

(2010) 10 MAD CK 0179

In the Madras High Court

Case No : Company Petition No. 132 of 2008

Sri Anjaneya Cotton Mills Ltd.

APPELLANT

Vs

Sheela Rani Textiles Ltd. and Industrial Development Bank of India

RESPONDENT

Date of Decision : 25-10-2010

Acts Referred:

Companies Act, 1956 — Section 220, 433, 434, 439

Citation : (2011) 1 BC 141 : (2010) 160 CompCas 211

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : P.S. Raman for K. Rajasekaran, for the Appellant; R. Thiagarajan, G. Ethirajulu and K. Murthy, for the Respondent

Judgement

P. Jyothimani, J.—The above company petition is filed under Sections 433(1)(e) and 434 read with Section 439(1)(b) of the Companies Act, 1956 for a direction to wind up the first respondent company and to appoint the Official Liquidator as the Liquidator.

2. The Industrial Development Bank of India (IDBI) was imp leaded as second respondent as per order dated 22.7.2010. Notice regarding admission was ordered in the company petition and the arguments of Mr. P.S. Raman, learned senior counsel appearing for the petitioner and Mr. R. Thiagarajan, learned senior counsel appearing for the first respondent company who raised objection about the maintainability of the company petition and Mr. K. Murthy learned Counsel appearing for IDBI were heard.

3. The first respondent company is a limited company with authorized share capital of Rs. 5 crores divided into 50 lakhs shares of Rs. 10/- each and its main object is to carry on the business of manufacturing, bleaching, dyeing, printing and selling yarn, cotton and/or staple fibre, cloth and other fabrics made from raw cotton, jute, wool and other suitable materials and generally to carry on the business of cotton spinning and as weaving mill proprietors in all branches.

a) It is stated that originally one M/s. Sivakami Textiles Ltd. borrowed loans from various banks including the 2nd respondent bank to the tune of Rs. 4,49,63,000/- and it was unable to repay the loan because of recession and the matter was referred to BIFR. At that time, the first respondent Company made a negotiation for taking over the said mill. It is stated that in the meantime, the said M/s. Sivakami Textiles Limited moved the AAIFR and the scheme was sanctioned by the appellate authority on 24.9.2001 and based on the scheme, the said M/s. Sivakami Textiles Limited was merged with the first respondent.

b) After merger, the appeal filed before the AAIFR by the first respondent was allowed by the first respondent which was allowed on 26.5.2000 by setting aside the order of winding up passed by the BIFR and the matter was remitted back to BIFR and the mill was taken over by the respondent with effect from 1.4.2001.

c) It is the case of the petitioner, which is a company incorporated under the Companies Act, carrying on the business in running textile mills that the first respondent contacted the petitioner and requested to run the textile mill by providing the required raw materials for conversion and stated that it would convert the raw cotton into yarn and deliver the same to the petitioner for consideration and the first respondent also requested to give an advance of Rs. 75 lakhs for the said purpose and the agreement was entered into on 19.1.2006 based on which it is stated that the petitioner paid an amount of Rs. 30 lakhs towards interest free conversion deposit and Rs. 45 lakhs towards deposit repayable in 10 instalments together with interest at the rate of 12% p.a.

d) It is stated that on 19.1.2006 the first respondent executed a deed of hypothecation hypothecating four generator sets in favour of the petitioner as security for the sum of Rs. 45 lakhs and therefore, the petitioner has a charge over the properties.

e) It is stated that against the first respondent company, one M/s. Dipalee Traders, Mumbai filed C.P. No. 295 of 2003 for winding up, which is pending in this Court. It is the case of the petitioner that after doing conversion work for some time, the first respondent failed to continue the same due to electricity disconnection and requested the petitioner to advance further amount of Rs. 32.32 lakhs towards electricity bills and the same was also paid by the petitioner under a supplementary agreement dated 17.4.2007 under which the first respondent agreed to repay the said amount at the rate of Rs. 5 lakhs per month on 25th of every month.

f) The petitioner also gave a further amount of Rs. 68,79,261/- at the request of the first respondent for the purpose of electricity payment and other liabilities and a simple mortgage deed was executed by Mrs. J.S.P. Jeyarani wife of R. John Sundara Pandian, who is one of the Directors of the first respondent in favour of the petitioner on 12.7.2006 and the said document was registered as document No. 2679 of 2006 in the Office of the Sub Registrar, Chokkikulam and under the mortgage, the properties described therein were furnished as security for

repayment of a total sum of Rs. 70 lakhs. A further advance of Rs. 16,68,000/- was paid towards electricity charges to the first respondent and for that, the said Mrs. J.S.P. Jeyarani, one of the Directors of the first respondent company executed another registered simple mortgage deed dated 8.9.2006 mortgaging further extent of property described in the schedule to the said document as security for repayment. It is stated that till September, 2006, the total advance amount paid by the petitioner to the first respondent was Rs. 1.92 crores which was acknowledged by the first respondent through account statement along with confirmation letter dated 20.9.2006.

g) It is stated that at the request of the first respondent, for the purpose of making payment of Deepavali advance to the workers, the petitioner made a further payment of Rs. 16.62 lakhs by way of two cheques drawn in UTI Bank for Rs. 9.62 lakhs and Rs. 7 lakhs. It is stated that the first respondent mill was locked on 25.10.2006 due to non-payment of labour wages though the petitioner had already paid the amount. It is stated that the first respondent diverted the amount for different purpose. It is stated that the raw materials, finished goods and waste worth Rs. 35,90,930/- are lying in the respondent mill and a total amount of Rs. 1,92,79,092/- was advanced by the petitioner to the first respondent apart from the excess conversion charges paid by the petitioner to which the petitioner is entitled to receive a sum of Rs. 4,67,492/- and therefore, a sum of Rs. 1,97,46,584/- is liable to be paid by the first respondent with interest as per the agreement.

h) It is stated that all payments for conversion were paid by the petitioner and the first respondent is liable to repay the said amount and the petitioner has got a charge over the assets of the first respondent as well as the mortgaged properties. It is stated that the petitioner filed O.S. No. 139 of 2007 on the file of III Additional Sub Judge, Madurai against the mill in liquidation for a part amount and obtained an order of injunction in I.A. No. 168 of 2007 and a criminal complaint was also filed against the respondent mill for hypothecating the already hypothecated assets. It is stated that the petitioner also filed a suit in O.S. No. 39 of 2007 on the file of I Additional District Judge, Madurai for recovery of Rs. 30 lakhs along with other charges for Rs. 4,69,492/- and the said suit is pending and I.A. No. 132 of 2007 for attachment filed by the petitioner was also allowed.

i) It is stated that the first respondent mill also appeared before the Court and undertook that it would not alienate the mill. In the meantime, as against the notice issued by IDBI under the Security Interest Enforcement Rules, 2002, the first respondent moved the Madurai Bench of this Court in W.P (MD). No. 2547 of 2007 to prevent IDBI from auctioning the properties of the first respondent. In the statement filed before the High Court, the first respondent has categorically admitted that the first respondent is liable to pay Rs. 8,27,45,000/- to the secured creditors and Rs. 6,38,21,000/- to unsecured creditors. It is stated that the petitioner is entitled as on 31.1.2007 to Rs. 2,03,00,441/- with interest up to

date and there is a persistent default on the part of the first respondent and hence, the petitioner issued a statutory notice on 29.2.2008, calling upon the first respondent to pay the amount within 21 days with interest and the first respondent gave an evasive reply on 9.3.2008, for which a rejoinder was issued by the petitioner on 19.3.2008. Since there was no reply, the present petition has been filed for winding up of the first respondent company.

4. The statutory notice dated 29.2.2008 issued by the petitioner through its counsel was sent to the first respondent at two addresses viz., No. 2, Kiruba Nagar, Thiruppalai, Madurai and No. 61, Meng"les Road, Nagal Nagar, Dindigul 624 003. After the merger of the first respondent company with M/s. Sivakami Textiles Limited, in the agreement between the petitioner and the first respondent represented by its Managing Director, Mr. R. John Sundara Pandian, the address of the first respondent is stated to be "M/s. Sheela Rani Textiles Ltd., Thenur, Samayanallur Post, Madurai". In the subsequent agreement dated 7.9.2006 entered between the petitioner and the first respondent, the address of the first respondent is stated as "M/s. Sheela Rani Textiles Ltd., Thenur, Samayanallur Post, Madurai while the address of its Managing Director, Mr. R. John Sundara Pandian is stated as, "No. 2, Kiruba Nagar, Thiruppalai, Madurai 624 014".

5. On facts, it is clear that the first respondent company has received the said notice as it is evident from the reply notice issued on behalf of the first respondent through its counsel dated 9.3.2008, of course, disputing the amount claimed by the petitioner and in the said reply, the first respondent has also stated that it is not having any office at Dindigul and it is not known as to how such letter was sent to Dindigul address.

6. The impleading respondent, viz., IDBI has also filed an affidavit stating that IDBI with the consent of other secured creditors took possession of the assets of the first respondent company under SARFAESI Act in February, 2007 and the recovery proceedings are in progress. It is stated that the first respondent, aggrieved against the proceedings under SARFAESI Act, approached the Debts Recovery Tribunal, Madurai in S.A. No. 140 of 2007 and obtained an order of interim stay and the same is pending. It is stated that the first respondent approached IDBI for one time settlement in respect of other secured creditors, which was accepted by IDBI and a part of the amount was paid in installments. IDBI took a stand that in the winding up proceedings, it is not a necessary party since it proceeded against the first respondent under SARFAESI Act. It is stated that the first respondent company is a sick company pending before BIFR and its assets are charged with IDBI as well as other banks and the first respondent has no right to sell or alienate its properties without the written permission of the secured creditors and BIFR.

7. The petition is resisted by the first respondent on the ground that the company petition is not maintainable since notice was not sent to the registered Office of the first respondent. Mr. R. Thiagarajan, learned senior counsel

appearing for the first respondent would vehemently contend that in the winding up proceedings, the statutory provisions are to be strictly followed and even though the statutory notice is stated to have been issued to two addresses, it was not sent to the registered office of the first respondent company.

a) It is his contention that even if a reply notice was issued on behalf of the first respondent, the violation of statutory provision will make the entire winding up proceedings as not maintainable, as the same was initiated on the basis of statutory notice, which was not addressed to the registered office.

b) He would also contend that as per the documents filed before the Registrar of Companies in Form-23AC pursuant to Section 220 of the Companies Act, the address of registered Office of the first respondent is stated as Thenur, Samayanallur Post, Madurai and therefore, the notice issued to a different address cannot be termed to be one that was sent in compliance with the provisions of the Companies Act.

c) He would also refer to Form No. 18 issued by the Registrar of Companies wherein it is stated that the registered Office of the first respondent company has been changed from "61, Meng"les Road, Nagal Nagar, Dindigul" to "Thenur, Samayanallur Post, Madurai" with effect from 7.5.2002.

d) It is his submission that even in the suit filed by the petitioner before the Principal District Judge, Madurai in O.S. No. 139 of 2007, the address of the first respondent is given by the petitioner as "Thenur, Samayanallur Post, Madurai 625 402" and that suit was filed on 9.3.2007 and therefore, the petitioner was aware of the address of registered Office of the first respondent company and in spite of it, the petitioner has deliberately chosen to give the statutory notice on 29.2.2008 to a different address and in that suit, an ex parte decree was obtained.

8. On the other hand, Mr. P.S. Raman, learned senior counsel for the petitioner would submit that taking into account the factual aspect that the first respondent issued a reply notice for the statutory notice issued by the petitioner, the non-sending of notice to the registered Office cannot be termed to be fatal to the filing of present petition. He would also rely upon the judgments in Rajearajeswari Packaging Products v. Dev Fasteners Ltd. (2002) 108 Comp. Cas 715 Mad, Indian Oil Corporation Ltd. v. NEPC India Ltd. (2003) 114 Comp. Cas 207 Mad, Hyderabad Abrasives and Minerals (P) Ltd. and Ors. v. Andhra Cements Ltd. (2003) 114 Comp. Cas 250 AP, Ramdas and Co. Vs. Kitti Steels Ltd., and Luxmi Industrial Gases Private Limited Vs. Punjab Chemi Plant International Ltd., .

a) He would submit that the Bombay High Court has taken a different stand and on the facts of the case, since the first respondent was aware of the statutory notice and issued a reply, the company petition cannot be rejected on that ground. It is his further submission that in fact, even in the scheme of amalgamation, the address of the first respondent was given as No. 2, Kiruba

Nagar, Thiruppalai, Madurai, Tamil Nadu and sending of notice to the Dindigul address cannot be said to be either mala fide or illegal since previously the Office of the first respondent was situated at No. 61, Meng"les Road, Nagal Nagar, Dindigul 624 003.

b) He would also submit that there are abundant records to show that the first respondent acknowledged its liabilities and there is unimpeachable evidence to show that the first respondent received various amounts. It is his submission that filing of a civil suit is not a bar for filing winding up petition by relying upon the judgment in Varinder Sahni v. MGRM Net Ltd. (2010) 156 Comp. Cas 36 and Indian Oil Corporation Ltd. v. NEPC India Limited (2003) 114 Comp. Cas 207.

9. I have heard the learned senior counsel for the petitioner as well as the first respondent and given my anxious thoughts to the issues involved in this case.

10. The fact that the first respondent company was originally having its registered Office at No. 2, Kiruba Nagar, Thiruppalai, Madurai is not in dispute and in fact, even in the scheme of amalgamation/merger entered on 24.7.2001, the address of registered office of the first respondent company is stated as above. In the said scheme of amalgamation in which the first respondent is a transferee, its address is given as follows:

Transferee Company means M/s. Sheela Rani Textiles Limited, a company formed and registered under the Companies Act, 1956 and having its registered office at No. 2, Kiruba Nagar, Thiruppalai, Madurai, Tamil Nadu.

11. In clause No. 3.5 (d), the scheme states that the transferor company on merger with the transferee company shall have the registered office changed from "Thenur, Madurai District, Tamilnadu" to "No. 2, Kiruba Nagar, Thiruppalai, Madurai, Tamilnadu" and the said clause reads as follows:

On merger, the activities of M/s. Sri Sivakami Mills Limited (SSML) will be carried on in the name and style of M/s. Sheela Rani Textiles Limited (SRTL) and the registered office of the Company shall be changed from Thenur, Madurai District, Tamil Nadu at No. 2, Kiruba Nagar, Thiruppalai, Madurai, Tamil Nadu.

Therefore, as per the scheme of amalgamation, even after the first respondent company took over M/s. Sivakami Textiles Limited, which was having its registered Office at Thenur, Madurai District, the address of registered office of the first respondent company remained the same, viz., No. 2, Kiruba Nagar, Thiruppalai, Madurai.

12. It appears that when the first respondent company commenced its business on 19.4.2000, its registered Office was situated at No. 61, Meng"les Road, Nagal Nagar, Dindigul 624 003 and the company was incorporated on 11.4.2000 and the said particulars are available in the form of company's report submitted u/s 17A of the Companies Act to the Registrar of Companies. Even in Form No. 18, the Notice of situation/change of situation of registered office of the first respondent company, it is stated that prior to 7.5.2002, the registered office of

the first respondent company was at No. 61, Meng"les Road, Nagal Nagar, Dindigul 624 003 and then it was changed to Thenur, Samayanallur Post, Madurai, presumably after the scheme of amalgamation came into effect, even though as per the scheme as stated above, the registered Office of the first respondent company should be No. 2, Kiruba Nagar, Thirupalai, Madurai, Tamil Nadu.

13. As per the memorandum and Articles of Association of the first respondent company, the address of the Managing Director is given as having situated at Dindigul and therefore, it is clear on facts that the first respondent company was having its registered office at Dindigul which was shifted to Madurai and after amalgamation with M/s. Sivakami Textiles Limited, the first respondent shifted its registered office to Thenur, Samayanallur Post, Madurai with effect from 7.5.2002 which is reflected in Form 23AC filed by the first respondent as per Section 220 of the Companies Act to the Registrar of Companies. But, the fact remains that the first respondent received the statutory notice issued by the petitioner.

14. The present company petition was filed by the petitioner u/s 433(e) read with Section 434(1) on the ground that the company is unable to pay off its debts. Sections 433(e) and 434(1) of the Companies Act are as follows:

Section 433. Circumstances in which company may be wound up by Tribunal.-
(a) to (d) xxxxx (e) if company is unable to pay its debts."

Section 434. Company when deemed unable to pay its debts.-

(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding [one lakh rupees] then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order of any Court [or Tribunal] in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the [Tribunal] that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the [Tribunal] shall take into account the contingent and prospective liabilities of the company."

Section 434(1), especially Sub-clause (a) makes it a condition that the creditor shall serve a notice on the company at its registered office by registered post and it is only such creditor who can file application before this Court u/s 434(1) (b). It is also no doubt true that the petitioner filed a suit in the year 2007 against the first respondent for recovery and got an ex parte decree and in the

said suit, the petitioner chose to give the address of the first respondent as "Thenur, Samayanallur Post, Madurai.

15. On the above said background, we have to approach the question of maintainability raised by the first respondent. Under similar circumstances, N.V. Balasubramanian, J. (as His Lordship then was) in *Indian Oil Corporation Ltd. v. NEPC India Limited* (2003) 114 Comp. Cas 207 held that in the winding up proceedings under the Company law being the recognition of law of insolvency, the main issue to be decided is as to the financial status of the company taking into consideration that the general interests of the creditors and contributors are to be protected. Even though the statutory notice is a condition precedent for maintaining a company petition for winding up, it was held that when it is proved that the respondent company received such notice and acted upon the same, the non-sending of letter to the registered office need not stand in the way of proceeding further with the winding up petition. The operative portion of the judgment is as follows:

Though it is essential that notice must be addressed and sent to the registered office, on the facts of the case, the fact remains that the notice was received by the respondent. The Department of Post, India has also issued a certificate to the effect that the registered notice was delivered to the addressee on July 22, 1997. I am of the view that the petitioner has acted in good faith and it is also seen that the company petition was also served on the respondent. I therefore hold that the petitioner has acted bona fide, because the respondent had issued more than one letter to the petitioner and in all letters the address of the registered office of the respondent was shown as No. 36, Wallajah Road, Chennai. Further, prior to the issue of the statutory notice, viz., July 16, 1997, the petitioner had received the letter of the respondent dated June 17, 1997, showing the address of its registered office as No. 36, Wallajah Road, Chennai. Even assuming that the respondent has already changed its registered office to the new address with effect from May 1, 1997, when the petitioner has acted on the basis of the letter issued by the respondent immediately before the despatch of the statutory notice, I hold that it is not open to the respondent to contend that the statutory notice was addressed to the old address and hence, the statutory notice is not valid. The address of the registered office is mentioned as 36, Wallajah Road, Chennai, not only in the letters issued prior to the statutory notice, but also in the letters subsequently issued by the respondent from August, 1997 to January, 1998. Moreover, subsequent to the statutory notice, the respondent has admitted its liability in the agreement dated September 20, 1997. The purpose of issuing notice is to give an opportunity to the respondent to discharge the liability and when subsequent to the notice the respondent admitted the liability and agreed to pay the amount, the wrong reference as to the address of the registered office of the respondent in the statutory notice would not vitiate the notice. Further, this Court in *Rajearajeswari Packaging Products v. Dev Fasteners Ltd.* (2002) 108 Comp Cas 715 : (2002) 2 LW 658 has taken the view that in the case of petition filed u/s 433(e) read with Section 434 of the Companies Act, notice served on

the administrative office is a valid notice. Here also, it is a case filed u/s 433(e) read with Section 434 of the Companies Act and the decision of this Court in Rajearajeswari Packaging Product's case (2002) 108 Comp Cas 715 would squarely apply to the facts of the case.

16. Holding that such a stand of not sending the statutory notice to the registered office, when admittedly the company received the statutory notice, is hyper-technical, under similar circumstances, E. Padmanabhan, J. in Rajearajeswari Packaging Products v. Dev Fasteners Limited (2002) 108 Comp. Cas 715, after referring to two judgments of Bombay High Court in N.L. Mehta Cinema Enterprises (P) Ltd. v. Pravinchandra P. Mehta (1991) 70 Comp. Cas 31 and Vysya Bank Ltd. Vs. Randhir Steel and Alloys (P.) Ltd., and also an earlier judgment of Madras High Court in Viswanathan B v. Seshasayee Paper and Boards Ltd. (1992) 73 Comp. Cas 136 wherein it was held that sending of notice to the registered Office is a mandatory requirement u/s 434(1)(a) of the Companies Act and there cannot be any presumption about company's inability, and by distinguishing the said three judgments, held as follows:

In other words, it is sought to be contended that in the absence of service of notice in conformity with Section 434(1)(a) by serving a notice on the registered office of the company, no application for winding up is maintainable. In this case the liability is not being denied and the receipt of notice by the respondent company at its administrative office is not disputed. But the hyper-technical objection raised is that such notice should have been served at its registered office and for want of service of notice on the registered office of the company, the company application is not maintainable, is the only and substantial contention advanced. The petitioner being a creditor is required to make a demand for payment. It is not in dispute that the statutory notice had been served on the respondent company at its administrative office, but it has not been served at its registered office. Learned Counsel for the respondent company relied upon the decision of the Bombay High Court in N.L. Mehta Cinema Enterprises (P) Ltd. v. Pravinchandra P. Mehta (1991) 70 Comp Cas 31 in support of its contention that the demand notice u/s 434(1)(a) must be served only on the registered office of the company and that service on the administrative office is invalid. However the Karnataka High Court has taken a different view in Manganese Ore India Ltd. v. Sander Manganese (1999) 98 Comp Cas 755. In this pronouncement, the Karnataka High Court held that a notice served not on the registered office of the company, but on its administrative office, a company petition is maintainable.

Learned Counsel for the respondent relied upon the judgment of AR. Lakshmanan, J. as he then was, in B. Viswanathan Vs. Seshasayee Paper and Boards Ltd., , where the learned Judge held that the notice is invalid because in the notice wrong pin code was mentioned. In the same case it was pointed out that the notice caused was addressed to the managing director only and not to the company. Further the registered office of the company is at Pallipalayam,

Salem District while the notice has been sent to Pallipalayam with a wrong pin code and in view of the said defect the learned Judge held that notice does not conform to the mandatory requirement of Section 434(1)(a) of the Act. That is not the case here.

In this case, notice has been sent to the company, but to its administrative office and it has been served on the company besides; besides copies had been forwarded to the managing director as well as other directors of the company. Presumably, because of sending copies to other directors including the IDBI's nominee might have caused certain amount of embarrassment and therefore the respondent company might have taken the notice as offending and is such a course. This is also evident from the stand taken in the counter that the petitioner was called upon to meet the managing director of the respondent-company for discussion. It is well settled that effect of notice which is validly given raises a presumption, as to the liability of the company to its debt and the same renders the company liable to be wound up compulsorily. The consequences of failure to comply with the notice sent u/s 434(1)(a) are definitely far reaching namely, presumption that the company is unable to pay its debts, this provision required to be strictly construed.

17. The Division Bench of Andhra Pradesh High Court in Ramdas and Co. v. Kitti Steels Ltd. (2001) 103 Comp. Cas 199 AP held that even in the absence of notice sent in compliance of Section 434 of the Companies Act, if it is proved to the satisfaction of the Court that the company is unable to pay off its debts, the application for winding up cannot be thrown out and the relevant portion of the judgment is as follows:

25. It is an admitted fact that notice u/s 434(1)(a) of the Act was not served on the respondent company on its registered address. Therefore, the presumption of inability to pay the debts may not be drawn against it under this section. Under Clause (b) *ibid*, the company shall be deemed to be unable to pay its debts when a decree remains unsatisfied while under Clause (c), if it is proved to the satisfaction of the court that the company is unable to pay its debts. And in determining whether the company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. Thus, it appears that even in the absence of notice u/s 434(1)(a) of the Act, if the applicant proves to the satisfaction of the court that the company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. A creditor can claim winding up of the company u/s 433(e) of the Act with the aid of Section 434(1)(a) and/or 434(1)(c) of the Act. If the case u/s 434(1)(a) is not proved, he can prove his case u/s 434(1)(c). Under these circumstances, merely because notice u/s 434(1)(a) of the Act was not validly served on the respondent company, the application for winding up cannot be thrown out, because as noted above, the petitioner-firm has proved the indebtedness of the respondent company as also the failure and/or negligence to pay the debt in question. The question whether the respondent

company is unable to meet its current liabilities as also the contingent and prospective liabilities is a question to be decided after advertisement of the petition and during the enquiry.

18. That was also followed by the Andhra Pradesh High Court subsequently in Hyderabad Abrasives and Minerals (P) Ltd. and Ors. v. Andhra Cements Ltd. (2003) 114 Comp. Cas 250.

19. The same was also the view of Punjab and Haryana High Court in Luxmi Industrial Gases Private Limited Vs. Punjab Chemi Plant International Ltd., , wherein it was held as follows:

The other contention raised on behalf of the respondent company that the notice has not been served in accordance with the provisions of Section 434 of the Companies Act, is also misconceived. No doubt the notice, in question, was addressed to the managing director but as the managing director of the respondent company. It may be true that the notice ought to be addressed to the respondent company and not the managing director but that would be true if the receipt of the notice on the respondent company was not proved or not admitted. In the present case, the receipt of the notice has been duly proved. The written statement has also been filed on behalf of the respondent company. In paragraph No. 12 of the reply/written statement filed on behalf of the respondent company, it has been admitted that the notice was served and received by the managing director of the respondent company. Admission of this fact cannot be ignored for the purposes of determining this controversy. Once notice is received by the respondent company, may be through its managing director, and this fact is admitted, there would be substantial compliance of the provisions of Section 434 of the Companies Act. The notice served under Sections 433 and 434 of the Companies Act had clearly given all the facts. The period of 21 days was also specified in the notice and it was specifically averred that in default a petition for winding up would be filed. It is also not disputed in the reply that the registered office of the respondent company is at the address, on which the notice was sent.

20. On the facts of the present case, which stand better than those cases decided and narrated above, it is not only clear that the first respondent received the statutory notice but also chose to give reply through its counsel and therefore, there is absolutely no point for the learned senior counsel appearing for the first respondent in harping upon the hyper-technicalities. Further, as far as the address of registered office of the first respondent is concerned, there are at least three addresses by way of change effected in respect of first respondent company and it is not as if the statutory notice issued by the petitioner was sent to a totally unknown place as held by this Court (E. Padmanabhan, J.) in the above said judgment. Certainly, two Bombay High Court judgments and the earlier judgment of Madras High Court in B. Viswanathan's case are, on facts, different. Therefore, I have absolutely no hesitation to hold on the facts of the present case that even if the statutory notice issued by the petitioner was not sent to the correct address of the registered Office of the first respondent

company, the same shall not stand in the way of considering the company petition and the company petition cannot be thrown out.

21. The further submission of the learned senior counsel for the first respondent that the filing of suit by the petitioner will bar the winding up proceedings under the Companies Act is unsustainable. While the civil Court is to vindicate the private rights of parties, the company petition filed for winding up is to decide about the capacity of the company to repay its debts which has got larger ramification while considering the plight of creditors and contributories of the company. Simply because the petitioner has filed a suit based on the mortgages stated to have been executed by one of the Directors of the first respondent company creating security for repayment of amount, which has been subsequently advanced by the petitioner, that cannot stand in the way of the petitioner in maintaining the company petition for winding up when the petitioner is able to establish before this Court that the first respondent company is unable to pay off its debts which is a basic requirement for winding up proceedings. That was also the view of this Court in *Varinder Sahni v. MGRM Net Ltd.* (2010) 156 Comp. Cas 36.

22. As far as the crucial aspect viz., the inability of the first respondent company to pay off the debts is concerned, as correctly submitted by the learned senior counsel for the petitioner, the balance sheet filed by the first respondent as on 31.3.2006 clearly shows the trade deposits made by the petitioner to the extent of Rs. 75 lakhs and advance received from the debtors to the extent of Rs. 3,96,610/-. That apart, the agreement between the petitioner and the first respondent dated 19.1.2006 and the endorsement made on the said agreement show it abundantly clear that the first respondent received various amounts from the petitioner viz., on 27.1.2006 Rs. 25 lakhs, on 30.1.2006 Rs. 5 lakhs, on 17.2.2006 Rs. 20 lakhs, on 6.3.2006 Rs. 5 lakhs, on 21.3.2006 Rs. 5 lakhs and on 29.3.2006 Rs. 10 lakhs. The proofs for receipt of further amounts are evident as it is seen in the supplementary agreement entered between the petitioner and the first respondent dated 17.4.2006 by which the first respondent received a sum of Rs. 32.32 lakhs against electricity charges and further agreement dated 7.9.2006 by which the first respondent received an additional sum of Rs. 70 lakhs by hypothecating the property of Managing Director Mr. R. John Sundara Pandian. The accounts maintained by the first respondent and the books of accounts also clearly prove various amounts received by the first respondent from the petitioner.

23. These are all documents which go to show about the receipt of various debts by the first respondent from the petitioner. The confirmation letter sent by way of fax message by the first respondent dated 20.9.2006 shows the receipt of Rs. 30,73,197/- by the first respondent from the petitioner. Again, the receipt of Rs. 16.62 lakhs from the petitioner by the first respondent for payment of wages to the employees of the first respondent for Deepavali in 2006 was admitted by way of fax message issued by the first respondent dated 17.10.2006 and that was

also followed by a letter issued by the first respondent. Further, the ledger account of the first respondent company as produced by the petitioner shows that as on 8.9.2006, the first respondent was due to the petitioner to the extent of Rs. 1,62,79,092/- and that has been followed by a further ledger account which shows that as on 8.9.2006, there was a due to the extent of Rs. 30 lakhs.

24. In the presence of these clinching documents, there is absolutely no difficulty to conclude that the first respondent has acknowledged its liability and despite the receipt of statutory notice, the first respondent is unable to repay the amounts to the petitioner and therefore, in my considered view, the objection raised by the first respondent against maintainability of the company petition is not sustainable and accordingly, the company petition is ordered to be admitted. Let notice of publication of the petition be effected by the petitioner in two dailies, viz., Business Line (English edition) and Daily Thanthi (Tamil edition) in accordance with the Companies (Court) Rules, 1959. The Official Liquidator attached to this Court is appointed as the Liquidator of the Company with a direction to take over all assets and records of the company wheresoever located and to proceed in the matter in accordance with law. The Official Liquidator shall file its report within two months of taking over possession of the assets and records of the company.

List this matter for further direction on 29.11.2010.