is and at all times was ready and willing to perform his obligations. That averment is a necessary precondition to the grant of relief; without it, i.e., without a confirmation of readiness and willingness, the relief cannot follow. In a winding up petition, the "inability to pay" may find place or expression in a variety of forms and structures. The petition must be read as a whole, its structural integrity maintained. Technical defects cannot be permitted to supplant the cause of justice.³

30. Mr. Khandeparkar's next submission that the power of attorney under which the present suit is filed is defective in that it does not expressly include "winding up petitions" and hence the petition is not maintainable need not detain us for long. He founds this submission on the decision of a learned single Judge of this Court in Shantilal Khushaldas and Bros. Pvt. Ltd. Vs. Smt. Chandanbala Sughir Shah and another, First, this was a ground always available and at no point in its tortuous history has this been seen as a reason to unseat the petitioner. It is, I think, not possible to take this point at this stage in the proceedings. What the argument overlooks is that in this case, the authority conferred is not limited to "suits and/or proceedings" as was the case in Shantilal Khushaldas, but expressly extends to "petitions ... and/or other proceedings", as also applications. It is sufficiently widely worded to include the authority to file this petition.⁴ The present action is commenced by a petition, as required by the Rules, and it is, therefore, maintainable; and the constituted attorney of Severn Trent had the necessary authority to affirm and file this petition.

31. In any case, courts have allowed amendments to winding up petitions, especially where the amendments are clarificatory or amplify a ground already taken.⁵ The present petition has been amended; the amendment sufficiently takes the ground of admission and a refusal to pay; the prayer is founded on this, and explicitly invokes the ground of an inability to pay. It is impossible to hold that the petition, as laid, is not maintainable.

32. Lastly, as Mr. Andhyarujina points out, a creditor's petition is not limited to Section 434(1)(a) to establish a company's inability to pay its debts. That section requires a specific notice. But Section 434(1)(c) makes it clear that a company may also be deemed to be unable to pay its debts if this is established to the satisfaction of the Court, and no special notice is required in such a case. Mr. Khandeparkar however submits that even a case under Section 434(1)(c) must be supported by a minimal pleading;⁶ there being none in this case, Severn Trent cannot fall back on this argument; a pleading that the company's substratum is eroded must be both pleaded and proved. That proposition is generally correct, but I do not think it applies in the context of the present case where the company, Capital Controls India, is demonstrably in the doldrums and can evidently do no business.

B. Limitation

33. Mr. Khandeparkar's submission is that the claim now made by amendment was barred on the date of its amendment in 2008. The claim made is under invoices of 1998 to 2001. What this unfortunately overlooks is that there have been since, and till as late as the end of 2003 and even in early 2004, exchanges of minutes of meetings. In these meetings, Severn Trent claims, Kocha, for Capital Controls India, made several admissions of liability. The original claim was based in part on these admissions, and the amendment is explicitly based on them. But the amendment introduces no new claim or cause of action. It builds on the claim first made and makes only a set of averments in that context. It is not possible to hold that the claim as made is barred by limitation.

C. Admissions & Indebtedness; Financials

34. This takes us to the next set of submissions, and these are central to the case at hand. Mr. Andhyarujina claims that there is not one single admission of liability on which the claim is founded. There are several, and these are repeated. They are unequivocal and they continue till as late as the reply of 1st September 2004 to the statutory notice of 4th August 2004. These several admissions, according to Mr. Andhyarujina, are sufficient to warrant an order of admission on the petition by Severn Trent as a creditor of Capital Controls India. In any event, says Mr. Andhyarujina, the record also reflects that Senior Counsel on behalf of Capital Controls India and Chloro Controls has, not once but twice, offered to make a substantial deposit in the amount of \$176,640.94 in Court. No such submission could have been made absent any liability. For one thing, it is no round number as an ad-hoc demonstration of bona fides or financial capability: it

is a very precise amount. The very fact that such an offer was made is, in Mr. Andhyarujina's submission, a sufficient admission of liability. It matters not why this submission was made. Finally, Mr. Andhyarujina draws attention to the financial position of the Company to submit that on any fair reading of its financial reports, Capital Controls India is in dire financial straits and is clearly unable to pay its debts. It is commercially insolvent. It must, therefore, be ordered to be wound up.

35. Paragraph 3 of the statutory notice dated 4th August 2004 issued by Severn Trent's Advocates to Capital Controls India refers to the supply by Severn Trent to Capital Controls India of various items of equipment, component parts etc. A claim is made on this account in the amount of US\$ 339,162.10. It is alleged that Kocha has acknowledged and admitted this liability on behalf of Capital Controls. Thereafter, interest is claimed at the rate of 18% per annum for an aggregate amount of additional US \$ 236,285.71. There was a reply dated 1st September 2004. Mr. Andhyarujina submits that the reply annexed as Exhibit R to the Affidavit in Reply raises a bogus defence of a counter-claim but without any particulars. Capital Controls India's reply to the statutory notice claims that Severn Trent did not furnish details of actual material and labour costs; that there are cross entries between the contesting parties raising a dispute that is incapable of a summary adjudication; that several invoices claimed to be unpaid were never in fact received by Capital Controls India; that Severn Trent in its claim in the statutory notice has failed to give credit for several entries; and that Capital Controls is entitled to an adjustment or set off.

36. Some portions of the statutory notice are fundamental to Mr. Andhyarujina's case. These are in paragraphs 8 to 11 of that reply, and they read as follows:

"8. On the basis of what is stated in paragraphs 3 to 7 above, our client has prepared a detailed statement, a copy of which is Annexure 2 hereto, in respect of the remaining 99 invoices listed in Annexure A to you letter under reply calculating the true, fair and correct net amount payable by the Company in respect of the said 99 invoices which aggregates to US \$ 14,857.58. From the aforesaid aggregate amount our client has deducted the aggregate credit entries shown in Annexure A to you letter under reply aggregating to US \$14,857.58 to arrive at a net aggregate amount payable to your client of US \$ 176,640.94. From the said amount of US \$ 176,640.94 a further amount of approximately US \$5,000 is required to be deducted on account of excess octroi payment made by the Company at the rate of 4% to the Local Authorities on the said 99 deliberately inflated invoices raised by you client, being a loss to the company admittedly attributable to you client's actions.

9. Without prejudice to the foregoing our client is in the process of carrying out a similar exercise in respect of invoices raised by your client and paid till date by our client. Undoubtedly, our client anticipates substantial overcharging by your client even in respect of these invoices, a fact repeatedly brought to the notice of your client as aforesaid, and which our client is entitled to adjust and/or set off

against the aforesaid amount of US \$176,640.94 (less a further sum of US \$ 5,000) given the fact that the dealings between our respective clients have been and continue to be on a running account basis.

10. In the meantime, and so as not to give your client any unnecessary cause for complaint, since the aforesaid amount of US \$176,640.94 (less a further sum of US \$ 5,000) pertains to invoices in respect of imports where more than 6 months have lapsed from the date of the respective shipments, the Company is approaching its bankers with a request to remit such amount as is found due and payable to your client (after the exercise mentioned in the preceding paragraph is complete.) on the basis that remittance of such amount has been delayed due to genuine disputes between our respective clients. You are undoubtedly aware this is the procedure which our client is obliged to follow under "applicable law" in India.

11. With further reference to paragraph 3 of your letter under reply, it is denied that the total principal amount outstanding aggregates to US \$339,162 as alleged in Annexure A to your letter under reply. Whereas it is correct that the Managing Director of the Company has acknowledged and admitted liability generally of the Company to make payment to your client, your client has deliberately omitted to record the repeated requests made by the Managing Director as well as the Company in correspondence as well as at Board Meetings to resolve the issue of transfer pricing amicably and in accordance with the terms of the Licence Agreement. It is denied that the Managing Director has continued to withhold payment as alleged or at all. Your client is well aware of the several demands made to amicably resolve the issue of transfer pricing by our client, which is matter of record in the Minutes of the Board Meetings and correspondence exchanged."

(Emphasis supplied)

37. On this basis, Mr. Andhyarujina says that there is no manner of doubt that the Company is indebted to Severn Trent. It is of no relevance whether the Company admits the entirety of the claim or only part of it. The amounts admitted exceeded the statutory minimum. There is no explanation for these admissions. They are clear, unambiguous and unequivocal. Even the amount admitted has never been paid. Therefore, Mr. Andhyarujina submits that not only is the petition maintainable, but an overwhelming case has been made out for an order of admission.

38. One of the most important admissions, in Mr. Andhyarujina's formulation of his case, is the statement made on behalf of the Company by learned Senior Counsel before the Supreme Court in the Special Leave Petition from the order of the Division Bench setting aside the first order of admission. That written submission was made on 24th July 2007 and it is annexed to the Reply at Exhibit "Q". That statement is worded thus:

"Despite the order passed by the Division Bench of the High Court remitting back

to the Company Judge the question as to whether the petition for winding up on the just and equitable ground could be maintained by the Petitioner as creditor, the Joint-Venture Company through its Managing Director Mr. M.B. Kocha seeks permission of this Hon"ble Court to deposit in this Hon"ble Court the rupee equivalent of US \$ 176,640.94 (mentioned in paragraph 8 of the reply to the statutory notice: Volume III page 554 at page 560), within six weeks from today for payment to Severn Trent Water Purification Inc. upon requisite permission for remittance being obtained from the Reserve Bank of India. The Joint-Venture Company, through the said Mr. M.B. Kocha (Managing Director of Capital Controls India Pvt. Ltd.,) undertakes to this Hon"ble Court to apply forthwith for the requisite permission from the Reserve Bank of India intimation to Severn Trent Water Purification Inc."

(Emphasis supplied)

39. Mr. Andhyarujina's submission is that this admission made by Capital Controls India before the Supreme Court is completely unqualified. It is not predicated on accounts being taken. Read with the reply to the statutory notice, this is the clearest possible admission of the Company's indebtedness to Severn Trent. There is also nothing in this written submission to indicate that it was made only to show bona fides, or as a demonstration of the Company's financial solvency.

40. Mr. Andhyarujina does not, however, rest his case solely on the admissions in the reply to the statutory notice. There are, he submits, admissions in the contemporaneous documents, including minutes of meetings and, most specially, minutes and comments on those minutes by Kocha on behalf of Capital Controls India which contain important admissions. For instance, Mr. Andhyarujina draws attention to the agreed minutes of 28th and 29th September 2002 where in paragraphs 3.4 and 3.4.2 there are admissions of liability made by Capital Controls India. These are also to be found in Kocha's version of minutes of later meetings such as the one held on 27th June 2003. In paragraphs 9.3 and 9.4 of these minutes prepared by Kocha on behalf of Capital Controls there is a unequivocal admission that there are amounts due to Severn Trent. These are reiterated in the last internal paragraph of paragraph 9.6 of these minutes and importantly in paragraphs 9.7 and 9.8. In paragraph 9.7, Severn Trent is described as a "creditor" of Capital Controls India. In paragraph 9.8 of these minutes Kocha sets out the resolution that according to him was passed. This resolution was that he, as the Managing Director of Capital Controls India, would submit a payment schedule to Severn Trent for the past two invoices totalling \$340,162. Severn Trent also prepared its own version of the minutes of this meeting. Not unexpectedly, there are discrepancies between the two versions but to the extent indicated above, and specially clause 9.8 of Kocha's version, there is complete consensus. There is then Kocha's version of the minutes of the board meeting held on 9th October 2003. Paragraph 9.5 of his version is crucial. Kocha records that he submitted a payment proposal. He admits Capital Controls

India's indebtedness to Severn Trent. There is a statement that the debt would be paid in two installments conditional on Severn Trent accepting certain terms.

41. Mr. Andhyarujina's submission is that if the case placed by Respondents is that these board minutes indicate that Severn Trent was in default of its contractual obligations under the joint venture agreement, then it is to be noticed that there is no reference to these board minutes in the reply to the statutory notice. This defence is raised only later. The entire claim of the Company that it has a set-off or counter-claim is ex-facie not credible. No such set-off or counter-claim has been filed.

42. What of the pleading in the Affidavit in Reply? Mr. Andhyarujina points to paragraphs 12 to 14 of that affidavit, read with Exhibit "T". Here, the Respondents justify the figure of USD 171,640.94 that they have arrived at, and claim that they have a counter-claim after adjusting this amount. Admittedly, the Respondents have at no point filed any action or proceeding to recover this amount that they claim is owed to them by Severn Trent. There is no suit, no petition, and, in arbitration, no counterclaim. It is a mere allegation and no more than that. But in the making of that allegation there is an explicit admission of a liability to Severn Trent in the amount of US\$ 171,640.94--the exact amount Capital Controls India offered to deposit in court.

43. What is also of undoubted significance, as Mr. Andhyarujina says, is that the admission comes from Kocha himself. It is he who has affirmed this Affidavit in Reply. He is in management, not Severn Trent. It makes little difference whether this claim comes from Severn Trent as a creditor or a contributory: clearly, Severn Trent lays claim to both hats. It may have had to take off one of those, but the other, as a creditor, is undoubtedly firmly in place. An admission of this kind and from this source is, as Mr. Andhyarujina says, not merely one that can be lightly brushed aside; it is one that binds the company on behalf of which it is made.⁷ Once that admission is made, the debt crystallizes and is payable eo instante and in praesenti. It is no answer at all for the company to merely claim that it has either a set-off or a counter-claim when the record does not show that the company has taken any steps to pursue either. I believe Mr. Andhyarujina is correct and Mr. Khandeparkar's response that these admissions are by Kocha himself and merely say that Kocha is withholding payment, not that the company is unable to pay its debts, is one without assured foundation. But Mr. Khandeparkar goes further: in essence, he suggests that in making these statements and admissions and, presumably in the Affidavit in Reply since he made it himself, as also in the reply to the statutory notice, Kocha was on some sort of a frolic, gambolling cheerfully through fields of minutes of meetings, correspondence, invoices and so on, unmindful of consequences; or, at any rate, confident that none of this had any consequence at all. There is, Mr. Khandeparkar says, no resolution of the company, no account certifying this liability, no note of acknowledgement; it is "only" a statement made by a director, and made by a 50% partner in the joint venture. All this, he says, must

be seen in the context provided by the reply to the statutory notice because there was some issue of transfer pricing. I do not see any substance to any of this. These submissions come far too late in the day to be material, and they are in themselves unclear and provide no explanation at all. Further, Mr. Khandeparkar's submission that the admission, assuming there is one, in the minutes of the 9th October 2003 meeting (Ex. "L" to the Affidavit in Reply) is conditional, unclear and not unequivocal and consequently of no effect is a submission that I cannot accept. There are subsequent admissions in the company's advocates' reply to the statutory notice, and those admissions are utterly unambiguous.

44. Mr. Andhyarujina also disputes the position that no company petition can ever be maintained on a running account. When that running account is accompanied by an admission or liability, then such petition can be maintained. In *M.X. Advertising Vs. Surya Hot-Sip Tea Co. (P.) Ltd.*, Dr. D.Y. Chandrachud J, as he then was, considered a similar argument. There, liability was held to be admitted by the issue of a cheque, a balance confirmation and part payment. In that situation, the Court held, it could not be said that the petition would not lie because moneys were claimed at the foot of an account. In the present case, too, though there may have been cross-entries and transactions in parallel, Kocha's admissions are clear and unambiguous. It is of little assistance to the company to contend that they are in some "context", and that all that Kocha offered was a contingent proposal for settlement not an admission of liability. It is difficult to see the admissions in any such manner. Mr. Khandeparkar's reliance on the decisions in *I T C Ltd. Vs. Fomento Resorts and Hotels Ltd.*, and *Parimahal Holdings (P.) Ltd. v. LKP Merchant Financing Ltd.* [2003] 114 Comp. Cas. 121 (Bom) is, I think, misplaced. Both decisions turned on the facts of each case and I do not believe that either of them sets out a general principle that can be imported to the case before me without regard to the peculiar facts here: the fact that there is a joint venture; the fact that Chloro Controls India is a 50% equity shareholder in that joint venture; the fact that Kocha dominates the joint venture; and the fact that even in legal correspondence and the Affidavit in Reply Kocha himself has made quite unambiguous statements of the amount due to Severn Trent.

45. Finally, Mr. Andhyarujina turns to the financials of the company, on the basis of statements tendered in court for the year ended 31st March 2013. These show a very marginal profit of only about Rs. 60 lakhs. The balance sheet on record shows receivables of about Rs. 13 crores. The other assets are negligible. There are, in contrast, about Rs. 6 crores in short-term borrowings and, he submits, all profits will be wiped out by liabilities. Of these, Severn Trent's claim is about Rs. 3.5 crores. Mr. Khandeparkar's submission that the company has reserves of about Rs. 3 crores and about Rs. 1 crore in bank balances does not, in my view, substantially alter the position in his favour.

D. Premature Publication

46. Both parties have tendered a copy of the public notice issued by Severn Trent in the Indian Express, Mumbai Edition, on 18th December 2004. This notice is not part of the present record. It is reproduced in the annexure to this order in full, for completeness.

47. Mr. Khandeparkar submits that this notice was clearly an attempt to over-reach the court and was an abuse of the process of the Court. The petition must, he submits, be dismissed on this ground alone, and he cites the decision of a Division Bench of the Punjab & Haryana High Court in Amritsar Swadeshi Textiles Corporation Pvt. Ltd. Vs. Vinod Krishan Khanna and Others, in support. There is no absolute requirement that an advertisement must follow even an order of admission, Mr. Khandeparkar says, pointing to the Supreme Court decision in National Conduits (P) Ltd. Vs. S.S. Arora, .

48. Mr. Khandeparkar's submission is, in my view, entirely misplaced. The advertisement in Amritsar Swadeshi, reproduced in the judgment, cited and referenced an order of the learned single Judge, one that did not direct any sort of advertisement but merely issued notice on admission. What of the notice issued by Severn Trent? It did not mention any order of this, or any other, court. It only said that Severn Trent had terminated the joint venture; that Kocha had filed a suit on behalf of Capital Controls India, and that this was pending (as were applications for interim relief); that it was Severn Trent's "intention to seek a winding up of the joint venture company ... in accordance with due process of law"; that Severn Trent had already filed the present petition for winding up; and that anyone dealing with Capital Controls India, Kocha and Chloro Controls India should bear these facts in mind and deal with them at their own risk as to consequences. I see nothing objectionable in this. There is no law that prohibits any such public notice being issued. Claiming to be a 50% equity shareholder in the joint venture, Severn Trent evidently felt need to ensure that it should not be held liable to third parties on account of anything done by Kocha in the name of the joint venture. This is hardly the sort of "premature publication" that was found to be an abuse of the process of the Court in Amritsar Swadeshi. I do not think there is any law that binds every litigant to silence about proceedings launched or that a person or entity cannot, in order to protect itself, issue a notice alerting the commercial public that it deals with certain entities at its own risk and puts the public to notice of pending proceedings. In the context of a joint venture, where a potential third-party claim or liability might well have affected Severn Trent, there was nothing wrong about this. As Mr. Andhyarujina says, this is a publication that is of absolutely no consequence.

V. CONCLUSIONS

49. As of 2004, Capital Controls India was indebted to Severn Trent at least in the amount of \$176,640.94. That amount is not in dispute. This debit is unequivocally admitted several times, including in the Affidavit in Reply. Were this a civil suit, on the basis of the statements in the Affidavit in Reply, Severn Trent could have moved to have judgment entered on admission in this amount

of \$176,640.94. There is no reason why, at least as regards the admission, a different consideration should obtain in a winding up proceeding. Capital Controls India's indebtedness to Severn Trent is clear. It has, despite notice, failed and refused to pay this amount. The consequences must follow.

50. The claim by Severn Trent is larger than this amount, and includes interest, and though Capital Controls India alleges that it has a counter-claim, it has done nothing at all to establish or prove that counter-claim.

51. It is impossible to hold, following IBA Health India, (Supra) that the defence is either bona fide or of substance. I do not find any valid or cogent explanation for the many admissions made at different times and in different places by Capital Controls India. The arguments of a set-off or a counter-claim seem to me to be merely sound and fury, signifying nothing. What has Capital Controls India done to assert or establish this much-vaunted "counter-claim"? Nothing. It is important, I think, to note that Capital Controls India does not stop at a set-off. Had it done so, it could have argued that it need do nothing except assert it. But it has gone further. It says it has a counter-claim. That, in civil law, means that Capital Controls India has an independent and free-standing claim against Severn Trent, one that it could pursue and, in order to make this a valid defence, ought to have pursued. It has done nothing. The defence is just smoke and mirrors, illusion and deception.

52. On my finding that the petition by Severn Trent as a creditor of Capital Controls India is maintainable, it follows then that this petition must be admitted.

53. Hence:

(a) The company petition is admitted and is made returnable on 26th March 2015;

(b) Service of the petition under Rule 28 of the Companies (Court) Rules, 1959 is waived.

54. However, given the history of the matter and the length of time that it has been pending, the Petition is not to be advertised till further orders of the Court. Liberty to the Petitioner to apply. It is also because of the length of time this petition has been pending that I have granted such a long returnable date.

55. I must thank both Mr. Andhyarujina and Mr. Khandeparkar for their assistance in this matter. I do realize that the judgment in this case has been inordinately delayed, well beyond anything that is either reasonable or even permissible, and I do regret this. I must note however Mr. Andhyarujina's and Mr. Khandeparkar's great kindness in offering their consent for an extension of time for delivering this judgment.

56. Mr. Shah, learned Advocate for the Respondents, applies for a stay of this order. As I have not directed the petition's admission to be advertised, no question of a stay arises.

ANNEXURE PUBLIC NOTICE

NOTICE is hereby given to all concerned that Severn Trent Water Purification, Inc. and the erstwhile Capital Controls group of Companies having their office at 3000 Advance Lane, Colmar, Pennsylvania 18915, USA have terminated the various joint venture agreements entered into with Mr. Madhusudan B. Kocha, Chloro Controls (India) Private Limited having its registered office at 15/AJ, Laxmi Industrial Estate, Link Road, Andheri (West), Mumbai India 400 053 and Capital Controls India Limited having its registered office at 15/AJ, Laxmi Industrial Estate, Link Road, Andheri (West), Mumbai, India 400 053.

A suit has been filed by Mr. Kocha, purportedly on behalf of Capital Controls India Private Limited, along with Notice of Motions for interlocutory relief's, which is pending in the Hon'ble Bombay High Court.

It is the intention of Severn Trent Water Purification, Inc. to seek a winding up of the joint venture company, namely Capital Controls India Private Limited in accordance with due process of law. Severn Trent Water Purification, Inc. has already filed a Winding Up Petition No. 857 of 2004 in the Hon'ble Bombay High Court for winding up the joint venture company and the same is currently pending.

Any person dealing with Capital Controls India Private Limited. Mr. Madhusudan B. Kocha, his family members and Chloro Controls (India) Private Limited may bear the aforesaid facts in mind and deal with them at their own risk as to the consequences.

Sd/- Severn Trent Water Purification, Inc.

THE INDIAN EXPRESS**** MUMBAI, SATURDAY DECEMBER 18, 2004

1 Per S.C. Dharmadhikari J. 2 Darjeeling Commercial Co. Ltd. Vs. Pandam Tea Co. Ltd., 3 Suvarn Rajaram Bandekar Vs. Rajaram Bandekar (Sirigao) Mines Pvt. Ltd., , following Darjeeling Commercial Co. 4 IFCI Factors Ltd. Vs. Koutons Retail India Ltd., 5 Kalra Iron Stores Vs. Faridabad Fabricators (P.) Ltd., ; Bhagat Industrial Corporation Ltd. Vs. Ego Metal Works P. Ltd., 6 Mahesh Enterprises, Mumbai Vs. Argus Industries Pvt. Ltd., Thane 7 Imperial Corporate and Services (P) Limited Vs. Aruna Sugars and Enterprises Ltd., ; Prem Nath Diesels Pvt. Ltd. Vs. Aloka Dam, .