

(1985) 07 KAR CK 0030
In the Karnataka High Court
Case No : Company Petition No. 8 of 1980

State Bank of India

APPELLANT

Vs

Hegde and Golay Limited

RESPONDENT

Date of Decision : 26-07-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Companies Act, 1956 — Section 433, 433 (e), 439 (1) (b), 528, 529

Citation : (1987) ILR (Kar) 2364

Hon'ble Judges : Bopanna, J

Bench : Single Bench

Advocate : S.G. Sundaraswamy, for the Appellant; Sampath Kumar and S. Shaker Shetty, for the Respondent

Final Decision : Dismissed

Judgement

Bopanna, J.—This Petition is filed by the State Bank of India (hereinafter referred to as "the Bank") having its Branch Office at J.C.Road, Bangalore, under the provisions of Section 439(i)(b) read with Section 433(e) and (f) of the Companies Act 1956 (in short "the Act") praying for the winding up of the respondent company Hegde & Golay Limited (in short "HGL") and for other incidental reliefs.

1.1 HGL was incorporated on 2/7/1965 under the Act initially as a Private Limited Company, limited by shares. It became a public Limited Company with effect from 27/6/ 1974 by virtue, of the provisions of Section 43A of the Act. Its nominal capital is Rs 50 lakhs divided into 50,000 equity shares of Rs 100/-each. The issued and paid-up capital or credited as paid-up is Rs 50 lakhs. HGL, among other things, is engaged in the manufacture and sale of various types of horological instruments both electronic and mechanical, printed circuits, their accessories and parts.

2. It is the case of the Bank that HGL in order to augment its manufacturing and trading activities applied to it for various cash credit advances. It represented to

the Bank that it was engaged in the manufacture of watches and other instruments under licence pursuant to a collaboration agreement with a reputed, watch Manufacturing Company of Switzerland by name Golay S.A., that there was a great potential for the manufacture of Watches in this Country and accordingly HGL was incorporated and contemporaneously it had set-up 18 ancillary units (in short "the units") for the manufacture of various parts and accessories required for watches and printed circuits and accordingly it sought financial assistance of the Bank for these units also, each of whom had been incorporated as a separate Company under the Act. Its further case is that acting on the representation of HGL and in particular the Chairman and Managing Director Sri B.T. Shankar Hegde (hereinafter referred to as "Sri Hegde"), it gave financial assistance in different ways to HGL as well as to the units commencing from the year 1974. The total amount advanced by the Bank to HGL and the units exceeded Rs 338 lakhs but the same has remained unpaid inspite of repeated demands. The amounts due from HGL to the Bank as on 31/3/1980 are as follows :-

Sl. No. Head of A/c

Limit sanctioned

Amount due

1. Cash Credit A/c No. 1

Rs. 25,00,000

Rs. 24,50,000.00

2. Cash Credit A/c No. 2

20,00,000

20,00,000.00

3. Cash Credit A/c No. 3

18,00,000

14,01,954.89

4. Cash Credit A/c No. 4

5,00,000

5,00,000.00

5. Cash Credit A/c No. 5

25,00,000

25,00,000.00

6. Cash Credit A/c No. 6

77,00,000

1,68,62,365.84

7. Cash Credit A/c No. 7

40,00,000

36,47,715.36

Total :

2,10,00,000

2,93,62,036. 09

And the aggregate amounts due from HGL inclusive of interest is about Rs. 6,36,30,504. 75. These advances are evidenced by the execution of appropriate loan documents in favour of the Bank. They are demand promissory notes drawn by the Bank in favour of Hegde and his wife Smt. Hegde, both of whom are admittedly Directors of HGL. Both of them had personally stood guarantee to the Bank for the repayment of the loans of HGL and therefore these promissory notes were endorsed in favour of the Bank and thus the Bank became holder-in-due-course thereof. HGL and its Directors, namely Sri & Smt. Hegde have also acknowledged their liability and confirmed the balances due for some accounts in the year 1977 and for others in 1978.

2.1 As security for repayment of these moneys advanced by the Bank inclusive of interest and Bank charges etc., HGL had hypothecated its stocks and book debts and had pledged some of its machinery to the Bank by separate agreements/ letters of hypothecation or pledge. But the Bank had permitted HGL to retain the custody of the pledged machinery and work the same. The charges created by HGL for the aforesaid hypothecation were also registered with the Registrar of Companies as required under the Act.

2.2 Additionally, HGL had borrowed moneys to an extent of Rs. 7,50,000/- from the Karnataka State Financial Corporation (in short "KSFC") in the year 1969 and as security for the said amount had mortgaged to KSFC all its land and building and it had also hypothecated some of the plant and machinery. The said loan is still outstanding and KSFC has taken certain coercive steps as provided for under the State Financial Corporation Act and to recover the moneys due to it. According to the Bank, the total liability of HGL towards KSFC either as principal debtor or as guarantor exceeds Rs. 50 lakhs.

2.3 The liability of Sri Hegde as guarantor for HGL and the units exceeds Rs. 3.38 crores on the date of the petition and according to his own declaration the assets possessed by him are only of the value of Rs. 36. 24 lakhs which is a very small fraction of his total liability. Out of this Rs. 36. 24 lakhs, a sum of Rs. 9. 57 lakhs represents investment in the shares of HGL, the realisable value of which is practically nil. The balance of Rs. 26. 27 lakhs includes a sum of Rs. 22. 36 lakhs

shown as due from HGL to Sri Hegde, the truth and validity of which is open to question, and in any event is of little value and consequence in view of the overall financial position of HGL. In the very same declaration published by Sri Hegde, his wife's assets are valued at Rs.2,00,400/- by way of investment in shares and Rs. 3,19,089/-. as other assets, the former of which has no market value at all. Therefore, both the guarantors are not possessed of means of any appreciable value.

2.4 The assets of HGL, namely, the installed plant and machinery are subject to a charge in favour of KSFC. They are also subject to a pledge in favour of the Bank but since they are in the custody of HGL and it is using the same for its manufacturing purpose, the value of the plant and machinery pledged to the Bank is depreciating fast and their depreciated value is far below the amounts due to the Bank.

2.5 As regards the stocks hypothecated to the Bank, they consist mostly of raw-materials, spares and parts. Their saleable value is negligible more particularly so in the hands of the creditor who is not a manufacturer. It is common knowledge that only when they are converted into finished products they acquire a saleable value.

2.6 On these facts, the value of the stocks held by HGL being inadequate to cover even a part of the debt due by HGL and interest which is accumulating at the rate of 3.6 lakhs per month, the financial position of HGL would become worse day-by-day with an asset which is depreciating fast on the one hand and a debt which is swelling up day-by-day with addition of interest and other charges etc., on the other hand.

2.7 The Bank has also made a serious grievance of the breach of various covenants entered into by HGL at the time of executing the loan documents in its favour and they are :

(a) One of the conditions of the agreement of hypothecation executed by the HGL is that it should submit to the Bank monthly, as far as possible, a report by it of stock statements with a list of current insurance policies verified by certificates of its Managing Director and the Manager for the time being stating that the quantities and the amounts stated are correct and that all stocks are fully covered by insurance in terms of Clause 8 of the hypothecation agreement. But the covenant was observed only in its breach as after November 1978 no statement of stock and no certificate in regard to the quantities and amounts of stock and insurance thereof had been furnished by HGL, with the result, the Bank was kept in dark of the particulars and values of the stocks of the spares and parts and other goods hypothecated to it.

(b) the Bank was entitled to enter any place where the hypothecated goods of HGL may be found and inspect the same and check any statements or account, reports and information furnished by HGL in terms of Clause 6 of the hypothecation agreement. The said clause also provides for the Bank to take

possession of the hypothecated goods and i dispose of the same for realisation of its dues. But it had been the experience of the Bank that whenever it tried to get i information about the stocks under hypothecation and i inspect the same, HGL obstructed all such attempts and thwarted all the efforts of the Bank in that behalf. In fact, HGL has refused permission to any of the Bank Officers to enter the factory premises of the Company after February 1978 though it was sending some statements of stocks till November 1978. But these statements by themselves were useless because the Bank could not verify the correctness thereof by personal inspection. After November 1978 even these stock statements ceased to come and the queries made by the Bank brought only long and evasive replies.

(c) The book debts were also hypothecated to the Bank. But HGL would not furnish any particulars of these debts and the state of recovery, though under Clause 5 of the hypothecation agreement HGL was enjoined to carry on business efficiently and to furnish statements, reports, accounts, documents and information. HGL having failed to carry out this obligation, the Bank was kept in darkness about these book debts.

2.8 In view of these breaches of the covenants on the part, of HGL, the Bank wrote a detailed letter dated 22-7-1978 (Exhibit P-96) drawing the attention of HGL to the numerous breaches committed by it and calling upon it to make amends forthwith if it was interested in the continuance of the credit facilities sanctioned by the Bank. But instead of making amends, HGL wrote a long reply dated 18-8-1978 Bx.R-40) finding fault with the Bank and accusing the Bank of non-cooperation, intransigence, indecision etc. Matters, did not improve thereafter and therefore, the Bank wrote a further letter dated 31-3-1979 reminding HGL of several breaches which were continued and calling upon it to do the needful without further delay. No reply was received from HGL and therefore, by a detailed letter dated 12-7-1979 the Bank intimated HGL that the cash credit advances sanctioned had been closed and called upon HGL to pay the amounts which were then outstanding in the several accounts. By reply dated 2-8-1979 HGL accused the Bank of committing various irregularities and called upon it to legalise the same.

2.9 On these facts the Bank has averred that HGL was in no mood to repay its dues and was only interested in faulting the Bank on baseless and untenable grounds. According to the Bank, HGL had utilised the money advanced to it for purchase of the machinery and for working capital under "the several facilities granted to it and instead of paying from the sale proceeds to the loan accounts with the Bank, it was Misappropriating the same by banking with other Banks and dealing with those funds as it liked. The proceeds of the watches and printed circuits are indeed the proceeds of the lank security. Therefore, HGL could not lawfully deal with it except by crediting the same to its loan accounts with the Bank. The Bank has also alleged that its attempt to have one of its nominee on the Board of Directors of HGL so that he could be acquainted himself with the

manner of functioning of HGL and that he could be able to monitor the manner with which the moneys provided by the Bank were being utilised was also thwarted by HGL by refusing to accept the nominee as the Director on the ground that the person nominated was not acceptable to HGL. Thereby, HGL has successfully resisted the attempts of the Bank to acquaint itself with the manner in which HGL's affairs were being conducted. Another specific allegation against HGL is that while sanctioning the credit limit of Rs. 40 lakhs in September 1977 for the "crash programme" of HGL to make watches from the components imported under CKD/SKD licence the bank had imposed the condition that HGL should submit at regular intervals returns showing the production, sales and other operating data. This was also not complied with by HGL.

2.10 The Bank being a creditor to whom a large sum of money is outstanding as stated above it is entitled to an order of winding up. Further, from the manner in which HGL has been functioning, it is obvious that its further continuance will only be detrimental to public interest and is likely to expose many other companies who have granted loans to HGL to great damages and loss. Therefore, it is just and equitable otherwise to wind-up the company. The Bank has filed this petition without prejudice to its right as the secured creditor and therefore without surrendering any of the securities it has presented this petition notwithstanding that it is a secured creditor.

3. HGL in its very elaborate statement of objections has joined issue with the Bank on the various allegations made against it.

(a) According to it, it was the Bank which had approached Sri Hegde to bank with it for all the requirements of HGL and induced it by its various promises and assurances which were not kept to close its over-draft facility of a concessional rate of interest in the Punjab National Bank and to switch over to the Bank in July 1973 on current account basis without any credit facility. It also assured HGL that it would open a branch at HGL complex without loss of time as till May 1977 HGL had to shuttle 40 kms. every day to reach the Bank for its day-to-day transactions.

(b) Though the Bank promised quick finalisation of the terms of cash credit, it did not do so and instead of finalising the credit arrangements properly, it started releasing amounts on adhoc basis at interest rates higher than what are applicable to finalised credit arrangements. Despite several requests to finalise the said arrangements, the Bank did not take any steps resulting in loss to HGL in the shape of interest charges and non-availability of funds at the appropriate and critical times and consequently HGL suffered business losses. Even on the date of filing objections the cash credit terms had not been finalised and the same was shown by the Bank as clean cash credit bearing high rate of interest which was recovered from HGL by debiting to its working capital account. By such excessive interest HGL was put to loss of Rs 15 lakhs under the cash credit account Nos. 1, 2 and 3. Since KSFC had agreed to finance the project requirement including 100% of the foreign exchange content of the ancillary

units" capital goods, the Bank's role was restricted to financing the working capital requirements of the project and total financial requirement of HGL only.

3.1) To a specific reference to the letter dated 22/7/1978 issued by the Bank making a detailed reference to the alleged omissions and commissions, HGL relied upon its letter dated 18/8/1978 (Ex R-40) and asserted that that letter proved beyond doubt the Bank's act of trying to cover-up their faults and for having caused HGL great prejudice. That letter contained the following proposal for rehabilitating HGL and to carry-out its programmes as envisaged. I have made a specific reference to those proposals since they are of some significance for the appreciation of the evidence on record and for coming to a correct conclusion on the disputed questions of fact. They are as follows :-

"(a) State Bank of India to give immediately Rs. 75 lakhs additional working capital as was discussed and agreed to in January 1978.

(b) To merge into one Term Loan the Cash Credit I loan of Rs. 25 lakhs, Cash Credit II Rs. 20 lakhs, Cash Credit III of 18 lakhs (Bridge Finance) totalling to Rs. 63 lakhs with a moratorium of 2 years for interest and instalments the same to be repaid in 6 annual instalments of Rs. 10 lakhs each and one final instalment of Rs. 3 lakhs ; the first instalment falling due at the end of 24 months from the date of term loan agreement. The interest for the first two years to be paid in equal instalments along with interest for the 3rd and 4th year. Hence, the SBI should release Rs 4 lakhs (Balance remaining out of Rs. 18 lakhs Bridge Finance) immediately to clear the machinery at Madras port.

(c) Since the interest in the accommodation was being reimbursed by the State Bank of India to themselves out of working Capital funds from February 1977, State Bank of India should reimburse Rs. 18.65 lakhs towards working capital for the amount taken by them out of the Rs. 40 lakhs working capital accommodation and convert this along with Rs. 18-35 lakhs interest due into a term loan of Rs. 37 lakhs with a moratorium of 2 years for interest and instalments. This loan will be repaid in six annual instalments of Rs. 5 lakhs each and one final instalment of Rs. 7 lakhs, the first instalment falling due at the end of 24 months from the date of term loan agreement. The interest for the first two years will be paid in equal instalments along with the interest for the third and fourth year.

(d) The total working capital accommodation of Rs. 222 lakhs will bear interest at 12 1/2% per annum for the first two years and thereafter at normal rates.

(e) Within the overall working capital limits facility for opening letters of credit upto the extent of Rs 40 lakhs to be sanctioned.

(f) KSIIDC guarantee of Rs. 20 lakhs to be retained by the Bank for the margin money for the Rs. 75 lakhs additional working capital accommodation as indicated in point No. 1 till the sufficient margin is built by the company as per projections.

"OPERATIONS OF THE ABOVE PROPOSALS"

1. Working Capital limits will consist of Rs. 107 lakhs + Rs. 40 lakhs + Rs. 75 lakhs additional facility totalling to Rs. 222 lakhs. The interest on the same will be met out of the working of the company monthly, 12 1/2% per annum to be charged for the first 2 years.

2. Term loan No. 1 will consist of Rs. 75 lakhs cash credit No. 1, Rs. 20 lakhs cash credit No. 2 and Rs. 18 lakhs cash credit No. 3 (Bridge Finance) totalling to Rs. 113 lakhs secured by hypothecation of plant and machinery. This loan will have a moratorium of 2 years for interest and instalments.

3. Term loan of Rs. 37 lakhs consisting of Rs. 18.65 lakhs interest to be reimbursed to the Company and Rs. 18.35 lakhs interest due. This loan will have a moratorium of 2 years for interest and instalments.

4. The projections enclosed are on the basis of above facilities being made available to us immediately. In case of delay, the re-scheduling will be done accordingly.

5. It would be appreciated and will be of immense help at this critical juncture if the 3% interest already collected from us in excess is refunded, as this will help in a faster expansion.

6. Based on the above proposals the company will be able to operate the account and achieve the targets as per the detailed working enclosed Conclusion :

The acceptance and implementation of the above proposal by the Bank immediately will enable the company to carry out the programme as envisaged".

3.2) HGL also accused the Bank of causing commercial injury to it by not releasing the assured amounts in time and by delaying and withholding the loans reimbursing to themselves towards interest and other charges unilaterally out of the sanctioned loans. The Bank also caused injury to HGL in its business and profits. If the amounts reimbursed by the Bank to themselves from time to time amounting to Rs. 80 lakhs had been made available to HGL, it would have resulted in the additional sales of Rs. 374.70 lakhs and the pre-tax profit for Rs. 29.60 lakhs after meeting the interest charges in 1978 itself.

3.3) HGL also relied on the helpful attitude of the State Government by arranging a meeting of the various authorities to bring about an amicable settlement in fairness to all concerned. Consequently, a meeting was arranged on 25-9-1978 in which the officials of the Bank, the Chairman and Managing Director of KSIIDC and Sri Hegde on behalf of HGL participated. Sri Hegde on behalf of HGL wanted to know whether in the event of the management audit finding that the Bank had been responsible for many delays, the Bank would adequately compensate the loss arising out of its delays. The Chief General Manager Mr. Datta stated that the Bank could not give such assurance. Likewise, there are several other allegations against the Bank in the statement of objections.

3.4) HGL has also relied on the encomiums showered on it by very eminent officials and industrialists who visited the complex between 1975 and 1979 and on its claim as being a pioneer in India in the manufacture of various types of printed circuits and possessing various facilities for the manufacture of various sophisticated equipments. It has accused the Bank offering to sell the company to the house of Tatas and thereby depriving Sri Hegde of all the Control over, the affairs of HGL. In Para 22 of the statement of objections it has averred as follows : -

"(xxii). Throughout the Company's efforts to settle the dispute, HGL was always keeping the Government of Karnataka fully informed. When the Bank realised that their coercive method of forcing the Chairman to handover the company to Tatas was frustrated, they misinformed the State Government about the facts of the case and in collusion with KSFC, tried to get the company taken over by Tatas. However, they failed for the simple reason that the company had kept the State Government fully informed at each stage. The Chairman of HGL presented the facts as they were to the State Government and in fact persuaded them to appoint 2 senior IAS Officials as Directors of the board of HGL and further co-opted the Managing Director of KSFC and Chairman and Managing Director of KSIIDC into its board. It may be noted here that this was done by the company on its own volition and its desire to gain through the mature experience of such senior Government Officials though there is no shareholding or financial assistance by the State Government to HGL. In spite of all these, the Bank insisted that the Chairman of HGL should resign and handover the company to somebody else though the Bank had no authority to do so. In view of such difficulties being faced by HGL and ancillaries, the Minister of Industries of Government of Karnataka himself arranged a meeting with the Chairman and representatives of the Bank and also addressed letters to the Bank to bring about an amicable settlement in fairness to all concerned".

3.5) Its further defence is that even assuming but not admitting that HGL was owing to the Bank, in order to raise the presumption of inability to pay, it is not enough merely to show that HGL had omitted to pay the debts despite service of notice. It must be further shown that HGL has omitted to pay without reasonable excuse. The existence of a prima facie valid counter claim of HGL would constitute reasonable excuse for non-payment of the amounts due. As there are prima facie counter claims against the Bank since 1976, it is a false and mala fide statement to say that HGL is unable to pay its debts, that the amounts claimed by the Bank are false and bloated-up and only a fraction of the amounts constitutes real advance and put of this, a portion has to be converted into a term loan and the balance of the working capital is secured fully ; therefore no amount was immediately due to the Bank.

3.6) On the merits of the petition, HGL has pleaded that where the petition is filed by the creditor knowing that there is bona fide dispute about the debt, it is an abuse of process of Court and in this case, it is conclusively proved by the

statements and the documents produced that there has been a bona fide dispute since 1976 and this has been the subject matter of correspondence between the parties. In fact, the State Government also have been trying to settle the dispute and the Bank is well aware of the same. It is well settled law that where a petition is filed by a creditor knowing that there is bona fide dispute about his debt, the petition for winding up would be clear abuse of the process of the Court. In the present case not only there is a bona fide dispute since 97, but even the petition itself is made only for mala fide reasons and is it highly belated.

3.7) In the reply filed by the Bank, they have reiterated all the averments made in the petition. They have relied on the Balance Sheets of HGL for proving that it is not commercially solvent and the alleged profits shown by HGL were on the basis of the accounts which did not reflect the real and correct state of affairs. According to the Bank, HGL had admitted its liability in a sum of Rs. 2,54,50,857 as secured loan for the year ending 30-6-1979 as against a sum of Rs. 2,27,97,077 for the previous year. This admission is found in the balance sheet produced as Annexure-A to the objection statement. This admission of the liability of HGL to the Bank and the failure to pay even the interest for the year ending 30/6/1979 though a set-off is claimed in the profit and loss account, should be enough for this Court to order winding up of HGL.

3.8) The Bank. has also relied on the admission made by HGL in the balance sheet for the year 1977-78 published in January 1979, In that balance sheet HGL has admitted various amounts due to the Bank and there has been no challenge to the correctness of the outstanding due to the Bank and is unequivocally admitted by HGL. Therefore, the denial of the liability by HGL is false and vexatious and only further establishes the mala fide intention of HGL and its inability to pay its due.

3.9 The Bank has further averred that the liability to pay has been admitted by HGL in all its balance sheets and also by the execution of the confirmation of balance and revival letters in December 1979 and therefore, the desperate attempt made by HGL to disown its liability to the Bank, which is a public institution, is detrimental to the public interest and this Court should not permit HGL to carry on its ways of "scorched earth policy" for sustaining the interest of few individuals for enriching themselves by extravagant perquisites, uncalled for foreign jaunts, tendentious allegations and by keeping the public sector institutions like the Bank, KSFC and KSIIDC "at bay" without repaying anything to the Bank. The Bank has repudiated each and every one of the allegations made against it by HGL in the statement of objections; but having regard to the narrow scope of the enquiry before this Court, it is unnecessary to refer to in detail to the various charges and counter charges, allegations and counter-allegations made by the parties.

3.10) Two facts emerge from the detailed statement of objections filed by HGL. They are :

(i) The Company did not challenge the right of the Bank to. adjust the amounts sanctioned towards accrued interest on the cash credit amounts already advanced.

(ii) That the company did not take the stand that the documents executed by if in favour of the Bank in proof of the cash credit arrangements were forged documents or they were secured by the Bank by putting undue influence oil the officials of HGL and on Sri Hegde.

4. Though this petition was filed in the year 1980, the matter has come up for final disposal after a lapse of more than five years. Parties are themselves to blame for this in donate delay. For nearly two years the Bank, for no good reason, did not pursue the matter before this Court. Advertisement of the petition was hotly contested by HGL by challenging the order of this Court right upto Supreme Court. Three contentions were raised for the dismissal of the Petition before advertisement, namely :

(i) that the complaint of HGL that the Bank had charged excess interest and that the Bank in the disbursement of loan amounts had unilaterally adjusted the same towards interest, cannot be dismissed as vague and it is a matter for evidence and therefore, the defence of HGL is bona fide and genuine.

(ii) that the debts in question are barred by limitation raise a substantial question of law requiring recording of evidence and detailed arguments and as such the Company Court in its summary jurisdiction should not decide that question but leave it to the Civil Court where a substantial defence in the pending suits has been taken, and

(iii) HGL is commercially solvent and therefore it is not just and equitable to proceed to wind-up this company even if it is found that debt was due and payable by the HGL to the Bank.

41. The order of this Court ordering advertisement was affirmed in appeal by a Division Bench of this Court in O.S.A 9/83 by its Order dated 14-6-1983. However, HGL obtained special leave from the Supreme Court on 18-8-1983, but by that time advertisement of the Petition had already been made pursuant to the order of this Court dated 22-4-1983 and therefore, the Supreme Court dismissed the appeal by its order dated 18-8-1983 reserving liberty to the parties to raise all such contentions as are open to them and directing this Court to decide those contentions without reference to the observations made by the Division Bench of this Court in O.S.A. 9/83. Accordingly, evidence was recorded by this Court and recording of evidence was concluded some time in April 1985 and the records were made ready for hearing on 25-6-1985.

5. In the light of the above pleadings and the arguments advanced by the Learned Counsel, the following points arise for consideration in this Petition :

1. Whether the Bank has proved that a sum of Rs. 2,93,62,036-09 is due from HGL as on 31-3-1980 ?

2. Whether there is an admission of this debt by HGL as contended by the Bank ?
3. If not, whether the Bank has proved that a substantial part of the debt is due from HGL ?
4. Whether there is a bona fide dispute in good faith regarding the debt due from HGL which raises a plausible defence in support of HGL ?
5. Whether HGL has proved a substantial counter-claim against the Bank ?
6. If there is a bona fide dispute, whether such dispute is only confined to interest on the amounts advanced by the Bank and not on the principal amount ?
7. If so, whether the Bank is entitled to an order of winding-up on the principal amount ?
8. Whether the Bank being a secured creditor, is entitled to an order of winding-up if it is proved that HGL has sufficient security to discharge the said debt ?
9. Whether this Petition is maintainable in view of the pending suits against HGL and on the admitted fact that the Bank has not given up its security ?
10. Whether the filing of suits by the Bank in the Civil Court would disentitle it to an order of winding-up in these proceedings ?
11. Whether the Petition is bad in law in view of Order II, Rule 2 of C.P.C ?
12. Whether it is open to HGL to contend that the documents on which the Bank relies for proving the debts due are forged documents and therefore no reliance could be placed on those documents in proof of the debt due from HGL ?
13. Is HGL liable on the basis of these documents on the ground that it has ratified and adopted those documents in favour of the Bank ?
14. Is the Petition barred by time ?
15. Whether on the facts and circumstances of the case, the date of presentation of the Petition is not relevant for the purpose of limitation, but the date on which the relief that has to be granted ?
16. Does the plea of limitation raise a substantial question of law which could only be determined by the Civil Court in the pending suits between the parties.
17. Is the acknowledgement in writing claimed by the Bank is not an acknowledgement in the eye of law binding HGL as the signatories to the revival letters and the balance sheets are none other than Sri Hegde and Smt. Hegde, who are themselves in the position of creditors of HGL being the payees under the various promissory notes executed by HGL ?
18. Whether HGL is commercially solvent and therefore it is not just and equitable to wind up the same even if it is found the debt is due and payable by it to the Bank ?

6. Since the petition is filed on the main plea that HGL was unable to pay the debts due to the Bank, that first issue will have to be answered first and an answer to that issue will also decide some of the other issues including the genuineness or otherwise of the documents which support the case of the Bank.

6.1) The loan documents and the mode of documentation on which the Bank mainly relies in establishing the debt due from HGL are as follows :-

6.2) By way of illustration, a sum of Rs. 25 lakhs sanctioned as Cash Credit to HGL is first evidenced by Exhibit P-77 the promissory note dated 25-3-1974 where the payees are Sri and Smt Hegde - the Directors of HGL. This promissory note discloses that sum of Rs. 25 lakhs for value received with interest from 5-3-1974 at 2 1/2% over the Bank advance rate, minimum 11 1/2% with monthly rates, is executed by HGL duly signed by Sri and Smt Hegde as Managing Director and Director respectively of HGL. This demand note is endorsed in favour of the State Bank of India by Sri and Smt Hegde. This promissory note is followed by a D.P. Delivery Note dated 25-3-1974 (Ex. P-78), That letter reads as under :

"Please take delivery of the accompanying DEMAND PROMISSORY NOTE dated 25-3-1974 for Rs.25,00,000/- made by us in favour of Shri B T. Shankar Hegde & Smt. Shaila S. Hegde.

We further request you to note that we dispense with a notice of dishonour in terms of Section 98(a) of the Negotiable Instruments Act, 1881, and that in the event of payment not being made on demand the Bank is at liberty to give time for payment to either of us without discharging the other of us from liability."

That letter is signed by Sri and Smt Hegde on behalf of HGL. On the very same day, an agreement is signed by Sri and Smt Hegde as guarantors as per Ex. P-79 in favour of the Bank and delivered to the Bank in the presence of two witnesses. The terms of the said agreement require to be noticed since they are of considerable significance for considering the defence of HGL. They are as follows:

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"We/I further agree that the said Cash Credit Account shall be made up with interest on the daily balance thereof and otherwise in accordance with the practice of the said Bank and that the interest payable under the said Promissory Note shall be applicable to the payment and satisfaction of the interest accruing upon so much of the moneys becoming payable to the said Bank in respect of the said Cash Credit as is secured by the said Promissory Note.

We/I further agree that the Bank shall be at liberty to take other securities for the said account or any part thereof and to release or forbear to enforce all or any of its remedies upon or under such securities and any collateral security or securities now held by the said Bank and that no such release or forbearance as aforesaid shall have the effect of releasing us/me from our/my liability or of prejudicing the said Bank's rights and remedies against us/me under the said

Promissory Note and that We/I shall have no right to the benefit of any other security that may be held by the said Bank until the claim of the said Bank against the Borrower in respect of the said Cash Credit and of all (if any) other claims of the said Bank against the Borrower on any other account whatsoever shall have been fully satisfied and then in so far only as such security shall not have been fully satisfied and then in so far only as such security shall not have been exhausted for the purpose of realising the amount of the said Bank's claims and rateably only with other guarantors or other persons (if any) entitled to the benefit or such securities respectively."

Since this was clear cash credit, there is no hypothecation of goods and book debts of HGL. If HGL has not paid the principal amount, a revival letter Form-I is taken from it as per Ex. P-83 dated 5-12-1978 and that letter reads as under-

"With reference to my/our cash credit account with you secured by a Demand Promissory Note dated the 25-3-1974 for Rs. 25,00,000/- with interest made by me/us in favour of B. T. Shankar Hegde and Shaila S. Hegde and endorsed by the payees to you, I/we acknowledge for the purpose of Section 18 of the Indian Limitation Act 1963 and any like limitation law in order to preclude any question of limitation law that I am/we are liable to you for payment of the said promissory note with interest in respect of all present and future indebtedness and liabilities secured thereby which Promissory Note is to remain in force with all relative securities, agreements and obligations."

This is followed by a revival letter in Form-II as per Ex. P-84 of the same date. By these revival letters both the Directors Sri & Smt Hegde had admitted the liability for payment of the amount in promissory note Ex. P-77 with interest in respect of present and future indebtedness and liability secured thereby, and the said promissory note is to remain in force with all relative agreements and obligations. This is followed by a confirmation of balance letter as per Ex. P-80 dated 30-5-77 duly signed by the Managing Director Sri Hegde for HGL. By that confirmation, Bank seeks to prove that HGL has admitted its liability in. a sum of Rs. 24,50,000/- for one of the loans as on 27-5-1977 as shown in the statement

7. In proof of the fact that HGL is due in a sum of Rs. 2,93,62,036.09 towards principal and interest the Bank has adduced both oral and documentary evidence. The oral evidence let in by the Bank is to prove the various documents executed by HGL, Sri and Smt Hegde as guarantors in favour of the Bank and the relevant Ledger books maintained by the Bank in its transactions with HGL on cash credit basis from time to time aggregating to Rs. 2,93,62,036-09. PW-1 H.S. Bhat, was an employee of the Bank attached to the Commercial and Institutional Section at the relevant time and he has spoken to the documents Exs. P. 1 to P. 63. He has also spoken to the fact that the loans sanctioned by the Bank were transferred to the city branch from Rajajinagar branch and that HGL had 7 loan accounts in the city branch. He has proved the copy of the minutes of the meeting of the Board of Directors of HGL held on various dates for passing the necessary resolution to execute the documents in favour of the Bank. In

cross-examination it is elicited that he did not have personal knowledge of the transactions of HGL either with Rajajinagar branch of the Bank or the city branch of the Bank ; that he had no idea who had filled in handwriting the contents of Exs P. 1 (Pronote dated 14-1-1976 for Rs. 5,00,030/-), P. 9 (Pronote dated 14-1-1976 for Rs. 45,00,000/-), P, 17 (Pronote dated 14-4-1977 for Rs. 32,00,000/- and P. 27 (Pronote dated 29-9-1977 for Rs. 40,00,000/-) including the date and rate of interest ; that he took charge of the present post at the city branch in October, 1980 ; that he did not have occasion to see all the papers relating to the loan transactions of HGL with the Bank ; he had seen the application filed by HGL for the several loans which are the subject matter of the petition though for every loan there must be an application by the borrower and corresponding sanction in writing by the Bank ; he had seen one sanction letter concerning one of the loans, i.e., Ex. P. 36 ; if the bank had already an account with the Bank it may not be necessary to require the party to fill up additional forms for opening accounts every time a loan is sanctioned ; he did not know whether in the case of HGL there was only a single sanction by Rajajinagar branch, and the bank on its own had split up the sanction into several loan accounts ; he could not say if the loans were sanctioned on the dates borne out by the loan documents ; the rate of interest to small-scale, medium scale and large scale industry varied in regard to loans advanced ; he does not know whether there is any policy on the part of the Bank not to raise the interest in the case of small-scale industry and interests are charged according to the regulations of the Reserve Bank of India. From this evidence it cannot be said that the validity of the other documents proved through him excepting Exs. P. 1, P. 9, P. 17 and P- 27 was seriously challenged in cross-examination by HGL. Though he does not have personal knowledge of the transactions of the respondent company, as an official of the Bank he had something to do with the preparation of the statement of accounts that were filed along with the Company Petition as he was a trainee in the Bank in 1978 and during the course of his training he was called upon to assist the manager in the preparation and filing of the petition. Therefore, these documents which were in the custody of the Bank had been seen by him and he was competent to prove the said documents.

8. The next witness is Sri Sadasivan (PW-2), the Special Officer. He has stated in his examination-in-chief that he was the branch/manager of the Rajajinagar branch where the account of HGL was originally opened till end of May, 1977 ; in June 1977 he was transferred to city branch of the Bank as Special Officer in charge of Advances made to HGL and its units ; he worked as officer on special duty in November 1978 and from November 1978 to March 1980 he was manager of C & I Division of the Bank ; he was conversant and familiar with the bank transactions concerning HGL because of the position he held at the two branches which had dealings with HGL ; when he took over the Rajajinagar branch there were 5 loan accounts in the name of HGL and as branch manager he took possession of all the documents connected with these loan accounts. The documents proved through him are Exs. P. 64 to P. 101, Apart from proving these

documents and the loan transactions based on the documents he has also spoken to Exs. P. 1 to P. 46 which were marked through PW-1 which according to him were documents either obtained by him from the executants in the course of his dealings with HGL or came to his possession on account of the fact that he was in charge of the city branch of the Bank in respect of loans sanctioned to HGL and its units. Regarding his experience as the Special Officer in charge of the Bank he had stated as follows :

"In my capacity as a Special Officer on other duties and as the Manager of the Commercial and Institutional division of the City branch of the bank and as the Bank's Manager of the Rajajinagar branch at the relevant time, it was my duty to disburse the loan sanctioned to the respondent-company under the various documents now exhibited in Court in this case, supervise the utilisation of the loans by the respondent-company to monitor the progress made by the respondent-company in the utilisation of the loans, to liason with the respondent-company in all matters covered by the loans and the terms under which the loans were granted and verify the security and production of the respondent-company. As Officer on special duties concerning the loans sanctioned to respondent company I was visiting almost every day the factory premises of the respondent-company. I used to have discussion with the designated officers of the company in regard to the security, production, machinery, sales and finance of the respondent-company. I have submitted fortnightly reports of my supervision of the work and the observations made by me in regard to the respondent-company to my superiors at the Bank. I discharged my duties as described earlier, at the factory premises of the respondent-company for about 8 months till March 1978. Thereafter the managing Director of the respondent-company had instructed his officers not to hold discussions with me. Some time latter they were also issued orders by the Managing Director of the respondent-company not to make available books of accounts and other records for my inspection and security. I was thus hampered in discharging my duties. I therefore stopped going to the factory. This was brought to the notice of my superiors, the matter was discussed and the situation that had developed was taken note of. As a result of the discussion, it was decided to address the respondent company bringing to its notice that there was breach of the terms and conditions under which the various loans had been sanctioned and disbursed to the company."

Regarding the security offered by HGL to cover the various loans he has stated as follows :

"The personal guarantee furnished in respect of each of the loans sanctioned, to which I have spoken, by Mr. B.T. Shankar Hegde, Smt. Shyla S. Hegde and the Karnataka State Industrial Investment and Development Corporation Ltd., are not worth much compared to the huge amounts outstanding, due and payable by the respondent-company. The guarantee of the Karnataka State Industrial Investment and Development Corporation Ltd, is only to the extent of Rs. 20

lakhs. Any personal assets of Mr. and Mrs Hegde may have jointly or separately to my knowledge will not cover the enormous loans due. Similarly, the security of pledge of machinery has diminished as the machinery has been fully utilised and exploited in 1978 and 1979 by the respondent-company and has depreciated in value. In the result, security of pledge is very much inadequate to meet the repayment demands of the petitioner-bank. The machinery in Hegde and Golay Ltd., has been pledged to the Bank as well as the Karnataka State Financial Corporation, but what is pledged to the bank is not pledged to the Karnataka State Financial Corporation. As on the date of the Petition, the bank was not in a position to know the exact stock position of the stock and raw-material which consisted of watch parts, but my own estimate is whatever there may have been would not offer any security at all for the loans advanced as such parts of the watches has negligible re-sale value. Similarly, the value of the book debts of the respondent company as on the date of the Petition was not known to the Bank for the reasons I have already given. However, having some knowledge of the sales performance of the respondent-company in the period when I was able to check the book debts realisable would not offer sufficient security for the loans advanced. To my knowledge as on the date of the filing of the petition the respondent-company was indebted to Karnataka State Financial Corporation and it had also defaulted in the repayment of the loan advanced by that corporation. I do not know the extent of the liability of the respondent company with reference to Karnataka State Financial Corporation. To my knowledge Hegde and Golay Ltd., had guaranteed the repayment of the loans advanced by the Karnataka State Financial Corporation to its ancillaries. To my knowledge as on the date of the petition the ancillary companies of Hegde and Golay Ltd. were also in default in the matter of repayment of the loans to the Karnataka State Financial Corporation. Witness states on seeing a copy of the balance sheet of the respondent-company for the period ending 30th June 1979 that the company owed to its suppliers of goods and trade advances a sum of Rs. 81,00,000 lakhs and therefore it was on the date of the petition heavily indebted to others also. To my knowledge as on the date of the present petition Hegde and Golay Ltd., did not have the means to repay loans to the petitioner-Bank from the assets available to it.

8.1) He also stated that the loans had been advanced against the promissory notes executed by the company in favour of third parties treating it as additional security as required u/s 32(1)(g) of the State Bank of India Act. Elaborating this he said that if a promissory note is endorsed by a third person in favour of the Bank it becomes a negotiable instrument and the Bank becomes a holder-in-due-course of such instrument and can legally enforce the same against those third persons. That has been the banking practice. He was cross-examined at great length by the learned Counsel for HGL. To a specific question put to him that the Bank could not be a holder-in-due-course of Ex.P.1 or similar promissory notes Exs.P.9, P. 17 and P.27 because the Bank was aware of the fact that no consideration passed between the payee and the maker of the promises, his

answer was he was not in a position to answer this question. That is a legal issue and he has answered it in his re-examination. It was further elicited that he did not know who had filled in handwriting the figures, the names and the amount of interest in the pronotes Exs. P.1, P.9, P. 17 & P.27 as Exs. P.1 & P.9 were obtained before his time & Ex P. 17 though taken during his time, he could not recollect as to who filled in the details. But as regards Ex.P.27 it was filled up by him in regard to its material details; part of Ex.P.6 and Ex.P.7, i.e. the revival letters dated 5-12-1978, were filled by his own hand but he does not know who had filled in the relevant details in Exs. P 2 (D.P.Note delivery letter dated 14-1-1976), P.3 (Agreement for Cash Credit Hypothecation of Goods dated 14-1-1976), P.4 (Agreement for Cash Credit, Hypothecation of Debts and Assets, dated 14-1-1976), P.5 (Guarantee Bond dated 14-1-1976) and P.8 (Confirmation of balance letter dated 27-5-1977). As regards Ex.P.6 he had filled in the date of the promissory note, the amount of the promissory note, the names of the guarantors and address at the top but he does not recollect who in the Bank had filled the other details in Ex.P.6 and P.7; though generally it is true in banking practice every loan is sanctioned against an application, in the case of HGL he could not find any formal application for a particular loan since some of the loans had been sanctioned by the Bank earlier to 1974 and having regard to the issues discussed and the frequency of the discussion with HGL not every discussion was confirmed in writing: that correspondence sometimes represented the application and sanction since in the case of HGL the loans were sanctioned after protracted correspondence resulting in the execution of the relevant documents; without reference to the statement of accounts he could not say whether a sum of Rs. 5 lakhs was transferred to the account of HGL at the Rajajinagar branch; even with reference to Ex.P 17 promissory note dated 14 4 1977 he could not say whether the amount mentioned therein was transferred to the account of HGL on 14-1-1976 without reference to the books of accounts; he did not remember that HGL applied to the Bank for copies of the loan documents executed by it in or about 1978 but the company was orally intimated that it was free to send its representative to examine the documents in question at the premises of the Bank; this information was given to one Krishna Murthy, that is, the Director and also to the Finance Manager of the HGL at the relevant time; it is not true that the loan documents in respect of the 7 loans were obtained in blank duly signed by the representative of HGL and its guarantors and later the details filled in by the Bank including the dates ; during the entire period of loan transactions HGL had with the Bank it had withdrawn 7.5590 crores of rupees approximately. But he cannot say during the corresponding period HGL has credited a little over 7.69 crores of rupees by way of deposits from sale proceeds, discounting of bills etc. This witness in cross-examination proved Exs. P.102, P.103, P.104 being the demand promissory note, delivery letter and the agreement for cash credit respectively dated 26-7-1977. He also proved Exs. P. 105 & 106 being the agreement for cash credit on hypothecation of the debts and assets covered under Ex. P. 102 and the letter of guarantee given by Sri and Smt Hegde in favour of the Bank concerning the loan under Ex. P. 102. He could not say who

had filled up the material particulars in Exs P. 102 (D. P. Note dated 26th July 1977), P. 103 (D. P. Note delivery letter dated 26th July 1977), P.104 (Agreement for Cash Credit, Hypothecation of goods dated 26th July 1977) P. 105 (Agreement for Cash Credit, Hypothecation of Debts and Assets dated 26th July 1977) and P. 106 (Guarantee Bond dated 26th July 1977). But he identified the signature of Sri and Smt Hegde in their personal capacity. According to him, a sum of Rs. 11 lakhs advanced under Ex.P. 102 was under the loan head Account No. 7 as disclosed in the petition. But this loan was not transferred to the ledger account concerning HGL as a single amount because by the time Ex. P. 102 and the allied documents came to be executed HGL had already overdrawn in a sum of Rs. 11 lakhs against other accounts and therefore an adjustment. was made adjusting Rs. 77 lakhs against the overdrawn amounts in the other accounts. But such adjustment was orally informed to HGL representatives by him and not in writing. But HGL was aware as it was receiving the periodical Bank statements concerning the loan accounts which reflected transfers made from one account to the other account.

8.2 Regarding Account No. 7 opened for the special programme of HGL he stated that he was the Special Officer in duty at that time at the city branch and this special programme came about on account of the liberalisation policy of of the Central Government in regard to import of normal parts of wrist watches and their re-assembly in India for the purpose of sale within the Country ; that HGL being one of the licensees special financial assistance was given to the company from time to time and in this special programme after due consideration a sum of Rs 40 lakhs was sanctioned by the Bank to HGL on 27-9-1977. But the Bank had imposed stringent conditions in the loan agreement for the utilisation of this amount and as a Special Officer he was keeping an eye on the utilisation of the loan. He denied the suggestion that a sum of Rs. 35 lakhs out of Rs. 40 lakhs sanctioned for the special programme was alone released to HGL and out of Rs. 35 lakhs nearly half of it was adjusted towards interest due by HGL in respect of other loan accounts. He also denied the suggestion that the reminder of Rs. 35 lakhs was utilised for retiring bills concerning imported items prior to the promulgation of the new policy of the Government. But after verifying the records he said that a sum of Rs. 1 1/2 lakhs out of this loan was permitted by the Bank to be used by HGL for payment of wages of its employees. It was further elicited that the loan amount was utilised for retiring bills in respect of the imported goods prior to the promulgation of the new policy of the Government which was not covered by the loan. But he admitted that a sum of Rs. 17,88,217 67 was transferred from the special programme loan account to cash credit account and that transfer was not for the purpose of adjustment of any overdue interest due by HGL to the Bank in respect of other loans. Similarly on 24-10-1977 a sum of Rs. 17 lakhs was transferred from the Special Programme Account No. 7 to Account No. 6 but not towards adjustment of any interest due. He explained this with reference to Clause-7 of Ex.P-36 which is the sanction for cash credit for the special programme containing the terms and

conditions governing such sanction. Clause-7 on which he relied reads as follows :

"Other terms and conditions :

a) Debits: The first debit in the account will represent transfer of the amount from the existing cash or dit limit of Rs 107 lacs -- amount being equal to the drawing power calculated on the basis of CKD/SKD movements held in stock for the special programme and debited to this account. For this purpose the company should furnish to the bank a separate stock statement bifurcating the stocks held under special programme and other stocks viz., stocks relating to own watch programme and P C. Division With this transfer the company should ensure that the outstandings under the limit of Rs 107 lacs are always covered both by the drawing power and by limit.

b) Debits under the following heads will only be permitted under the special account :

i) Retirement of import bills representing import of CKD/SKD components.

ii) Payment of customs duty relating to imports under (i) above and such payments will be made by means of a draft or Banker's cheque only.

iii) Retirement of inward bills drawn on the company covering purchase of components locally in India such as cases, dials etc., required for the special programme.

iv) In respect of components which are manufactured by ancillaries for the special programme, no separate pay-merit should be made as HGL will be assisting the ancillaries for overheads, other expenses etc., an amount not exceeding Rs. 1 lakh per month. As payment to the maximum of Rs. 1 lakh per month which will be met from the existing cash credit limit of Rs. 107 lacs subject to the availability of drawing power is being permitted to the ancillaries from HGL, only on the basis of the company's statement that cash generation to the extent of Rs. 3 lacs will be forthcoming from the special programme, the aforesaid payment would not be made if it is observed that the cash generation from the special programme is less than Rs. 3 lacs. For the purpose of ascertaining the cash generation, the company should submit operating statements set out in Section (d) below promptly.

(v) As regards other overheads such as wages, salaries, energetic relating to watch division such portion of expenditure as can be attributable to the operations under the special programme for assembly, inspection, despatch of the production/sales/accounts departments of HGL will be appropriated to the special programme on the basis of proportionate number of watches produced under the special programme and own watches. This would not, however, exceed the figure given to us in the cash budget for special programme. Such debits would be transferred from the special account to the regular account of Rs. 107 lacs on the basis of statements furnished to the bank at monthly or fortnightly intervals.

(vi) The salaries and expenses of HGL which are directly attributable on account of the support extended by HGL to the ancillaries will not be included in the above overheads and will not be debited to the special account. These would continue to be met by HGL from out of their regular operations of increased watch production under Own Watch Manufacture.

(vii) Interest relating to the special account would be debited to the account as and when accrued

(viii) No payments to the ancillaries would be permitted from this account under any circumstances.

(c) (i) The sale proceeds under this programme as also other proceeds should be remitted by telegraphic transfer. Different series of invoices should be introduced by the company, one for CKD/SKD programme and other for Own Watch Production. The Telegraphic Transfers should contain particulars of the distinctive invoices so that the proceeds can be appropriated properly.

(ii) Regarding the sale proceeds, as far as possible sale should be made under the Bill Discounting scheme so that it will be easy for the bank to identify the sale proceeds under the special programme. If this is not possible, then the company should get the approval of the bank before hand for the terms of sale and also appointment of major dealers. The major dealers list can be expanded with the prior approval of the bank while the terms of sale should be standardised once for all in consultation with the bank. Any deviation therefrom may be permitted with the prior concurrence of the bank.

(iii) The company should not purchase further components in respect of Own Watch Programme from the ancillaries unless (a) such components are perfected components and (b) actual production of own-watch models picks up within a reasonable period as per the company's letter of the 26th August, as a result of which the accumulation of these components is progressively reduced.

(b) In order to enable the bank to monitor the sales realisation properly, the company should submit statements at weekly intervals giving the following details :-

(i) Production of watches in quantity during the previous week -- each model separately.

(ii) Sale of watches in quantity during the previous week -- sales could be broken into cash sales and credit sales and values indicated ; again model-wise.

(iii) Realisation of sale proceeds and value during the previous week -- again model-wise.

(iv) Closing stock of watches as on the previous Friday or Saturday in quantity as well as in value -again model wise.

The above statements should contain figures separately for special programme

and others and the statements should be submitted to the bank not later than the following Friday. By correlating the closing stock of watches and production during the particular week it would be possible for the bank to arrive at the data for sale of watches under the various categories independently of the sale figures. These data together with CKD/SKD profit data will help identify the actual cash generation.

(e) The company should open separate sales journal, invoicing etc., for the special programme and their operations under the regular watch production and P.C. division should not, under any circumstances, be included in the above registers. It should be possible at any point of time for the company as well as the bank's officers inspecting the company's books of accounts to arrive at the various production/sales figures for the special programme as well as for the regular manufacture without any difficulty.

(f) A separate register for P.C. division should also be maintained for this purpose.

(g) No cheque book will be issued for the account to be opened in respect of the special programme.

(h) In addition to the weekly statements production and sales mentioned above, the company would also submit similar weekly statements giving figures of : (i) sales of Shylendra Enterprises during the week ; (ii) realisation effected by Shylendra Enterprises during the week ; (iii) outstanding book-debts at the end of the week classified age-wise.

(i) The company should also submit to the bank at fortnightly intervals a statement of book debts under the special programme giving age-wise classification of receivables. In regard to the regular operations of the company the company should submit to us at weekly intervals a statement of expenses programmed for the following week relating to HGL and ancillaries -- separate figures for HGL and ancillaries should be given. The following figures should be incorporated I

(a) Cheques likely to be issued classified purpose-wise and category-wise for Own Watch Production, P.C. division, ancillaries.

(b) Value of materials and consumables to be purchased by HGL and supplied to the ancillaries.

(j) Before undertaking any tour abroad on behalf of the company, the Managing Director/Chairman of the company will give an undertaking to the bank that he would not enter into any fresh commitment for purchases etc., without having the financial arrangements therefore cleared with the bank.

(k) The company should confirm to the bank that they have not made any financial arrangements with the Syndicate Bank or any other bank.

(l) The company should make arrangements with IDBI to have the bank's bridge loan of Rs. 40 lacs liquidated from out of the proceeds of IDBI loan as soon as it

is sanctioned. The company should follow up the matter with IDBI vigorously for the purpose.

(m) The components manufactured by the ancillaries in future should only be those which are required for the watches on the production line, i.e., should be linked to a definite production programme in HGL.

(n) By an irrevocable power of attorney the company should authorise the bank to collect all dues from NCCF/Canteen Stores and other bulk purchasers. The cheques/drafts issued by such parties should be in favour of State Bank of India, account : HGL.

(o) The total value of components of HG. 55, 88 & 65 models with HGL should, on no account, exceed Rs. 60 lacs The actual production of watches should result in a downward trend in the value of components referred to above, in line with the production programme by the company vide their letter of 26th August, 1977."

8.3) Therefore, according to him, the transfer represented the amount of loan which had already been utilised for the special programme even before the loan documents for this document were prepared and executed and this debit was arrived at in accordance with the statements furnished by HGL by its letter dated 24-7-1977 Ex.P. 107). He admitted that the limit of Rs. 107 lakhs adverted to in terms of Clause 7(a) in Ex. P. 36 included a sum of Rs. 77 lakhs under loan account No. 6 but it was not correct to suggest that the scheme of special programme loan was to advance from cash credit loan account No. 6 of the Company and then debit the same to loan account No. 7 which was meant for special programme. He also denied the suggestion that the transfer from account No. 6 on 30-9-1977 in a sum of Rs. 17,88,217-67 was made only to bring the closing balance in account No. 6 to the limit of Rs. 77 lakhs permitted under the terms of loan sanctioned under loan account No. 6 as evidenced in Ex. P. 107 and an enclosure to it; the Bank was advancing to HGL under the special programme even against finished products of HGL ; the loan covered by Ex. P.36 specifically provides under Clause 3(a) that the loan disbursed under that agreement should be secured by the finished products of the company ; in the result there was no legal obstruction to the Bank to advance the money against the finished products under the scheme of special programme as indicated in Ex. P 107 and its enclosures; from September 1977 onwards HGL had only two operating accounts, one a cash credit account, that is, Account No. 6, and the other, special programme account referred to as Account No. 7 ; there was nothing in Ex. P. 36 which required HGL to deposit all sale proceeds to account No. 7 only ; the company had an option to credit the sale proceeds either to Account No. 6 or Account No. 7. He denied the suggestion that the Bank did not advance any amount under special programme covered by Ex. P. 36 because of the stringent terms imposed by the Bank ; but the account was debited towards excess drawing over the limit of Rs. 77 lakhs in Account No. 6. He also denied the suggestion that the charge entered on 8-1-1978 with the Registrar of Companies

concerning the special programme loan was registered at the instance of the Bank because HGL resisted to get the same registered as there was no disbursement of the loan. In further cross-examination he admitted that a sum of Rs. 17,88,217-67 was overdrawn by the Company in its Cash Credit Account and not in the special programme account. To a further question that these loans were not 7 in number that they were all result of single transaction between the Bank and HGL he stated that it was not so and some of the loans sanctioned to HGL were not against any application made in that behalf but all the 7 loans had been sanctioned separately. He produced Exs. P.108 (Letter of the Bank to HGL, dated 22-5-1973) P. 109 (Letter of the Bank to HGL, dated 3-2-1975) from the records to prove this fact. Elaborating his answer he stated as follows :

"These are not separately shown as loans advanced in the petition. Loan No. 1 cash credit of Rs. 3 lakhs indicated in Ex. P. 108 became part of the loan of cash credit (bills) indicated in Ex. P. 109 at loan No. 2 sanctioned. Similarly, the unsecured overdraft sanctioned in Ex. P. 108 became part of cash credit guarantee-cum-hypothecation loan sanctioned under Ex. P. 109. Similarly, the loans 1 and 2 indicated in Ex. P. 109 became part of the loan of Rs. 45 lakhs evidenced by Ex. P. 9. Loans item 3 and 4 in Ex. P. 109 became the loans 1 and 2 in the petition."

He denied the suggestion that the loans in all cases were sanctioned and released even before the loans were documented by the Bank but only in two cases as far as he could recollect, namely, a sum of Rs 11 lakhs and a sum of Rs 17 lakhs respectively had been released and allowed to be overdrawn in Account No. 6 for the special programme before the special programme documents were prepared and executed. He also denied the suggestion that the loan documents exhibited by the Bank were all obtained by the Bank at the same time in blank form duly signed by Sri & Smt Hegde for themselves and on behalf of the company as the case may be to be filled by the Bank at a subsequent date according to the requirements of the Bank including the dates on them. But he admitted that it is true that in respect of each of the several loans there is no corresponding credit entry in one or the other account of HGL with the Bank on the date of the execution of the loan documents. He explained this by stating that in case of cash credit account the documents designate a maximum limit to which that account can be operated by the loanee and therefore there is no open credit entry in favour of the loanee; the charge registered with the Registrar of Companies on 10-6-1974 is not reflected in the ledger or in any of the accounts; the charge of Rs. 50 lakhs consists of several loans of which Rs. 25 lakhs was sanctioned on 25-3-1975 and the remaining Rs. 25 lakhs was a consolidation of the earlier loans as evidenced in Exs. P. 108 and P. 109; he knew that there were sundry creditors of HGL when he had access to its books prior to April, 1978. In his further cross-examination PW-2 admitted that HGL was transacting its business in Punjab National Bank before it became the constituent of the Bank. But he was not aware whether Punjab National Bank was charging only 6% interest on the secured loans. He could not recollect the rate of interest charged

by the Bank for similar grants in 1973-74. That when HGL commenced operating with the Bank, it was classified as a small scale industry; that he does not know the specific regulation of the Reserve Bank of India prescribing the rate of interest for small scale industries; that it is not true to suggest that when HGL became a medium scale industry, for a period of two years the rate of interest charged to small scale industry was required to be charged; that he does not know at what point of time HGL became a medium scale industry; that he does not know whether the report of Ibcon who was appointed for valuing the goods, machineries and stock-in-trade of HGL was in order; that he knew from experience of lending to industry and after making an estimate of the hypothecation of machinery of HGL at the time of filing of the petition, that the price fetched at the time of hypothecation sale does not bear any semblance to the price claimed for it at the time of obtaining the loan and therefore from his experience the estimated value of the security was only a percentage of the book value of the machinery on that date. He admitted that Hegde was not pleased with his appointment as Special Officer in charge of HGL and that Hegde had expressed this in several complaints to his superior officers; though his name was suggested to be a nominee director of the Board of HGL, nothing came out of it; that he does not remember that in the meeting of the Board of Directors of HGL on 30-1-1977, Hegde had stated that the Bank had vindictively made interest adjustments denying HGL the working capital; that he was only an observer but did not participate in that discussion. He also denied that in the meeting held on 3-3-1978 it was suggested on behalf of the Bank that further funds of the Bank would be made available to HGL only if Hegde was removed from the position of Chairman and Managing Director ; that he was not aware that the Bank had put pressure on Hegde to hand over the management of HGL to the Tatas ; that he had no illwill against Hegde and it is not correct to state that this Petition was filed in order to pressurise Hegde to hand over HGL to Tatas.

8.4 This witness was further cross-examined with reference to the entries in the ledgers pertaining to the loan transactions. In his further cross-examination he has stated as follows :

That HGL had opened two loan accounts with effect from 25-3-1973 ; both these accounts were cash credit loan accounts designated as guarantee-cum-hypothecation account with a limit of 3 lakhs while the other account was designated as Bills account with a limit of Rs. 1.5 lakhs; these two accounts continued while drawing limits changed from time to time up to 14-1-1976 The balance in these two accounts were merged into three new cash credit accounts on 14-1-1976. at no time HGL asked these cash credit accounts to be closed, but it is true from the ledger that the guarantee-cum-hypothecation account was closed on 6-11-1973 and so also the other bills account ; that there should have been an application whenever a new account was opened. He denied the suggestion that the Ledger Ex, P. 110 was not kept in the usual course of the banking business. This suggestion was based on the variation in pagination and

insertion of certain ledger folios. The witness explained that those variations and insertions were not on account of any insertion made by the Bank contrary to the normal method of keeping the books by Banks, but it was due to the fact that part of the ledger now bound together was extracted from another ledger relating to the account of HGL for the sake of convenience in Court and to show the continuity of the account ; that this had been done with the permission of the Rajajinagar branch for facilitating the disposal of this case ; that on 14-1-1976 three separate accounts for HGL were opened for varying limits of Rs. 25 lakhs, 5 lakhs and 45 lakhs ; these sanctioned cash credits were adjusted to the extent necessary to close the earlier two cash credit accounts of HGL and that was done by transfer of Rs. 25 lakhs from the account carrying Rs. 25 lakhs limit and transfer of Rs. 29. 5 lakhs approximately from the account carrying a limit of Rs. 45 lakhs ; all the transfers have been made from one account to the other either on the debit side or on the credit said only on the instructions from HGL ; those instructions were either in writing or in some cases debit vouchers were obtained from the party authorising the transfer; in yet another case instructions were received telephonically or orally from the party subject to confirmation in writing. In some cases the Bank had obtained such confirmations in writing (it is common ground that those confirmations in writing were not produced by the Bank). He denied the suggestion that the instructions were given to the Bank by persons who were not authorised on behalf of HGL to deal with the Bank.

In re-examination, it was elicited that no consideration passed between HGL and Hegde ; that the Bank paid the amounts to the promisor on the guarantee of the promisee and therefore the endorsement by the promisee was for consideration ; in that way both the execution of the promissory notes and the endorsements by operation of law were for consideration. He produced Exs P. 112 and P. 121 which are the letters written by HGL instructing the Bank the specific cash credit utilisation for the special programme. He also produced another letter (Ex. P. 123) addressed by the Branch Manager of the Bank drawing attention of HGL to the breach of the terms of the cash credit granted for the special programme.

8.5) The line of cross-examination adopted by HGL regarding this witness does not bear out the serious grievances made by it in its statement of objections touching the Bank's non-cooperation, intransigent, mala fide and unbusinesslike attitude to starve HGL of the requisite finances whenever it was in need of the same and ruin its business. It is not in dispute that he was the Special Officer in charge of HGL and most of the cash credit papers were processed by him. The only suggestion put to him in cross-examination is that Hegde was not pleased with his being in charge of the loan Section and he had expressed that in several written complaints to the superiors. This witness could have been cross-examined on the several complaints made against him by Hegde to his superiors and he would have been in a position to answer the allegations made against the Bank generally and in particular against him. Secondly, this witness has given a clear answer to the defences of HGL that there were no seven accounts but only one account The correspondence between the parties may disclose a cash credit

account. The application for a cash credit may be a rule of practice but not a legal requirement. He has also given a clear answer to the dispute on adjustment of overdue interest of HGL from time to time from the loans newly sanctioned. He has also explained the variation in pagination and insertion of certain ledger folios in the ledger book of the Bank. His evidence regarding adjustment of interest and the entries in the ledger folios becomes clear if the meaning of the term "Cash Credit" is properly understood.

"A Cash credit is an arrangement by which a banker allows his customer to borrow money up to a certain limit against either a bond of credit by one or more sureties, or certain ether securities. This is the most favourite mode of borrowing by large commercial and industrial concerns in India, on account of the advantage that a customer need not borrow at once, the whole of the amount he is likely to require, but can draw such amounts as and when required. He can put back any surplus amount which he may find with him for the time being. The banker granting cash credit and overdraft facilities has to estimate the amount of his customer's requirements, and in case the actual drawings fall much below his estimate he may lose interest on the funds remaining idle. In order to provide against such a contingency, generally, banker's cash credit agreement stipulate ""one-half or one-quarter, interest clause", "according to which the customer has to pay interest on at least one-half or one-quarter of the amount of cash credit limit allowed to him, even when he does not use that amount. Commitment charges whether part of the advance should be given as loan."

(BANKING LAW & PRACTICE IN INDIA BY M L. TANNAN-16th Edition, Pp 329, 330)

Though a number of documents were marked through him, the only documents on which he was cross-examined regarding their contents are Exs. P. 1 to 8, 17, 27 and 102 to 110. In the absence of any evidence to show that these documents could have been only filled up by PW-2 being the Special Officer of HGL, the fact that the material particulars therein had been filled up by a person other than PW-2 would not invalidate those documents. Therefore, a mere admission by him that he does not know the person who had filled-in in writing the material particulars in the said documents does not raise any doubt on the validity of the said documents. HGL has not denied the execution of those documents. Every one of these documents bear the signature of the executants on behalf of HGL and they are also supported by the relevant resolutions passed by the Board of Directors of HGL to which a reference will be made at the appropriate stage.

8.6 In the circumstances, in my view, HGL has failed to make out from the evidence of these two witnesses though there have been some admissions and evasive answers to a couple of questions, that the documents proved through them could not be relied upon. Their evidence when considered with the documentary evidence proved through them will make it clear that there were several loan transactions on cash credit basis and those cash credit transactions

are reflected by the necessary documents which will be considered presently and these documents came into existence pursuant to the resolutions of the Board of HGL authorising Sri & Smt Hegde and the Secretary of HGL to execute the same on behalf of HGL.

9. However, it was contended by the learned Counsel for HGL that the mere execution of the documents would not amount to proof of the same and no one had spoken in proof of the contents of the documents. In support of this contention he relied on the decision of the Supreme Court in *Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others*, of the decision the Supreme Court observed as follows ;

"The plaintiffs wanted to rely on Exhibits A-12 and A-13, the day book and the ledger respectively The plaintiffs did not prove these books. There is no reference to these books in the judgments. The mere marking of an exhibit does not dispense with the proof of documents. It is common place to say that the negative cannot be proved. The proof of the plaintiff's books of account became important because the plaintiffs accounts were impeached and falsified by the defendants' case of larger payments than those admitted by the plaintiffs. The irresistible inference arises that the plaintiff's books would not have supported the plaintiffs."

From these facts it is clear that Exhibits A-12 and A-13 in that case were only marked but not proved through the witness concerned. But that is not the case here.

9.1 The contention of the learned Counsel could have been upheld if at the stage of marking the documents as exhibits through PWs 1 and 2 HGL had taken any objection to the admissibility of the documents. No such objection had been raised as is evident from the depositions of PWs 1 and 2. Therefore, the contents of the documents could be said to have been proved and it is open to this Court to rely upon these documents for a proper consideration of the competing contentions of the parties

9.2 It is also significant to note that in the entire cross-examination of PW-2 no suggestion was put to him that the Bank resorted to forgery of the cash credit documents in order to saddle HGL with the liability of Rs 6 and odd crores. No suggestion was also put to him that the Bank acted either out of mala fides or in collusion with KSFC as sought to be made out in the statement of objections.

9.3) Now, the documentary evidence of the Bank that a sum of Rs. 2,93,62,036-09 was due on the date of the winding up petition remains to be considered.

The documentary evidence in support of the loan transactions are found in Exs P.1 to P.278. Ex.P.I is the D.P. note dated 14-1-1976 for a sum of Rs. 5 lakhs cash credit. The promisor of this pronote is HGL and the promisees are Sri & Smt Hegde who in turn have endorsed it to the Bank. So, the execution of this note is

in consonance with the Banking practice of the Bank to which PW- 2 has spoken in his evidence placing reliance on Section 33(q)(g) of the State Bank of India Act. The execution of this Promissory Note is not challenged by HGL and it is also not shown to be contrary to the Banking practice of the Bank. On the very same day of execution of this D.P. note, the other connected documents also came into existence, namely, Ex. P.2 the D.P. note delivery letter duly signed by Sri Hegde on behalf of HGL and his wife addressed to the Branch Manager of the Bank, Ex-P.3 the agreement for cash credit by hypothecation of goods for the sum of Rs. 5 lakhs. Ex.P.4 agreement for cash credit by hypothecation of the debts and assets for the said sum, Ex.P.5 the letter of guarantee by Sri & Smt Hegde in favour of the Bank personally guaranteeing repayment of the said sum, Ex-P.6, the revival letter Form-I dated 5-12-1978 signed by Sri & Smt Hegde on behalf of HGL for the purpose of Section 18 of the Limitation Act, 1963, with reference to this loan, Ex.P.8, a similar letter in Form-II of the same date signed by Sri & Smt Hegde as guarantors and Ex. P.9 the confirmation of balance letter dated 27-5-1977 confirming the balance of cash credit account at Rs. 5 lakhs duly signed by Sri Hegde on behalf of HGL. The execution of these documents is supported by the Board resolution passed on 13 4-1976 in the meeting of the Board, of HGL as per Ex. P. 39. The temporary cash credit for a sum of Rs. 5 lakhs finds a place and it was resolved to avail of the said facility on the terms and conditions stipulated by the Bank and it had authorised Sri Hegde to execute the necessary documents. The ledger entry for this amount is at page 235 in Ex. P.111.

9.4 On these documents, one important question arises is, whether the Bank was justified in adjusting the cash credit loan sanctioned towards interest due from HGL on the earlier cash credit balance debited to it since one of the defence taken by HGL is that there were separate loans sanctioned by the Bank, but those loan amounts were not disbursed to HGL with a view to utilise the same for the purpose for which they were sanctioned and what was actually realised from these loans was a very negligible amount and the major portion of the same were adjusted towards the interest due unilaterally by the Bank. On this basis, it was argued that there is a bonafide dispute regarding the actual principal amount due apart from the question of interest and that by itself would disentitle the Bank from pressing the winding-tip of HGL.

9.5 The evidence of PW-2 and the ledger entries maintained by the Bank are consistent with the Banking practice of this bank, namely, to bring upto date the over-due interest by adjusting the newly sanctioned loans towards the overdue interest. The bank, on this point, rests its case on the banking Practice and also on the documents executed by HGL in its favour. That such a banking practice exists is not challenged by HGL as in the cross-examination of PW-2 it has not been suggested to him that such Banking Practice does not prevail in the Bank or it is contrary to the general banking policy. This Banking Policy is also supported by the documents executed by HGL, In Ex. P-3, which is the agreement for hypothecation of goods, HGL has hypothecated its goods for availing itself of the cash credit for Rs. 5 lakhs and that hypothecation also serves as security for the

payment and discharge of all indebtedness or liability of the borrower to the bank in respect of any bills of exchange, promissory notes or instruments at any time drawn, made, accented or endorsed by the borrower etc. etc.

9.6 Similarly Ex P-4 HGL has hypothecated its book debts and assets and they also serve as security for the payment and discharge of all indebtedness or liability of HGL to the Bank in respect of any bills of exchange, promissory notes or instruments at any time drawn, made, accepted or etc., etc. So also in Ex. P.5 the Directors Sri & Smt Hegde have personally guaranteed the payment of Rs. 5 lakhs to the Bank and had agreed that the cash credit account of Rs. 5 lakhs should be made up with interest on the daily balance thereof and otherwise that was in accordance with the practice of the Bank. Therefore, in view of Exhibits P-3, P-4 and P-5 in which HGL had unconditionally agreed for adjustment of the loan amounts towards over due interest, it will be futile to contend that the bank had unilaterally adjusted the sanctioned loan amounts towards over due interest. Therefore, it is open to the bank to contend that the loan amounts is sanctioned became due on the ground that HGL failed to repay those loans when so demanded, though a portion of the loans were adjusted towards overdue interest.

9.7 As noticed in para 11-1 Ex. P-39 records the minutes of the meeting dated 13-1-1976 for availing of the cash credit facility of Rs. 45 lakhs from the Bank. This is availed of by HGL under Exhibits P-9 to P-16. The documentation for this loan follows the same pattern as documentation for the cash credit loan of Rs. 5 lakhs. Ex. P-9 is the Promissory Note dated 14-1-1976, P-10 is the delivery letter, P-11 is the agreement for hypothecation of goods, P-12 is the hypothecation agreement of book debts and assets, P-13 is the guarantee bond, P-14 and P-15 are the revival letters and P-16 is the confirmation letter of the same date duly signed by Sri & Smt Hegde on behalf of HGL or by Hegde alone, as the case may be, in the capacity of Managing Director and Director respectively or in their personal capacity as guarantors.

9.8 Likewise, the cash credit loan of Rs. 32 lakhs sanctioned on 14-4-1977 is evidenced by Exhibits P-17 to P-21 and the cash credit loan of Rs. 40/- lakhs sanctioned on 29-9-1977 is evidenced by Exhibits P-27 to P-31. These two loans of Rs. 32 lakhs and Rs. 40 lakhs are covered by the resolution dated 14-1-1976 as per Ex. P-40. The minutes of the meeting of the Board meeting of HGL held on that day discloses that HGL had already borrowed Rs. 90 lakhs from the Bank and Rs. 4.9 lakhs from KSFC and it needed further finance for day-to-day operation and for other purposes and therefore it had resolved that HGL shall borrow a total sum of Rs. 300 lakhs from the Bank, KSFC, IDBI and or from any other financial institutions etc. Pursuant to this resolution only the Directors of HGL executed the documents forth, cash credit loans of Rs. 32 lakhs and Rs. 40 lakhs availed of on 14-4 77 and 29-9-1977. That is the reason there is no separate resolution by the Board of HGL for availing of the loan of Rs. 32 lakhs. However, there is another resolution Exhibit P-41 passed on 4-6-1977 for availing of Rs. 40 lakhs as cash credit. Therefore, it could be thus seen that the cash

credit loans of Rs. 5 lakhs, Rs. 32 lakhs, Rs. 45 lakhs and Rs 40 lakhs are all covered by the Board resolutions of HGL and the documents are executed by the executants on behalf of HGL in terms of those resolutions duly passed by the Board. It is not the case of HGL that these resolutions were fake resolutions and got-up by the Bank in order to establish the genuineness of the documents executed by HGL in favour of the Bank. These resolutions also have some bearing on the plea of forgery set-up by HGL in the course of arguments.

9.9 As noticed earlier, in the cross-examination of PWs 1 and 2 no suggestions were put to them on the authenticity of these board resolutions. The Board of HGL having authorised its Managing Director and Director to execute the documents on such terms and conditions as stipulated by the Bank and also on such terms and conditions as the Board of Directors may think fit, the Directors had executed the documents in terms of the said resolutions. Therefore, it is not open to them to contend for the first time in these proceedings that the documents executed by them are forged documents and therefore they cannot be given effect to in law. But, I have permitted the plea of forgery to be raised in the course of arguments, since, it cannot be disputed that most of these documents were executed in one or more sets by the executants in blank form without the date or other material particulars being filled in. This will be considered presently.

9.10 As against this oral evidence of the Bank, the oral evidence of HGL may be noticed. RW-1 Srinivasan was the Company Secretary for the period 11/10/1976 to 14/5/1977 and he was also the Finance Manager. He has spoken to the fact that he knew PW-2 when he was the Branch Manager of Rajajinagar and as the Secretary of HGL he used to meet him frequently in connection with HGL's work; that in early 1966 there was a meeting at the office of the Bank at St.Marks's Road, Bangalore, and in that meeting he and Smt Hegde and HGL's Technical Consultant one Mr. Baliga were present. In his view, the relationship between PW-2 and Sri Hegde was not good; that he had not signed any papers for and on behalf of HGL or on his own account with the Bank before 11/10/1976; he had no occasion to sign any paper on behalf of the units of HGL. But, he admitted that he had affixed his signature on the common seal of HGL for several loan transactions with the Rajajinagar Branch of the Bank. He identified his signature in Ex P-20 - the agreement of hypothecation of debts and assets for cash credit of Rs 32 lakhs dated 14/4/1977. Regarding the document said to have been executed by Sri Hegde on 14/5/1977, he said that Sri. Hegde was attending a Task Force Committee meeting at HMT on that day but he does not have personal knowledge of his presence at that meeting. He remembered the date because Sri Hegde was leaving the Country for USA as he was anxious to contact him as he wanted to be relieved from his duties. He denied that there was any meeting of HGL Board on 4/5/77. He also stated that "normally no board meetings as such were held by Hegde & Golay during my employment under it". He was asked to clarify the statement but he hesitated to clarify the same, but admitted that the common seal of HGL was in his custody during his tenure as

Secretary but he had also given the common seal to others on occasion including PW-2. But he qualified his statement by saying that he gave the common seal to PW-2 on instructions from Smt Hegde.

9.11 From this examination-in-chief, two things are clear, namely, that there was some misunderstanding between PW.2 and Sri Hegde and during his employment no Board meetings as such had been held by HGL. But, in cross-examination it has been elicited that Sri Hegde as also Smt Hegde were shrewd businessmen and competent persons in methods of business; that Smt Hegde and himself were dealing with the Bank though on only one occasion Sri Hegde accompanied him to the Bank; that the loan documents were executed by Sri and Smt Hegde on behalf of HGL in favour of the Bank; that they were so executed in the normal course of business; that some times he found that some of the loan documents were not filled in details such as date but nevertheless were signed by Sri & Smt Hegde, to which he had affixed the common seal of HGL. He recollected that on some occasions some of the documents were not dated but he advised Sri Hegde about the same and asked him to fill-up the date.

9.12 In further cross-examination he admitted that what ever Sri & Smt Hegde may have done or may not have done, the documents which were attested by affixing the common seal of HGL were so attested and the seal put only after verification and satisfaction of its proper and due execution. He affirmed this statement after examining Ex.P-17 - the promissory note dated 14-4-1977 for Rs. 32 lakhs, Ex. P-12 the agreement of hypothecation of debts and assets for cash credit of the same date for the said amount, Ex. P-88 - the promissory note dated 4-5-1977 for a sum of Rs. 18 lakhs, Ex. P-89 the delivery letter and Ex. P-91 the letter pledging the machineries in favour of the Bank for the said amount on the same day. He also admitted that HGL after receipt of the sanction of the loans passed appropriate resolutions at its Board meetings accepting the terms and authorising the execution of the necessary loan documents. He also admitted that in his tenure as Secretary he had sent such resolutions to the Bank duly certified by him as Secretary of HGL. The resolutions thus certified by him, namely, Exs.P-38 and P-45, were certified to be correct and there was nothing to the contrary. He also admitted the balance sheet Ex. P-123 and that it reflected truthfully the financial position of HGL. He admitted that the charges created by HGL under Exs. P-19, P-20 and P-21 (hypothecation documents) were duly registered and returns filed in respect thereof.

9.13 Though this witness was working in HGL for a short period, it could be seen from Exs. P-124 to P-126 which are the letters written by him to the Bank that there were some allegations that the Bank was not very co-operative in releasing the funds as and when required and was procrastinating its decisions on the ground that it had not received any sanction from the Central Office. But surprisingly, in his examination-in-chief he was not asked any questions about the non-cooperation of the Bank to the financial requirements of HGL. Therefore, his evidence is only helpful to HGL so far as it relates to certain irregularities in

the execution of the documents executed by HGL before he joined the services of HGL. But in cross-examination it should be noted that he had stated that Sri & Smt Hegde were aware of the fact that the documents were not complete in themselves when they executed them and he had also advised them to make a note of that.

10. The next witness who speaks about the loan transactions is RW-3 H. Prakashchandra Shetty, the Chartered Accountant by profession and a partner of V. M. Shetty & Company, who are the auditors of HGL since 1974 and continue as such even now. He had been examined by HGL to prove certain letters issued by him, namely, Exs. R-5 to R-9. Exs. R-5, R-6 and R-7 bearing the date 9-11-1983, R-8 dated 29-12-1983 and R-9 dated 9-11-1983 addressed to HGL by the said V.M. Shetty and Co. However, in his cross-examination he stated that in the course of audit of the books of HGL he came to know that this Company had borrowed large sums of money from the Bank ; that in the course of his audit he satisfied himself that the debt shown in the HGL books regarding the principal and the interest due to Bank were in accordance with the documents executed by HGL in favour of the Bank ; that the interest charged in excess was lawfully stipulated by the Bank and it was for the auditors to point out the excess in the interest charged on the outstanding due from HGL; that he had not noted in any of the audit reports that the interest charged by the Bank was in excess of interest stipulated under the various loan transactions ; similarly in any of the balance-sheets prepared by him it had not been shown that excess interest was charged for advances from the Bank ; that if there had been excess advance or excessive interest on the advances in the books of HGL he as auditor would have pointed out in the Balance Sheets namely, Exs. P-123 and P-127 to 131 which are the audited balance sheets of HGL for the years 30-6-1976 to 30-6-1981 ; that upto the year 30-6-1977 HGL had not made any qualifications regarding the interest debited to its accounts but only for the first time in the year 1978 and in the year 1979 it raised a qualification regarding the interest charged ; for the year ended 30-6-1980 and 30-6-1981 HGL had totally omitted the debits of interest in its book. According to him, as on 30-3-1980 HGL should have been debited Rs. 39.11 lakhs as interest due to Bank and for the year ending 30-6-1981 HGL should have been debited interest at the rate of 15% on the loan amount of Rs. 3 1/2 crores ; subsequently interest had accrued on a much larger sum and the same had not been debited in the books of HGL. RW-6's (Sri Hegde) explanation was that the sum that was due from the Bank was more than what was due from HGL to the Bank and that is the reason the debits were omitted in the books ; that whenever a person owed money to HGL, the amount due will find a place on the debit side of the Balance Sheet but in none of these years any sum was not shown as having been due from the Bank in the list of assets in the HGL Balance sheets ; that he was not satisfied with the explanation of HGL for not including interest as debits in the debit side of the balance sheet and that is the reason he made a qualified report that no documents evidencing that the Bank owed any money was shown by HGL ; that some correspondence

between the parties regarding excess interest charged (according to HGL) was shown to him. According to him, the amount shown as due to the Bank in the Balance Sheets Exs P-123 and P-127 to 131 are correct. Thus, as on 30-6-1981 the company owed to the Bank Rs. 2,62,94,862 ; to this amount if interest which is not added but were to be added, the debit balance would go beyond Rs. 3 1/2 crores ; that HGL did not have liquid cash on 30-6-1981 to repay the principal amount and interest due thereon ; that the value of the lease - hold lands and buildings thereon put together in about Rs. 4,13,618/-and the current assets valued at Rs. 3,72,46,930/-consists of stocks, debts, advances receivable, deposits, cash and Bank balances. Regarding the profits earned by HGL, he stated that in the year ending 30-6-1980 it made a profit of Rs. 37 lakhs and odd, for the year ending 30-6-1979 it made a profit of Rs. 3,11,772/- and for the year ending 30-6-1982 it had made a profit of Rs. 34,655/-. But he added that Ex.P-132 that is the Balance Sheet for the year ending 30-6-1982 does not contain any figures relating to Bank debits on account of interest, The amount shown as due to Bank for that year is Rs. 2,62,77,605 ; that for the years 30-6-1976, 30 6-1978 and 30-6-1981 the working result of the company showed loss and even for the years 1980 and 1982 its working results would have shown losses if interest debits of the Bank had been taken into consideration. He also admitted that HGL owed moneys to other financial institutions like KSFC and according to his scrutiny of the HGL books and accounts this money also remained outstanding ; that the list of sundry creditors showed an extent of Rs. 74 lakhs and odd was due from HGL ; regarding the execution of the loan documents by HGL, he had this to say :

"The company was signing the confirmation of balances due to State Bank of India from time to time. I see Exs. P-8, P-16, P-68, P-74, P-80 and P 92. The loans which the company borrowed from the SBI were all authorised by resolutions of the Board of Directors of the company. The documents executed by the company in respect of the loans given by SBI were all executed by the officers authorised by the company. The charges created by the company in favour of the SBI for these loans were all registered with the Registrar of Companies as provided in the Companies Act. The company had kept the copies of the loan documents executed by the Banks and my Partner had scrutinised them in the course of audit."

10.1 Regarding Exs. R-5 to R-9 which are the letters addressed by V.M. Shetty & Co., Chartered Accountants to HGL Produced by him in reply to the company's letters Exs. R-12 to R-16, he stated that the information asked for by the HGL in those letters was within the knowledge of HGL itself and he did not know for what purpose they asked him to furnish the information asked for in those letters. Regarding the debit of Rs. 97,18,316/- as interest in para-2 of Ex. R-5, he said that it is in terms of the documents executed by HGL in favour of the Bank and the same is the position in regard to the interest debited as found in para-2 of Ex. R-5, in para-3 of Ex. P-6 the interest debit of Rs. 3,64,432/- was in accordance with the Bank statement and the books of accounts of HGL and he

did not find anything wrong with it : that it is correct to say that the debit balance as on 30-6-1977 in favour of the Bank was struck after taking into consideration the deposits referred to in Ex. R-8 ; that the withdrawal of Rs. 76 lakhs and odd as found in Ex. 6 (wrongly mentioned as R-9) was in excess of the sanctioned limit of the loan and when further limits were sanctioned, the excess debits were regularised in book adjustments ; this is a very normal banking practice ; that HGL had not taken any objection to such regularisation ; that a sum of Rs. 34 lakhs and odd had been sanctioned under the special programme account by the Bank and in anticipation of the same, a sum of Rs. 17 lakhs had been transferred to the operating account ; from the accounting pointed out there was nothing wrong in transferring this amount of Rs. 17 lakhs to the operating account. The qualifications made by this witness in the balance sheet may be noted. In Ex. P-129 the balance sheet for the year ending 30-6-1979, notes on accounts in Schedule 14 at Sl. No. 17 on the overleaf of page No. 394 is as follows :-

"In respect of interest charged by the State Bank of India on its loans from time to time since 1,4.1976, the Company is of the opinion that the rates charged are in excess of the rates they were entitled to charge. The company"s claim with the Bank for refund/credit is yet to be considered by the Bank and the same will be reflected in the accounts as and when any amount is received/credited by/to the Company towards the same."

Sl. No, 18 on the over-leaf of page No. 383 in Ex. P-128 the balance sheet for the year ending 30-6-1978 is as follows :

"In respect of interest charged by the State Bank of India en its loans from time to time since 1-4-1976, the Company is of the opinion that the rates charged are in excess of the rates they were entitled to charge. The Company has taken up the matter with the Bankers The Value of claim, presently unascertained, will be brought into account on realisation. Further, the Company has also urged upon the Bankers for transferring the interest element, with retrospective effect, to a loan account carrying nominee interest. Necessary adjustments in this regard too would be carried out upon Bank"s consideration of the proposal."

10.2 But, in cross-examination this witness had stated that he was not satisfied with the explanation of HGL for non-inclusion of interest debits in the debit side of the balance sheet and that is the reason he made a qualified report. In re-examination it was elicited that though personally he had not seen the loan sanction papers or the documents executed by the HGL in favour of the Bank, he was satisfied with the statement prepared by his partner who had inspected the books of the company. Though this witness was examined by HGL to prove the amount of interest debited by the Bank during the period 1973 to 1978 and for the period 1978-79, he does not say that those debits were wrongly made. Having prepared the balance sheet of HGL for the relevant years and having certified the amounts due as interest by HGL to the Bank as correct, he as a Chartered Accountant could not have risked his professional reputation to come

to the aid of HGL. His evidence in cross-examination completely demolishes the case of HGL that for the relevant period the Bank had either wrongfully charged, interest or excessively charged interest on the cash credit advances made from time to time. He had also spoken to the fact that the documents executed by HGL were found to be in order in the course of the audit and therefore the point that arises for consideration in his evidence as also from the other evidence on record is, whether the irregularities in the execution of these documents would establish the case of forgery as contended by the learned Counsel for HGL?

10.3 RW-5 S. R. Chandrashekhara Shetty, an Officer of KSFC was examined by HGL to prove that it was prepared to settle the dues to KSFC by paying the amounts in monthly instalments of Rs 10,000/-, but that offer was rejected by the KSFC But it has come in the evidence of this witness that a sum of Rs 7,50,000/- was due from HGL to KSFC and in the suit filed on 1/6/1982 the suit claim is Rs 6,92,242-99. In cross-examination it was elicited that Sri & Smt Hegde had personally guaranteed the cash credits given by KSFC and the lands and buildings belonging to HGL were also offered as security. But the land on which the building of HGL is put-up is lease-hold land. He admitted that HGL had not only committed defaults regarding the repayment of loans due to KSFC but it had also committed defaults in some of the terms and conditions stipulated in the loan sanction. So, his evidence does not in any way help HGL either on the first issue or on the many other issues which arise for consideration in this petition.

11. Sri Hegde has examined himself as RW-6. It has come in his evidence that he holds Rs 27 lakhs shares of the face value of Rs 100/ each in HGL and the other share holders are his wife and his three daughters; that HGL is still running now and had not incurred any losses; that excepting himself and some of the units, there were no creditors of HGL. He had denied that HGL owed any moneys to the Bank and that HGL had 7 cash credit accounts with the Bank. According to him, it had only one operating account with the Bank and it had not filed any application for cash credit to the Bank after 1978; that HGL did not open the 7 accounts by signing the account opening forms. On the documents executed by him and his wife in favour of the Bank, he stated that all the documents were signed in blank forms. His attention was invited to Exs.P-1 to P-34, P-36, P-49, P-52 to P-71, P-73 to P-85, P-88 to P-92, P-99, P-101, P-102, P-104, P-108, P-112, P-113, P-122. According to him, all these documents, excepting Ex P-85, P-107, P-108, P-112 to P-192 were either signed in blank or they were issued without his authority or were fabricated for the purpose of this case. I do not find it necessary to deal with his evidence on each and every one of the documents shown, to him in his examination-in-chief. It is true that most of the documents bear out the defects pointed out by him in his examination-in-chief. So, what would be the effect of these documents on the nature of the transactions between the Bank and HGL on the first issue relating to the debt due from HGL to the Bank has to be considered. This can be considered with reference to the documents admitted to be correct by RW-6. Ex.P-32 is one such document

signed by him and his wife. It refers to the cash credit of Rs 40 lakhs under the special programme account and also the execution of the documents for the said sum. RW-6 has stated in his evidence that his signature was obtained on a piece of paper in blank form at the places marked as E1 & P1 and he does not know the contents of the said letter. Those exhibits were marked and proved through PW-1 H.S. Bhat. This witness was conversant with the special programme loan sanctioned under Ex.P-36 and therefore, he should have been asked by HGL that Ex.P-32 was obtained in blank as alleged by RW-6. The fact that this document is on plain paper does not take away the authenticity of the same since in all probability this document was taken by the Bank from Sri & Smt Hegde at the Bank premises itself. RW-6 has admitted the execution of Ex.P-36. That apart, RW-6 having agreed to the terms and conditions of the special programme loan under Ex. P-36 after signing the same along with his wife on 27-9-1977 and given his assent to the terms and conditions mentioned therein, it is difficult to believe his statement that he signed Ex. P-32 in blank form without knowing the contents thereof, which is as follows:-

"CASH CREDIT SPECIAL PROGRAMME ACCOUNT

With reference to the Promissory Note and agreements for Rs. 40 lakhs executed by the undersigned on date for the above account, we are agreeable to obtain thereunder a sum of Rs. 30 lakhs only till such time the Bank at its discretion decides to release the balance sum of Rs. 10 lakhs. We confirm that the execution of the documents for the sum of Rs. 40 lakhs does not imply any commitment on behalf of the Bank to make available to us any monies in excess of Rs. 30 lakhs."

11.1 Likewise, he admits the execution of Ex. P-37 which is the extract of the resolution of the Board of HGL dated 25-3-1974 for executing the loan documents for the cash credit limit of Rs 25 lakhs. But he says that he does not remember whether the contents mentioned therein were there in that document while he signed the same. Ex. P-37 is the resolution of HGL and signed by him as the Chairman of the Board of Directors of HGL but he feigns ignorance of the contents of this document. It is an important document extracted from the register of the Board meetings maintained by the Bank and if he as the Chairman of HGL Board were to feign ignorance about the contents of the same, it is a sad reflection on the affairs of HGL under his Chairmanship. He admits the execution of Ex. p-38 but he says that on 4-5-1977 which is the date of the resolution covered by Ex. P-38, no meeting of HGL Board was held. If he were to say that on 4-5-1977 no Board meeting was held, he has fabricated this document only for the purpose of securing the cash credit from the Bank, it would indeed be imprudent for any Bank to deal with a Company like HGL if the Chairman of the company were to go back on his own documents. If it was his case that Ex. P-38 was a fabricated document such fabrication could have been done by his Own staff or by the Bank. The Bank's witnesses were not cross-examined on Ex. P-38. His own witness Srinivasan does not say that it was a fabricated document.

Then, under what circumstances it came into existence and was given to the Bank should have been explained by him.

11.2 Similarly, Ex. P-39 is the extract of the meeting of the Board of Directors of HGL held on 13-1- 1976. It bears the signature of RW-6. The resolution mentioned therein authorises the execution of the loan documents for availing, of the cash credit facilities for a total sum of Rs 75 lakhs. The contents of this document are denied by RW-6. This document was proved through PW-1 and HGL should have cross-examined him as to how this document came into existence. It cannot be said that the Bank took the letterheads of HGL and forged the resolution in order to prove the relevant transaction. Similarly, Ex. P-40 is the extract of another Board resolution of HGL, the contents of which are denied by RW-6. That is an extract of the minutes of the meeting held on 14-1-1976 signed by Smt Hegde. She did not get herself examined before this Court and therefore, RW-6 could not have said that the contents of Ex. P-40 were not there when his wife signed it. May be, as stated by him Ex. P-40 bears the phone number that existed in the year 19/4, but that is a document furnished by HGL to the Bank and the Bank cannot be held responsible for any discrepancy in the phone number. Ex. P-41 is the extract of the resolution of the HGL Board dated 4-6-1977. RW-6 agrees with the contents thereof, though he says that the contents were not there when he signed it. Having admitted the contents thereof, he has also admitted the sanction of Rs. 40 lakhs cash credit pursuant to the said resolution. He has spoken to the contents of Ex. P-42, i.e. the letter of HGL on the creation of Paripasu charge on the fixed assets of HGL, though he stated that it was signed in blank by his wife. He admits the contents of Ex. P-44, which is a letter issued by the KSFC to the Bank agreeing in principle to share the charge over the HGL's entire fixed assets on paripasu basis with the Bank as security for the clean cash credit limits aggregating to Rs. 63 lakhs sanctioned by the Bank. This latter is clear proof of the fact that the Bank had sanctioned Rs. 63 lakhs cash credit upto 29-7-1977, but it has been explained by RW-6 by stating that this letter was issued by KSFC to the Bank without HGL's authority. It is difficult to accept his explanation that this letter Ex. P-44 was issued by KSFC without his authority. Why his authority was required is not clear from his evidence. Ex. P-45 is the extract of the minutes of the meeting of the Board of HGL dated 29-3 1977. RW-6 admits the signature of HGL's Secretary RW-1, but he says that there was no Board Meeting on 29-3-1977. If that be so, his own witness RW-1 who was the Secretary has forged the document Ex. P-45 in order to favour the Bank. But, that is not the case of HGL and no suggestion was put to Srinivasan either by treating him as hostile and by cross-examining him. He was shown Exhibits P-52 to P-63 which are the extracts of the Bank account statements issued from time to time regarding the cash credit position of HGL with the Bank. These documents were proved through PW-2. His comment on these documents is that they are all fabricated to suit the case of the Bank. No such suggestion was put either to PW-1 or PW-2 and therefore, I am at a loss to understand how he could characterise these documents, which have come from proper custody,

as fabricated documents.

11.3 Now, coming to the documents which according to him were signed in blank forms or never executed, his evidence in cross-examination needs to be noticed. Regarding the resolutions passed by HGL, he stated that they were not true copies of the resolutions ; that they were obtained by the Bank on blank forms signed by himself and his wife excepting Srinivasan. In the absence of original minutes book, he could not have said that he and his wife signed the documents in favour of the Bank only on two occasions ; once in 1974 and the second time in 1976. According to him, the contents of all the Exhibits i.e., P-38, P-39, P-40, P-45 and P-46 the resolutions passed by HGL board were fabricated by Sadashivan-PW2 and the Secretary RW-1. Having said this, he admits that in 1973 the Bank had lent Rs. 20 lakhs, but that was paid Back with interest during the period 1974 to 1979, but he had no documents to show either the borrowings or the discharge of the loans. His explanation is since HGL was having running account, the books of account of HGL do not show either the borrowings or the discharge of the bank loans. Regarding the pronotes, he admitted the signatures of himself and his wife, but he denied that they were executed for consideration and endorsed by them to the Bank for the consideration mentioned therein. He also denied that one of the conditions imposed by the Bank for the grant of cash credits was that he and his wife should be guarantors for the repayment of the same. It is rather difficult to believe this evidence of PW-6 since the documents executed by him and his wife, namely, Exs. P-5, 13, 21, 31, 67, 73, 79, 87, and 90 clearly show that they were executed by them as guarantors. That apart, as noticed earlier, the practice of the Bank as spoken by PW-2 was not challenged by HGL in his cross examination. However, PW-6 admitted that the promissory notes though taken on blank form, were not misused by the Bank till 1980. Regarding the delivery letters, which accompanied the Promissory Notes, he admitted his signature on these documents, but he stated that they were signed in blank by him and his wife. But, he admitted that when they signed these delivery letters, the printed matter was there and he knew that he was signing D.P. Notes and the delivery letters when he signed those exhibits. Therefore, even assuming these documents were signed in blank, RW-6 and his wife knew the contents thereof and therefore, it is not possible for them to avoid their liability and their obligation to the Bank by stating that their signatures were taken when the material particulars regarding the date etc had not been filled in. He denied in his cross-examination that it was not correct to state that the Bank had stipulated that there should be hypothecation of stock, machineries, books of account etc as security for the loan to be sanctioned by the Bank, but when he was confronted with Exs. P-3, 11, 25, 19, 29 and 104 which are the letters of hypothecation relating to stock, Exs. P-91, 33 and 34 which are letters of hypothecation relating to machineries, Exs. P 4, 12, 13, and 105 which are letters of hypothecation relating to book debts, he stated at first that these documents were signed by him when they were in blank form and then he

admitted that he did not see the contents of these documents, but all the same he signed them. If RW-6 as the Chairman of HGL were to commit HGL to huge liabilities in favour of the Bank by signing those documents, the contents of which he did not bother to read, he and HGL must take the consequences of the imprudent act committed by him. It would be a far fetched argument to say that the Bank had fabricated the documents to suit its case. Regarding the revival letters Exs. P-81, 82, 75, 76, 83, 84, 6, 7, 14 and 15, his answer was that they were signed in blank and he did not know the contents therein when he signed them. Regarding the confirmation of balance letters Exs. P-8, 16, 67, 80 and 92, he said that he knew that he was signing the confirmation of balance, but they were signed in blank form. His charge was that he was not getting the statement of accounts from the bank periodically. But he admitted that the auditors had gone to the bank and checked-up the accounts and obtained the extracts of the same. Regarding the statement of accounts Exs. P-52 to 63 furnished by the bank, he reiterated that they were fabricated as the amounts mentioned in Exs. P-54 to P-59 as loans to HGL were not borne out by any records and he does not know how the Bank found that these debts of HGL were due in the sums mentioned therein. All the same he admitted that HGL had maintained regular books of account regarding its business and the same reflects faithfully and correctly the receipts and expenses pertaining to its business. But those books were not produced by HGL for reasons best known to RW-6 and it has come on record that he would produce those documents if this Court were to order the same.

11.4 In his further cross-examination he admitted that the moneys appearing to have been paid by SBI also finds a place in his books; that the debt balance of HGL accords with the debt balance in the books of the Bank upto 1976; that subsequent to 1976 the debts in HGL books accord with debt balance against HGL in the Bank's book but there were differences regarding the interest payable. Therefore, even without producing the books he had admitted that the difference was only regarding interest, otherwise the debt balance of the Bank accorded with the debt balance in HGL books. But, he improved on his version by stating that the dispute was only regarding interest and there was no dispute regarding the principal amount because nothing was outstanding as per the HGL account to the Bank. He also admitted that in the books of HGL no objection had been raised on the quantum of interest debited by the Bank to HGL's current account.

11.5 He further admitted in cross-examination that in the Balance Sheets of HGL Exs. P-135, 136 and 137 for the years ending 1974, 1975 and 1976, in the Balance Sheet Ex, P- 127 for the year ending 1977 no objections on the liability of HGL for amounts due to the Bank were raised. He admitted that the liability of HGL as on 30-6-1977 stood at Rs. 1,73,14,022 and he had not paid that amount to the Bank since his defence is that he had been cheated by the Bank on the basis of the documents executed in blank forms. He admitted that for the years 1978 to 1982 they were debits in the balance sheets of HGL as amounts due

from HGL to the Bank. But, he said that there were objections from the Directors on the debits. Though he stated that there is a recording in the Board meeting as also in the General Body Meeting regarding the objections raised by HGL on the interest charged by the Bank, that recording was not produced, but he categorically admitted that there was no resolution relating to any dispute on the principal amount due to the Bank. He denied the proper execution of another document, namely, Ex. P-100 the copy of the loan sanction letter dated 14-1-1976 for cash credit pledge -cum- guarantee limit of Rs. 25 lakhs and cash credit guarantee-cum-hypothecation (with a sub-limit of Rs. 25 lakhs for book debts) for Rs. 44 lakhs, temporary cash credit (against lodgment of firm irrecoverable letter of credit) for Rs. 5 lakhs. The terms and conditions offered by the Bank are found therein and it was the original of Ex.P-100 that was sent to HGL with a request to return the duplicate copy duly signed by it in token of its acceptance of the said terms. RW-6 has signed this letter of April 7, 1976 after scoring off the word "March" and substituting the word "April" in his own hand. He has initialled it. The original endorsement in the said exhibit reads like this :-

"Accepted subject to our letter of March 1, 1976."

Obviously the Bank was not agreeable to this condition and therefore the words "subject to our letter of March 1, 1976" were scored off, with the result the word "accepted" stands in isolation, thereby indicating that HGL had accepted the terms and conditions of the aforesaid loan sanction. RW-6 also knew that he had scored off that portion. But he says in his cross-examination as follows :-

"The portion scored off after the word "accepted" in Exhibit P-100 is not done by me. But my initials are there. I do not know for what purpose I put my initials. But I can say it is not for authenticating the scored off portion".

Having accepted the terms and conditions which included the personal guarantee of himself and his wife, he maintained that the guarantee was also subject to his letter dated 1-3-1976. If that be so, he should have written to the Bank that the terms and conditions in Ex. P-100 were subject to his letter of 1-3-1976. However, he admitted that he did not write to the Bank stating neither himself nor his wife would guarantee the cash credits to HGL.

11.6 On the letters of guarantee issued by him and his wife, namely Exs. P-79, 13, 5, 66, 21 and 19, his answer was that their signatures were taken in blank form, but excepting Ex. P-66, in the other documents the printed matter was there when he signed them but he did not read the contents of the printed matter. Though he admitted that there was no impediment for him to read the contents of these documents, he added that because he knew that the Bank would not give loan that he had sought for, he did not care to read the printed matter. He denied that the documents under Exs. P-1 to P-5 related to Rs. 5 lakhs, Exs. P.9 to P. 13 related to Rs. 35 lakhs and Exs. P-22 to P.26 related to Rs 25 lakhs mentioned to in the said documents on the ground that those documents were taken in blank forms.

Regarding the charges filed with the Registrar of Companies, his answer was that excepting one charge all other registrations were done by the Bank and he took steps to rectify the register of charges and brought the amount mentioned in those charges from Rs. 90 lakhs to Rs. 45 lakhs. To a specific question that he got the amounts reduced to Rs. 45 lakhs because according to him that amount was due to the Bank, he denied the suggestion and stated that the sum of Rs. 45 lakhs relates to disputed quantum of interest claimed by the Bank.

11.7 This witness in the course of cross-examination produced certain Statements prepared by HGL to show the amounts claimed to have been debited to the HGL's account by the Bank. This Statement was not based on the original books of account and therefore it has no evidentiary value.

11.8 When confronted with the confirmation of balance letters Exs. P-38 and 39, his comment was that he could not say whether these letters were signed by an Officer authorised by HGL and he could not identify the person who had signed those two letters. He was also confronted with Exs. P-138, 139 and 140. Ex. P-139 is the letter from HGL to the Branch Manager of the Bank requesting them to furnish the confirmation of balances with reference to the 8 loan accounts of HGL. "I hat letter clearly shows that there were 8 loan accounts according to HGL. The contents of this letter are of considerable significance for resolving the controversy between the parties both on the existence of the number of loan accounts and the amounts due under the said accounts. Therefore, they warrant reproduction here :

"Please let us have confirmation of balance certificates for the following accounts :

1. Cash Credit Term loan No. I
2. Cash Credit No. II
3. Cash Credit (Machinery) No. III
4. Bills cum-Hypothecation.
5. Bills A/c-Factory type.
6. Temporary Cash Credit (Against lodgment of a firm irrevocable L.C).
7. Special programme.
8. L.C. Margin Account.

The Certificates are required as on 30-6-1979.

As the certificates are required to be produced to our auditors, we request you to arrange for the issue of the same at an early date."

In reply to Ex. P-139, the Bank had written as per Ex. P-140 dated 25-9-1979. It had been duly acknowledged by HGL. In that reply the Bank had furnished the

following particulars:

1.

Clean Cash Credit No. 1

Rs. 24.50 lacs.

2.

-do- II

Rs. 20.00 lacs.

3.

-do- III

Rs. 14,01,954.89

4.

Cash Credit Hypothecation

Rs. 1,30,07,753.06

5.

Cash Credit Pledge

Rs. 25,00,000.00

6.

Cash Credit Temporary

Rs. 5,00,000.00

7.

Cash Credit Special Programme

Rs. 34,84,713.66

8.

Margin Amount held for L/Cs

Rs. 76,693.35.

Therefore, on 25-9-1979 there was no dispute either about the number of loan accounts or about the amounts due under the said accounts by HGL. When confronted with these two documents, PW-6 stated as follows :

"I cannot say that these two letters were signed by an officer authorised by the Company. I am also unable to identify the person who has signed these letters."

Ex. P-139 bears the signature of Cost Accountant of HGL. It is not the case of

PW-6 that it is a forged document by one of his officers. Ex. P-140, i.e, the reply from the Bank is duly acknowledged by HGL. The signature of the person who has signed this exhibit is the same as the signature of the person who has signed the statements of HGL produced by RW 6 in this Court. Therefore, any controversy on the number of accounts or on the amounts due under those accounts does not merit further examination in the light of these two documents, which came into existence at an undisputed point of time--about 1 1/2 years prior to the filing of winding-up Petition. Ex. P-141 is the letter signed by PW 6 himself. He admitted his signature, but he did not know the contents thereof. To a specific question put to him whether there was anything in that letter he could take objection, he said that there was no need to do that.

11.9 On this state of evidence of RW-6 regarding the documents executed by him and his wife and also RW-1 the Secretary of HGL, the irresistible inference is that this witness is an interested witness and therefore his evidence should be viewed with great care and caution. The other witnesses examined by HGL regarding the cash credit documents and also regarding the dispute regarding the debt, namely RWs. 1 to 4, do not support his case. He may be justified in saying that most of the cash credit documents were executed in blank form and the manner of execution was also highly irregular. The seals and rubber stamps might have been put either before or after the actual date of execution, the common seal would have been affixed to some documents though it was not required under law, the date of the documents were either put in rubber stamp or in ink throwing great doubt on the manner of execution of these documents. But he and his wife knew what they were signing, they knew the contents thereof in some cases and in some cases they did not bother to know the contents. But all the same they signed them. Therefore, they are bound by the said documents and they cannot deny the existence of the loan transactions merely on the ground that those documents did not come into existence in the proper manner on the dates mentioned therein.

11.10 As noticed earlier, the transactions are in the nature of cash credit arrangements and not loans. Only when the cash credit limits are fully reached, the liability of HGL to the amounts sanctioned becomes complete. If that is kept in view, then the entries in the ledger book and the manner in which the documentation was done would be easily understood and the Bank cannot be faulted because certain doubts are created in the mind of the Court regarding the mode of execution of the documents and the date of execution of documents. RW-6 wants this Court to discard his own documents, namely the Board resolutions and the Balance Sheets. The evidence of RW-6 in cross-examination is a sad reflection on the way HGL is functioning and that will have some relevance for considering the other ground under which the Bank has sought the winding-up of HGL, namely, the just and equitable ground.

12. Mr. Sampath Kumar, learned Counsel for HGL drew my attention to the confirmation of balance letter as on 30-5-1977 and maintained that this

document was forged since RW-6 was not in Bangalore on that date. By the same token, his contention is that the documents evidencing cash credit transactions, namely, Exs. P-16 to 20, 37 to 41, 58 to 83, 100 to 125, 142 to 146, 163 to 167, 184 to 188 and 205 to 209 which were all executed on 30-5-1977 are forged documents and should not be relied upon. He also maintained that the balance sheet Ex. P-127 for the year ending 30th June 1977 does not mention in the schedule the guarantee given by HGL to the Bank and therefore that is also a forged document. On this point he relied on the decision of the Supreme Court in Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh,

12.1 No doubt, it has been proved by the evidence of RW-6 that on 30-5-1977 he was in Bombay, but all the same Ex. P-8 bears the date 30-5-1977. Does it mean by putting the date of execution of Ex. P-8 as 30-5-1977 the Bank had committed forgery? As noticed in the cross-examination of RW-6, he had admitted his signature and also admitted the contents of the documents. The learned Counsel has specifically invited my attention to Ex. P-77 which is an on demand Promissory note for a sum of Rs 25 lakhs executed on 25-3-1974 and argued that it was intrinsically unreliable as PW-2 was not employed in Bangalore in 1974, but all the same he had made the notation regarding the common seal of HGL. If they are forged documents, he maintained that the Bank has approached this Court with unclean hands and therefore it is not entitled to an order of winding-up. I will consider some of those documents on which the learned Counsel for HGL relied.

12.2 Ex. P-77 bears the date 25-3-1974. The contents of the document, excluding the printed matter, are in one shade of ink, but the date 25th March 1974 bears another shade of ink. Though this document did not require the common seal, the common seal of Hegde & Golay Private Ltd., has been affixed. But the rubber seal of Hegde & Golay Ltd. has been altered by adding the letter "P" between Golay and Limited in order to make it appear as Hegde & Golay Private Limited. The notation in Ex. P-77, it is not in dispute, is in the handwriting of PW-2 and PW-2 was not in the employment of the Bank in the year 1974 as is evident from his evidence. In Ex. P-80 the rubber stamp of 30th May 1977 appears to have been inserted after obtaining the signature of Sri Hegde. It has come in the evidence that Sri Hegde was abroad and just returned to Bombay on that date and was attending some meeting in connection with HGL work is Ex. P-81 the contents other than the printed matter are in one shade of ink but the words ""Bangalore 17th July 1976" are in another shade of ink. This is a revival letter signed by Sri & Smt Hegde on behalf of HGL. Likewise, Ex. P-82 is another revival letter which is taken on a plain paper unlike the earlier revival letter which is in a printed form, Ex. P.83 is a revival letter where two types of rubber seals of HGL are used for the signature of Sri & Smt Hegde; one type of rubber stamp is used for taking the signature of Sri Hegde and another type of rubber stamp is used for taking the signature of Smt. Hegde. Ex. P.84 does not bear the rubber stamp of HGL at all. But they bear the signatures of Sri & Smt.

Hegde. But this revival form does not bear the rubber stamp, may be because they are signed by Sri & Smt Hegde as guarantors. But the contents of the documents excluding the printed matter are in one shade of ink. Ex. P-85 is an on demand Promissory note for Rs. 20 lakhs. Two different rubber stamps are used for taking the signature of Mr. Hegde. The date 25th January 1978 is in rubber stamp but the contents excluding the printed matter are typed. According to Mr. Hegde, P-85 is the only promissory note which he signed properly because it was executed in favour of KSIIDC to enable him to give a guarantee for Rs. 20 lakhs for the Bank for the purpose of releasing a sum of Rs. 75 lakhs allotted by the Bank to HGL as working capital. If this document could bear the date in rubber stamp while the contents are typed and if this document could bear two different rubber stamps for identifying that Hegde had signed the same as Managing Director, the use of two different rubber stamps in the other documents and the use of the rubber stamp for indicating the date in other documents cannot be faulted by HGL. Further, in those documents there are discrepancies in the rate of interest irregularities in the use of the common seal, over-writings and variation in the shade of ink used for filling-up the documents and so on and so forth. But do these defects or irregularities in the execution of the documents make out a case of forgery when there is no dispute about the signatures of the executants ?

12.3 "Forgery" is defined u/s 463 of the Indian Penal Code as follows :

"Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

Certain illustrations are given u/s 464 IPC regarding negotiable instruments. Mr. Sampath Kumar has not explained under which of these illustrations the documents in question could be brought under. Head-Note (i) in Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, no doubt, supports the contention of the Learned Counsel, but on a close scrutiny of the facts in that case, it is difficult to accept his contention that the Bank or precisely its officers had committed forgery by ante-dating certain documents and by filling up the particulars in other cash credit documents after obtaining the signature of RW-6 and his wife. The facts in that case should be noted in order to appreciate the contention of the Learned Counsel. The appellant in that case was charged for the offence of obtaining illegal gratification u/s 161 of the Penal Code and Sections 465 and 466 of the said Code. The charge u/s 161 arose on account of the fact that the appellant had allegedly received illegal gratification from a Diamond Mining Syndicate for granting certain official favour, namely, an order of resumption of mining in Panna Diamond Mines Having demanded the bribe from the Mining Syndicate, a trap was laid for apprehending him at the time he accepted the illegal gratification on 11-4-1949 at the Constitution House in Delhi

where the appellant was camping. It is not in dispute that he was approached earlier by a representative of the Mining Syndicate for obtaining the resumption order on 1-4-1949 when he was at Rewa, that is, his official place of residence, but no resumption order was given on that date, presumably because the appellant wanted a bribe. Therefore, when the representative of the Mining Syndicate met the appellant as desired by him in the Constitution House on 11-4-1949, he was asked to file an application for resumption in Hindi and at the instance of the appellant it was dated 1-4-1949. He made the resumption order on receiving the gratification in a sum of Rs. 25,000/- and for that purpose he had the official file with him in the Constitution House. Therefore he wanted to ante-date the application and thereby make out a case that this order of resumption was passed on 2-4-1949 when he was at Rewa and not in the Constitution House at Delhi. From these facts the Supreme Court observed that :

"... far from these documents coming into existence on the respective dates which they bore they were in fact brought into existence on the afternoon of the 11th April 1949 at the Constitution House as alleged by the prosecution and were antedated to the 1st April 1949 and the 2nd April 1949 respectively with a view to show that the resumption order had already been granted by the Appellant No. 1 to the Syndicate at Rewa on the 2nd April 1949 "

On these facts, there was deliberate intention on the part of the appellant to ante-date the document with a view to cause damage and injury to the public or to cause any person to pass property or with intent to commit fraud or that fraud may be committed.

12.4 In the instant case, when PWs 1 and 2 were examined, no suggestion was put to them that the persons who got the documents in question executed by RW-6 and his wife committed forgery. It has come in the evidence of the Chartered Accountant RW-4 that copies of all these documents were with HGL when they audited the accounts of HGL. It has also come in the evidence of RW-1 that the documents executed during his time were executed by Sri & Smt Hegde in favour of the Bank and they were so executed in the normal course of business and though he had noticed the absence of dates in some documents, he had brought this to their notice. Sri Hegde in his cross examination had stated that though he knew that he was signing the D. P. Notes in blank form, they were not misused by the Bank till 1980 ; that he knew that he was signing D.P. Notes and delivery letters when he signed the Exhibits pertaining to these two documents ; that he did not bother to see the contents of the printed matter in the letters of hypothecation relating to machinery and book debts ; that he knew that he was signing the confirmation of balances due. In the light of these admissions made by him in cross examination, his further statement that he was cheated by the Bank and on the basis of the documents executed in blank form they had foisted the liability on him, cannot be accepted as proof of evidence of the intention of the Bank and its officials to make false documents or parts of documents with intent to cause damage or injury to HGL or to support any claim

against him or HGL or with intent to commit fraud. If the nature of the cash credit transactions are understood in their proper perspective, in my view, despite the discrepancies in the various documents pointed out to me by the learned Counsel, they have come into existence in the regular course of banking business and therefore, the plea of forgery must fail. That apart, the evidence of HGL's auditor RW-4 is wholly destructive of the theory of forgery put forth by the learned Counsel. The plea of forgery is also not sustainable since in my view HGL has ratified and adopted the accounts of the Bank regarding transactions in question by its own conduct as reflected in the balance sheets of HGL and the revival letters Exs. P-6, 7, 14, 15, 69, 70 etc.,

The plea of forgery having failed, the further contention that the Bank having approached this Court with unclean hands is not entitled to an order of winding up does not merit consideration.

13. The next limb of the argument of the Learned Counsel for HGL is that there is a serious dispute about the rate of interest due on the cash credits and therefore the dispute regarding interest due on the cash credits gives rise to a bona fide dispute which in the very nature of things could not be adjudicated by the Company Court in exercise of its summary jurisdiction. The dispute regarding interest appears to have been arisen from the fact that the company was a small scale industry upto 1975 and became a medium scale industry after 1975. The rate of interest payable by a small scale industry is 11 per cent and by a medium scale industry is 13%. The Learned Counsel invited my attention to Ex. P. 3 which is the cash credit agreement on hypothecation of goods dated 14-1-1976 for a sum of Rs. 5 lakhs. The rate of interest prescribed in that agreement is 1 1/2 % above the Bank advance rates and minimum of 15 1/2 %. Therefore, according to the Learned Counsel, there is a serious dispute regarding the interest payable and that is the reason HGL did not pay the amounts alleged to be due to the Bank. He also invited my attention to Ex. P. 88 where the interest is payable in quarterly rests whereas in other documents it is payable on monthly rests. Therefore, there was a bona fide dispute about the rate of interest. On the point what a bona fide dispute is, he relied on the following decisions, namely :

(i) The Aluminium Corporation of India Ltd. and Another Vs. Lakshmi Ratan Cotton Mills Co. Ltd. and Others, .

(ii) In Re In Re: Sulekha Works Ltd.,

(iii) U.V. Shenoy v. Karnataka Engineering Products Co. Ltd. & anr. 1982(1) KarLJ 167.

(iv) Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others,

(v) Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another,

13.1 The ratio of these decisions is that what a bona fide dispute is must be

determined from the facts of each case. In *The Aluminium Corporation of India Ltd. and Another Vs. Lakshmi Ratan Cotton Mills Co. Ltd. and Others*, Beg. J., as he then was, while dealing with the case of decretal debt, had observed in para 23 of his Judgment as follows :

"But, together with other facts a bona fide dispute either about the validity or about correctness of a decree may be established. The decision in each case must turn on its own facts."

In *Re: Sulekha Works Ltd.*, , deals with a number of points which arise in a winding up petition. That was a case where a winding up petition was filed not on the ground that debt was due but on the ground of various charges against the directors of the company and also the managing agents of the company. There were as many as 50 charges against the directors and the managing agents relating to the mismanagement of the affairs of the company and some were in contravention of the provisions of the Act. The Calcutta High Court dismissed the winding up petition on the ground that the allegations in the petition made out a case of violation of the provisions of Sections 372(2) and 372(4) of the Act and therefore the just and equitable clause could not be attracted for winding up the company. In that context the Calcutta High Court observed :

"Where there has been violation of the provisions of Section 372(2) and Section 372(4), Section 374 specifies the penalty for such violation. Since the statute itself provides for penalty for violation of the provisions of the statute, recourse cannot be had to winding up proceedings for the same violation. Besides an order for winding up is a discretionary order ; the conditions under which such discretion is to be exercised, when a petition is presented for winding up a company on the just and equitable ground has been laid down in Section 443(2)."

I am unable to get any assistance from this decision of the Calcutta High Court for deciding what a bona fide dispute is. The decision of our High Court in 1982(1) Kar. L.J 167 : 1982(1) KarLJ 167 also lays down that a bona fide dispute must be decided on the facts and circumstances of each case. HGL had raised certain objections regarding the rate of interest as could be seen from the noting of the auditors in the Balance Sheets for the years ending 30-6-1978 and 30-6-1979 (Exs. P/128 and P. 129) extracted above. RW-6 and his wife have executed the documents which clearly indicated the rate of interest and the quantum of interest have been calculated on the basis of the stipulation in the relevant documents. The auditors of HGL also have certified that the rate of interest was in accordance with the terms of the loan documents. Therefore it cannot be said that there was a bona fide dispute which raises a plausible defence on the rate of interest charged by the Bank. At a late stage in the correspondence between the Bank and HGL, it had taken the plea that the rate of interest was usurious. But I have permitted HGL to raise that plea because of the decision of this Court, *D.S. Gowda Vs. Corporation Bank*, which is now pending consideration before the Supreme Court. Though the decision of this Court is stayed by the Supreme Court, I am bound by that decision. This Court has taken

the view that the payment of interest at the rate of 16 1/2% per annum with monthly or quarterly rests does not appear to be in consonance with regular banking practice. Without going into the question whether it is usurious or not, the Bank's claim for the principal amount is proved and it is not the case of HGL that it was in a position to pay interest at the undisputed rate of 11 % or 13% after 1975 when it became a medium scale industry. Its witness RW-4 could have said that it had the necessary liquidity to pay the amount due to the Bank at the rate of 11 percent, or 13 per cent as the case may be. No such statement is forthcoming in his evidence and HGL also did not lead any evidence to show that it was in a position to pay interest at the admitted rate of 11% or 13% the case may be. As a matter of fact the evidence of RW-6 is that HGL does not owe any money at all to the Bank and the Bank has cheated HGL. The stand taken by him in his evidence docs not amount to a bona fide dispute which raises a plausible defence either regarding the principal or regarding interest. As rightly contended by Sri Sundaraswamy, the learned Counsel for the Bank, there could be no bona fide dispute regarding interest since that dispute would be a dispute in regard to the part of a debt and dispute regarding part of a debt is not a bona fide dispute. He has invited my attention to Halsbury's Laws of England Volume 7, Para 1004, State of Andhra Pradesh Vs. Hyderabad Vegetable Products Co. Ltd., Hyderabad, Re Tweeds Garages, Ltd 1962(1) All.E.R. Ch D. 121 at 122 and Pennington's Company Law 4th Edition at page . In AIR 1963 A. P. 679 State of Andhra Pradesh Vs. Hyderabad Vegetable Products Co. Ltd., Hyderabad, the Andhra Pradesh High Court held that :

"It has been argued on behalf of the Company that there is a "bona fide" dispute with regard to the indebtedness of the Company to the petitioner and that the presentation of the winding up Petition is an abuse of the process of the Court, and that in this case the Company "has not neglected to pay the amount demanded"" within the meaning of Section 434 or the Indian Companies Act. Reliance has been placed upon the decision of a Division Bench of the Calcutta High Court, consisting of Sanderson, C.J. and Woodroffe, J., in the Company v. Sir Rameshwar Singh 23 Cal WN 844 : AIR 1920 Cal 1004. There, the Learned Judges, after referring to the judgment of Sri G. Jessel, M. R., in London and Paris Banking Corporation, In re (1875) 19 Eq. 444 at page 446, held that negligence in paying a debt on demand is omitting to pay without reasonable excuse and that mere omission by itself does not amount to negligence. In the above case the company alleged that there was a "bona fide" dispute and that they were willing to pay what was found due on a taking of the accounts. Now, in this case, as I have already pointed out, Learned Counsel for the respondent has invited me not to decide finally about the quantum of the debt Therefore, the only question is whether, on the materials placed before this Court, there is ground for supposing that there is a "bona fide" dispute as to a substantial part of the debt on which the winding up Petition is based. On the statement of accounts above mentioned, I find no difficulty in reaching the conclusion that far from there being a "bona fide" dispute as to a substantial part of the debt, there

is an admission that a substantial part is due and owing by the Company to the petitioner. Whatever may be said with regard to the balance of the amount, the company admits its liability to the petitioner to the extent of Rs. 9,00,000/- out of 15 lakhs. That being the position, I am unable to hold that there is a "bona fide" dispute with regard to a substantial portion of the debt "

13.2 On the facts of this case, though on the evidence of RW-6 there is no admission of liability, on the evidence of RW-4 and the documentary evidence of the Bank the principal debt is proved and the only dispute would be regarding interest in that whether it should be more than 11 per cent or 13 per cent as the case may be and that by itself would not raise a bona fide dispute regarding the substantial part of debt. *Plowman, J.*, in (1962) 1 AER 121 : 1962(1) All.E.R. Ch D. 121 at 122 ruled that when there was no doubt that the petitioners were creditors for a sum which would otherwise entitle them to a winding up order, a dispute as to the precise amount owed was not a sufficient answer to the petition and accordingly a winding up order would be made. Pennington in his treatise on Company Law observed as follows :

"The fact that the company disputes the amount of the debt claimed by the petitioning creditor will not induce the Court to dismiss the Petition if the company admits that it is indebted to him for an amount which, taken by itself, would be sufficient for making a winding up order."

13.3 As noticed earlier, HGL did not produce its books of account. Being a company, it was bound to maintain the necessary books of account and it had, maintained the accounts as is evident from the evidence of RW-3, Therefore, an adverse inference has to be drawn from the fact of non-production of books of account of HGL.

13.4 No doubt, it has produced a large number of other documents by way of correspondence between it and the Bank, State Government, KSFC and other parties. A reference to these documents would show that there was no serious dispute about the cash credit finances made available by the Bank to HGL. These documents do not throw any light on the plea taken by HGL disputing the quantum of the cash credits sanctioned and disbursed by the Bank. Ex. R.1 the register of charges filed with the Registrar of Companies shows that Punjab National Bank was charging interest 6% per annum in the year 1970, but the reasons which prompted HGL to switch-over to the Bank is not clear from the exhibits filed by HGL. However, one letter produced as Ex. R.24 throws some light on this disputed question, which is made much of by HGL in these proceedings. According to RW-6, he had given-up the credit facilities of Punjab National Bank at a lower rate of interest on the persuasion of the Bank. But, he said that the subsequent events proved that the Bank did not keep its assurance. Ex.R-24 the letter dated 11-11-1972 from the bank discloses that RW-6 had given in his letter of 30-10-72 a "lucid account of the efforts" he had made to get recognition for his project from the various authorities concerned. In reply to that letter, the Bank in Ex. R-24 has replied as :

"We have pleasure in advising that we are agreeable in principle to look after the entire credit requirements of the twelve small scale ancillary units proposed to be set-up in the above industrial estate, subject to our usual norms and the viability of their schemes being proved to our satisfaction."

This reply indicates that it was RW-6 who had asked the Bank credit requirements for the ancillaries and that would have been clear by his letter dated 30-10-1972. He has not produced that letter, obviously because he might have requested the Bank for financial assistance at the earlier stage of the setting-up of the industrial complex for the manufacture of watches. This is also clear from his letter Ex. R-26 dated 23-3-1977 addressed to the Bank. Though this letter is in the letter-head of the industrial complex of the units, he has admitted that in 1972 the Bank accepted in principle to finance the complex for both medium term loan and working capital and assured that a branch would be opened. Therefore, HGL has not proved that it was the Bank which persuaded it to switch-over from Punjab National Bank. This is also clear from para 4 of Ex. R-26, which reads as :

"In 1973 August, Hegde & Golay applied for medium term and working capital loan to Bank. We were assured by December 15th our loan application will be scrutinised and sanctioned; in the meanwhile adhoc assistance was given, this was finalised in December 1975".

13.5 So, in the year 1977 when misunderstanding arose between the Bank and HGL as is evident from the detailed letter Ex. R-26 consisting of as many as 29 points made out by RW-6 for placing more funds for the industrial complex, RW-6 had admitted that HGL had applied in 1973 for the loan facilities. Therefore, the case sought to be made out by HGL that it was the bank which persuaded HGL to switch-over from Punjab National Bank to itself, is not borne out by any cogent evidence.

13.6 What exactly was the nature of the dispute between the parties is evident from the minutes of the Board Meetings of HGL as reflected in Exs. R-33, 34 and 35. In the first and the second meetings the representatives of KSFC, IDBI, Bank, KSIIDC and the representatives of HGL and its units were present. In the third meeting the representative of KSFC could not be present since he was otherwise engaged. What was discussed in the said meetings calls for a special reference in order to understand the controversy between the parties.

13.7 Though, as noticed earlier on 23-3-1977 Mr. Hegde has raised as many as 29 points regarding the financing by the Bank, none of these grievances were put before the Board when the representatives of other financial institutions were present and they were also interested parties having financed HGL and its units. As a matter of fact, the representatives of financial institutions wanted more information from HGL regarding its production programme. RW-6 also felt in the meeting dated 10-7-1977 (Ex. R-33) that regarding the production programme of HGL, an embargo had to be put on internal expenditure. One of the invitees

wanted to know whether HGL had the production capacity to maintain the expected level of production. In the said meeting the members present also discussed the sanction, disbursement, rescheduling of finance facilities sought by the complex.

13.8 In the meeting held on 9-8-1977 (Ex. R-34) RW-6 had explained the critical situation HGL was facing due to competitors taking advantage of the facilities given by the Government even though HGL was the largest in the private sector. In that meeting it was brought to the notice of the invitees present that the ancillaries had been seriously affected for want of working capital and HGL was not in a position to do it since the Bank had imposed a condition that HGL should not agree for the further addition to the stock of components. As the ancillaries had not gone into production as is clear from the query raised by the Bank representative, it was not clear to them whether the advances could be treated as working capital till the ancillaries regularised their production.

13.9 In the minutes of the meeting dated 31-10-77 (Ex. R-35), the Board noted that the liquidity position of the company was not quite good and considered the methods to improve the liquidity methods. Though in this meeting RW-6 had complained of lack of funds, no allegations were made on the manner in which the Bank was financing the project. The Bank representative was very much there and all the grievances that RW-6 had with the Bank could have been thrashed out in the said meetings.

13.10 Further, in the meeting held on 31-10-1977 RW-6 had admitted that a sum of Rs. 45 lakhs was obtained from the Bank for financing the assets and these amounts were being treated as clean cash credit and HGL had also furnished the Bank the payment schedule as follows: -

"Principal : In twenty half yearly instalments of 2.25 lacs on 31st March and 30 September commencing from 31st March 79.

Interest: Payable half yearly on 30th June and 31st December on the balances outstanding."

On this proposal the Bank's representative pointed out that though HGL has requested the Bank to charge interest at 12 1/2% from the date of RBI circular, according to his information the new rates would apply to loans sanctioned upto that date. The Bank representative also pointed out that as part of the condition for new working capital, the Bank had requested HGL to close its transaction with other Banks and also to open separate collection accounts. After some discussion a decision on this point was agreed to be deferred to the next meeting.

13.11 The proceedings of these meetings to which I have briefly adverted do disclose that there was no serious grievance by HGL against the Bank when the representatives of the financial institutions attended the Board meetings on 10-7-1977, 9-8-1977 and 31-10-1977. As a matter of fact, HGL and its ancillaries had their own teething problems and additional finance was one of

those problems. But the Bank had advanced Rs. 45 lakhs as clear cash credit at that time and the question of working capital was a matter for consideration since the Bank wanted HGL to close its account in the other Banks, which is understandable in view of the large cash Credit arrangement with the Bank.

13.12 Mr. Sampath Kumar made a pointed out reference to Ex. R-40 to which I have already adverted to earlier. That letter is dated 18-8-1978 in reply to the letter of 22-7-78 issued by the Bank. The real rub between the parties is reflected in these two letters. Letter dated 22-7-1978 by the Bank, marked as Ex. P-96 not only throws some light on the cash credit facilities made available to HGL, but also on the various omissions and commissions of HGL in the matter of compliance with the terms and conditions of cash credit and the understanding reached between the parties regarding the manner of managing HGL. The latter part of para 2 of the letter reads as under :-

".....At the time the company made their application to lie Bank for these facilities, the company had projected sales turnover of Rs. 135 lacs for 1975-76, Rs. 233.00 lacs for 1976-77 and Rs. 450.00 lacs for 1977-78. The actual levels of operations since 1976 have, however, been nowhere near expectations, e.g., the company's turnover during the first six months of 1977 78 was only Rs. 64.00 lacs. While this was more disquieting was the full utilisation of the Bank finance without relation to actual production sales, scrutiny of relevant data during the past one year has revealed that the financial assistance made available has gone towards building up of increasing volume of immobile inventories, lock up of funds in receivables, etc. Even as far back as April 1977 this immobile inventory was quantified at about Rs. 60 lacs and the company were requested to initiate action for early liquidation of these virtually blocked assets. However, there has not been any significant reduction in these stocks, despite the passage of nearly a year."

Thereafter, the Bank has listed the various acts of omissions and commissions committed by HGL in para 3 of this letter. To this letter, a reply was sent as per Ex. R-40, on which the learned Counsel for HGL relied upon. In this letter the averments of the Bank in para 2 of the letter extracted above are not denied, but what HGL stated was that :

"The working capital facilities reached Rs. 75 lacs in 1976 on adhoc basis due to the Bank indiscriminately debiting HGL working capital account with the liabilities of the ancillaries on the basis of guarantee by HGL and Mr. Hegde on trust."

So, the grievance of HGL was that the Bank was not entitled to debit HGL with the liabilities of the units on the basis of guarantee by HGL and RW-6. But that is a different aspect of the matter which I have already considered. As per the documents executed by HGL for the cash credit arrangements, namely Exs : P. 36, P.57, P.99, P. 120 etc., it was open to the Bank to debit HGL the liabilities of the ancillaries in their cash credit account.

13.13 Therefore, the dispute between the parties was whether the Bank

consistently failed in implementing its assurances regarding financial aid ? or, whether HGL violated any of the covenants pertaining to the cash credit transactions between it and the Bank and the subsequent understanding between the parties regarding the management of HGL by regularising its production and for protecting the security offered by it for the huge amounts advanced by the Bank ?

13.14 These differences or disputes as HGL wants to make out, do not raise a bona fide dispute which offers a tenable defence in law to the demand of the Bank. The Bank had its own reasons for not extending the credit facilities since it was not satisfied with the performance of HGL and the way in which it was managed. In Ex. P-96 it had made it clear that it would be difficult for it to continue the facilities made available unless HGL took the following immediate steps :-

"a) Adjust the irregularity in the accounts ;

b) If (a) is not feasible, immediately provide additional security for the irregular drawings in the working capital amounts, which now stand at about Rs. 40 lacs and for the shortfall in the security cover for the finance availed for fixed assets. The additional security to be made available by you should be acceptable to the Bank ;

c) Give us a categorical assurance that none of the violations of the terms, conditions and covenants governing the credit facilities will be repeated ;

d) Raise adequate long term resources by way of share capital to a minimum extent of Rs. 30 to Rs. 40 lacs to set-right the imbalance in your financial structure as on 30-6-1977 You will note that your company on that date had a tangible net worth of Rs. 49 lacs (including deposit from Shri B. T. Shankar Hegde) against liabilities aggregating to Rs. 219 lacs ; and

e) Your company should make arrangements for revamping your managerial structure, especially in the areas of finance, management and sales organisation, by inducting professionals at top managerial levels."

The Bank also made it clear in para 7 of this letter that :

"We hereby state that the above requirements for continuing the advance facilities to your company are being advised without prejudice to our rights under the several agreements executed by you and without prejudice to our right of continuing the advances at our discretion."

Of course, HGL in its own way replied to the various allegations of the Bank, in Ex. R-40, to which the learned Counsel had made a pointed reference. What it said in Ex. R-40 is as under :-

"a) The so called irregularity has been caused by the Bank's own actions. The total amount involved will have to be commuted and converted into a Term Loan at fair interest rates ;

b) In view of the Bank's consistent failure in implementing its assurances, the Company's position has come to a very critical stage involving survival instead of its earning a profit of about Rs. 1 crore since January" 77. Hence it is not possible to provide anymore security other than what has been provided. The Bank should implement its own promises and immediately give Rs.75 lakhs additional working capital, as was agreed to by them, on the basis of the guarantee given by KSIIDC, to enable the company to go into full production ;

c) We have not violated any of the covenants. It is the Bank who has brought the company to the present situation due to collateral reasons which can be proved. However, we are willing for an impartial committee to investigate this charge and if any one of these assertions are anywhere near the truth, we will give the needed undertaking ;

d) For reasons stated above, this is not possible. The allegations contained therein are emphatically denied.

e) We do not understand the intentions behind such a suggestion. In watch industry, we have the finest professional men available and we challenge you to disprove this We have adequate professional staff.

But, the proposals put forth by HGL in the annexure to Ex. R-40 which are extracted in para 3.1 above show that there was no dispute about the quantum of cash credit advances to HGL till 18-8-1978. That was the position in 1978.

13.15 Now, what were the differences between the parties in the year 1979 are seen in Ex.P 98, which is marked as "Private & Confidential" by the Bank to RW-6. In that letter the Bank called upon HGL to pay the following amounts outstanding in its accounts together with interest from 1-7-79 upto the date of settlement at the contracted rate within 15 days from the date of receipt of Ex.P-98;

Facility/Account

Limit

Balance/outstanding

Clean Cash Credit I

25,00,000

24,50,000-00

" II

20,00,000

20,00,00-000

" III

18,00,000

14,01,954-89

Cash Credit Hypothecation-cum-guarantee.

77,00,000

1,38,92,094-29

Cash Credit Pledge cum Guarantee.

25,00,000

25,00,000-00,

Cash Credit (Temporary) guaranteed.

2,00,000

5,00,000-00,

Cash Credit (Special Programme) guaranteed.

40,00,000

34,84,713-66".

13.16 The reply given by HGL in Ex R-58 to this specific demand is as follows :

"3.the various sums claimed in the said para as balance outstanding are incorrect. The interest referred to, stated to be a contracted rate, is again not in accordance with the law and the terms of loan and this has already been pointed out to you number of times including in our letter.... dated 18-8-78 with enclosures. Further, the question of foreclosures now does not arise as already you have stopped the facilities to us from early 1978 though it was illegal....."

(i) The first three amounts were agreed to be advanced to us under the specific understanding that they will be converted into a medium term loan. You have not only failed to do so inspite of our repeated request in this respect, but have actually diverted large portion of these amounts to meet the various interests and other liabilities of the ancillary units, despite our protest. Further, you compelled to pay 15 1/2% P.A. interest on these amounts instead of the normal 12% and debited the same to our account and again charged interest on such interest which is usurious in nature and illegal than causing us a huge loss by making our working capital account inoperative to that extent.

(ii) the next three amounts shown as due by us are interest and not tenable as these include wrongful and usurious debits of interest on various heads of advance including themselves and also include wrongful debits pertaining to the ancillaries in spite of our protest.....

(iii) the last head of account again consists a large extent of the usurious interest

debited as explained above. As this is not in accordance with law, we are not liable to pay....."

13.17 It cannot be said that this stand taken by HGL raises a bona fide dispute regarding the debt due. There may be dispute on the question of interest as to whether it should be 15 1/2% or 12%. There is a reference in that letter that the Bank did not take into account the credit amounts due to HGL as per its claim dated 2-6-1978. What that claim is not proved in these proceedings by any satisfactory evidence. Even then, after giving deduction to that claim, the other principal amounts certainly remain outstanding and therefore these amounts with 12% interest was admittedly due from HGL to the Bank, Therefore, it cannot be said that there is a bona fide dispute which enables HGL to raise a tenable defence disentitling this Court from making an order of winding up.

14. It should be noted that even the dispute regarding interest cropped up only after 1977 as is evident from the balance sheets of HGL. Without adding interest a sum of Rs. 2,54,50,857/-was due from HGL as on 30-6-1979 and a sum of Rs. 2,62,94,862/-was due from HGL as on 30-6-1980. Therefore, even assuming that there was a dispute regarding the rate of interest after 30-6-1977 that dispute by itself will not afford a defence to HGL for repudiating the entire debt due to the Bank. As observed by the Supreme Court in *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Private Limited* AIR 1971 SC 2660:

"Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See *Re A Company* 94 SJ 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the Court will make a winding up order without requiring the creditor to quantify the debt precisely (See *Re. Tweeds Garages Ltd.*, 1962 Oh. 406). The principles en which the Court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly, the company adduces prima facie proof of the facts on which the defence depends."

None of these principles are satisfied by HGL.

15. The next point for consideration is whether the debts are barred by limitation and therefore the petition is liable to be dismissed. The plea of limitation is based on the fact that cash credits for Rs. 5 lakhs, Rs. 45 lakhs, Rs. 32 lakhs, Rs. 25 lakhs and Rs. 20 lakhs were under pronotes dated 14-1-1976, 14-1-1976, 14-4-1977, 16-1-1976 and 8 12-1974 respectively. Therefore, on the date of the petition, i.e.. 16-4-1980 these debts were barred by limitation. But the Bank has taken the revival letters Ex.P.6, P.7, P.14, P.15, P.69 and P.70 dated 5-12-1978, P.75 and P.76 dated 29-9-1977. These revival letters are signed by both HGL and Sri & Smt. Hegde personally. There are also confirmation of balance letters Exs.P 8, P. 16, P.68 and P 74 dated 27-5-1977. I have already held that these documents and other documents relating to cash credit accounts of HGL are not

forged documents. As observed by Lord Delvin in *Kwei Tek Chao v. British Traders and Shippers Ltd* (1954) 2 QB 459, 476:

"If the forgery corrupts the whole of the instrument or its heart, then the instrument is destroyed ; but if it corrupts merely a limb, the instrument remains alive, though no doubt defective. By way of example, if a man adds two thoughts to a cheque, that is the end of it. It is no longer a cheque for, let us say 1962(1) All.E.R. Ch D. 121 at 122, because the original figure of 1962(1) All.E.R. Ch D. 121 at 122 has been destroyed by the addition of two thoughts. It is not a cheque for (sic)1,000 because the figure of (sic)1,000 is a forged figure. There is therefore nothing left of it and it must go. The same result would not necessarily follow, however, if a man were, for example, to forge the date on a cheque, because he thought that, it being overdue, there was a possibility that awkward questions might be asked "

Therefore the plea of limitation is of no avail. That apart, the balance sheets of HGL, namely Exs.P 10 and P. 131 also negative the plea of limitation. Though there was considerable argument on this point, the question in my view does not admit of any controversy.

15.1 In *Jones v. Bellegrove properties, Ltd.* 1949 (1) All ER 498 Affirmed in 1949 (3) All ER 198 Birkett J. decreed the suit of the plaintiff who was a shareholder of the defendant company on the basis of the written acknowledgment of debt in the balance sheet for the years 1939 to 1945 which had been communicated to him in 1946. The Learned Judge held that parol evidence was admissible to show that the sum mentioned in the entry in the Balance Sheet included a debt due to plaintiff and the entry thus explained constitutes an acknowledgment of the debt due to the plaintiff within the meaning of Sections 23(4) and 24(1) of the Limitation Act, 1939. That decision was rendered on a consideration of the various decisions of the House of Lords and the Court of Appeal. That was a case where the debt claimed by the plaintiff was mentioned under the sundry creditors in the Balance Sheet and evidence of that debt was let in by the plaintiff that he was also one of the sundry creditors. The ruling of Birkett, J., was affirmed in appeal by the Court of Appeal in 1949 (2) AER 198.

15.2 The position would be, however, different if the Balance Sheet were to disclose a debt due to the Directors of the Company. Even then, in *Re Gee & Co. (Woolwich) Ltd.* 1974 (1) All E.R. 1149 it was held by Brightman, J., of the Chancery Court that although it was not competent for the Director to acknowledge a debt due to himself for the purpose of Section 23(4) of the Limitation Act, such an acknowledgment would be fully effective if sanctioned by every member of the Company, for in such circumstances the Directors could not be said to have been acting in breach of their fiduciary duty.

15.3 In *Re Compania De Electricidad De I a Provincia De Buenos Aires Ltd.* 1978 (3) All E.R. 668 Slade, J., of the Chancery Court ruled that the statement in the company's accounts that money was owed in respect of capital repayments due

to shareholders and unclaimed dividends, interests and bonds redeemable was capable of constituting an acknowledgment of a debt, within Sub section 23m and 24n of the 1939 Act, but, by virtue of Section 24(2), for an acknowledgment to be effective it had to be made to the person or an agent of the person whose title was being acknowledged. An acknowledgment could not be made to a person or his agent, within Section 24(2), unless it was received by either of them. Accordingly the relevant Balance Sheets could not be treated as constituting acknowledgments in relation to any creditor if there was no evidence that he or his agent had received copies of them.

It cannot be disputed that Exs. P. 128, P. 130 and P. 131 are the balance sheets of HGL which were produced through PW-2 and therefore, it is obvious that the Bank had received the copies of these balance-sheets of HGL.

15.4 In *Ambica Mills Ltd., Ahmedabad Vs. Commissioner of Income Tax Gujarat, Ahmedabad*, a Division Bench of Gujarat High Court consisting of Shelat, C.J., and Bhagwati, as they then were, held that debt shown in the balance sheet is an acknowledgment within the meaning of Section 19 of the Limitation Act and in order to be so, the Balance Sheet in which such an acknowledgment is made need not be addressed to the creditor.

So, our High Courts have differed from the English view in so far as it relates to communication of acknowledgment to the creditor.

15.5 In *Bengal Silk Mills Co. Vs. Ismail Golam Hossain Ariff*, a Division Bench of the Calcutta High Court (Lahiri, C. J., Bachawat, J., as they were then) considered the very same point though it was not in a case of winding up. The point that arose for consideration was whether the amounts shown under liabilities as debt owing by company to plaintiff signed by the managing agent duly authorised to borrow and also passed by the general meeting would amount to an acknowledgment of liability for the purpose of Section 19 of the Limitation Act, Bachawat, J., observed as follows :

"There was necessarily a time lag between the date of the signing of the Balance Sheet and the end of the previous year. The balance-sheet contained no admission of the amount due on the date of the signature. That amount might be and often was different from the amount shown as due at the end of the previous year, but that fact alone did not take the amount out of the purview of Section 19.

To come u/s 19 an acknowledgment of a debt need not be made to the creditor nor need it amount to a promise to pay the debt. An admission of indebtedness in a Balance-sheet is therefore a sufficient acknowledgment u/s 19 Limitation Act."

15.6 In *Babulal Rukmanand Vs. Official Liquidator, Bharatpur Oil Mills (Private) Ltd., Shinghal, J.*, as he then was, dissenting from the view taken by the Nagpur High Court in AIR 1951 Nag 255, *A.C.K. Krishnaswami Vs. Stressed Concrete Constructions Pvt. Ltd.*, , *A.C. Krishnaswamy v. S.C. Constructions Pvt. Ltd.* held

as follows :

"An entry in the Balance Sheet of the Company showing debt owed to the creditor amounts to an acknowledgment of liability if it fulfills the requirement of Section 19. What Section 19 requires is that the words used in the acknowledgment must indicate the existence of "journal relationship between the parties such as that of debtor and creditor" and the Courts lean in favour of a liberal construction of such a statement unless it is shown that it was made clearly without intending to admit the existence of such relationship."

15.7 Learned Counsel for HGL placed reliance on the observations of the same Judge in para-15 of the decision. I am unable to get any assistance from this paragraph in support of his view. What the Learned Judge says is even if a Balance Sheet is otherwise found to have been authenticated in accordance with law, that will not avail the creditor if the authentication is colourable and has been vitiated for some satisfactory reason. There is no vitiating factor in these Balance Sheets. All because RW-6 and his wife are the guarantors for HGL and RW-6 is creditor of HGL, the authentication of the Balance Sheet Ex. P. 123 does not take away the effect of admission in Schedule C to Balance Sheet to the extent of Rs. 1,73,01,422 as secured loan from the Bank as on 30-6-1977.

15.8 The decisions of the Madras High Court, A.C. Krishnaswamy v. S.C. Constructions Pvt. Ltd. and also the decision of Nagpur High Court, Kashinath Shankarappa v. the New Akot Cotton Ginning & Pressing Co. Ltd. which were dissented by Shinghal. J., rest on the facts of those cases. In the Madras case, A.C. Krishnaswamy v. S.C. Constructions Pvt. Ltd. the directors who had signed the Balance Sheet were also the creditors of the Company in view of the fact that they were the promisees under the pronote executed by the Company. That was a case where the creditor of the Company was one of the directors and as a director he had acknowledged the debt due to him from the company and therefore, that decision does not apply to the facts of this case. In this case, RW-6 and his wife having endorsed the promissory notes to the Bank, they were the creditors of HGL. Further, the debt due from HGL to RW 6 is shown separately in Schedule C to Ex. P. 123. Therefore, there was no conflict of interest as between HGL, RW-6 and his wife when he authenticated Ex. P. 123, as RW-6, his wife and his daughters were the holders of all the shares in HGL. However, in AIR 1951 Nag 225, Kashinath Shankarappa v. the New Akot Cotton Ginning & Pressing Co. Ltd. the Nagpur High Court has taken a different view. Para-17 of the Judgment reads as :

"Turning next to the balance sheets, the mere signing of a balance sheet by a Director does not operate to save limitation because the Director in drawing up a balance sheet does not do so with the intention of acknowledging liability but under a duty where he is bound to set out, among other things, the claims made on the company. It is then for the Directors, and later for the company, to pass on these claims and either accept them or reject them."

This decision does not make any reference to the precedents in Indian or English law. Moreover, the weight of authority is in favour of the Bank and therefore, with great respect, the decision of the Nagpur High Court does not state the correct law.

15.9 The second limb of the argument on the point of limitation is that if the debt is statutorily barred at the time of passing of the winding up order the petition is not maintainable. According to the learned Counsel whether the Petition is barred by limitation should be considered with reference to the date of winding up order and not with reference to the date of filing of the Petition. He relied on the decisions in *J.A. Dixit Vs. Official Liquidator, Lahore Enamelling and Stamping Co. Ltd. Vs. A.K. Bhalla and Others*, and in *In Re: Chanbali Steamer Service Co., Ltd. (In Liquidation)*, . The decision of the Allahabad High Court *J.A. Dixit Vs. Official Liquidator*, relates to the proceedings in a Company Court after the Company was ordered to be wound up compulsorily. In that context the Allahabad High Court held that the date material for determining the question of limitation in respect of the debts recoverable by a company ordered to be wound up compulsorily is the date of the winding up order and therefore any debt from the company which was barred at the date of the winding up would be barred and not recoverable in a winding up petition. I am unable to understand how this decision is of any assistance to HGL. The plea of limitation in this petition can be raised only if the debts in question are barred by limitation on the date of the filing of the petition. The petition was filed on 11-4-1980 and therefore the petition was well within time if the revival letters dated 29-9-1979 and 5-12-1978 are taken into account. In the circumstances, the decision of the Allahabad High Court *J.A. Dixit Vs. Official Liquidator*, the decision of the Calcutta High Court in *In Re: Chanbali Steamer Service Co., Ltd. (In Liquidation)*, , and the decision of the Punjab High Court *Lahore Enamelling and Stamping Co. Ltd. Vs. A.K. Bhalla and Others*, are not applicable to the question of limitation in this case. In *In Re: Chanbali Steamer Service Co., Ltd. (In Liquidation)*, , the Court was concerned with an application under Sections 228 and 229 of the repealed Act, which correspond to the provisions of Sections 528 and 529 of the Act. Sections 228 and 229 of the repealed Act deal with the proof of debts after the winding up is ordered. Section 229 deals with application in insolvency in winding up of insolvent companies and therefore the point of limitation raised in regard to a debt in a petition u/s 433 of the Act did not arise for consideration in that case. It cannot be disputed that a winding up petition is one mode of recovery of a debt and if that be so, the short point for consideration is whether the debt alleged to be due by HGL was time barred on the date of the presentation of the winding up petition. If it is time barred in the Civil Court it will be time barred in the Company Court. Therefore, the Calcutta decision *In Re: Chanbali Steamer Service Co., Ltd. (In Liquidation)*, does not lay down the law for the determination of the period of limitation for proving a debt in the winding up petition u/s 433(e) of the Act. Likewise, the decision of the Punjab High Court in *Lahore Enamelling and Stamping Co. Ltd. Vs. A.K. Bhalla and Others*, on the effect of Section 171 of the repealed Act on

Section 168 of the said Act is not relevant for the purpose of our case.

16. Regarding solvency : On this point the evidence of PW-2 requires to be noticed. He had stated that the personal guarantee furnished by Sri & Smt. Hegde in respect of each of the loans sanctioned are not worth much when compared to the huge amounts outstanding due and payable by HGL ; that the personal assets of Sri Hegde and his wife would not cover the enormous amounts ; similarly the security by pledge of machinery had diminished as the machinery had been fully utilised and exploited in 1978 and 1979 and had depreciated in value, in the result the security pledged was very much inadequate to meet the huge payments to the Bank ; that the machinery of HGL had also been pledged to KSFC and in his own estimate the stock and raw-materials of HGL would not offer any security at all for the cash credits advanced as spare parts of the watches had negligible resale value ; that having some knowledge of the sales performance of HGL during the period he was able to check its book debts, there was no sufficient security for the amounts advanced ; that HGL also defaulted in the repayment of term loan to KSFC and the amounts due to sundry creditors as on 30-6-1979 were about Rs. 81 lakhs.

16.1 As against this evidence, HGL in order to prove the value of its assets had examined two witnesses, namely, Doreswamy, Chartered Engineer and Consultant as RW-2 & P. Laxminarasimhan, practising Cost Accountant as RW-4. RW-2 has submitted his valuation report which is marked as Ex. R.4. He is the member of the Institution of Valuers of India and also founder member of the Karnataka Chapter of the Institute of Valuers ; he is an approved Valuer for wealth-tax and estate duty purposes and authorised valuer for some of the nationalised banks like Canara Bank, UCO Bank etc. He had valued the properties and assets of HGL and had prepared the report Ex. R.4. According to him, the value of the plant, equipment, technology, stock of goods gives a total fair market value of Rs. 6,14,29,000/- including valuation of lands and buildings thereon. In his examination in-chief he has stated that he inspected HGL factory with his partner Sheshadri in the presence of RW-6. In cross-examination it is elicited that he had submitted his report on the request made by RW-6 and that request came to him during the pendency of this petition and he was also made known that the report would be used in these proceedings ; that for the purpose of valuation he had taken the extent of land owned by HGL as 7 acres. Regarding the title to these lands, he stated that the title vested in HGL on the basis of the possession certificate issued by KIADB dated 23-8-1972 and he did not see any other title deed that though he enquired about the sale deed, he was told that the land was given on a lease-cum-sale basis for a period of 10 years and therefore possession certificate was as good as an acceptable document for this land, but he was not aware of any lease-cum-sale agreement in favour of HGL ; that he had no idea of the price of the land when it was given to HGL and on the date he valued the land it was still a leasehold land, but for the purpose of valuation, he had treated this land as freehold land ; that he did not make any enquiries whether this land was held by the units of HGL in part or on lease-cum-

sale basis from KIADB; that he was not aware whether RW-6 had any right in the land where HGL is situate ; that he was not aware of any encumbrances of this land or the building situate thereon ; that the value of the land and building mentioned in Ex. R. 4 was without any encumbrance on the said land ; that he had taken the fair market value of the land as on 30-4-1980. According to him, the value of this land per acre is Rs. 2,50,000/- based on the sale transactions pertaining to Mysore Chrome Tanning, taken over by MSIL and Popsee Company situate at Peenya Industrial Estate ; he had not seen the registered sale deeds of the properties of these companies when he had valued them at this rate or slightly higher rate ; the plinth area of the factory building of HGL is 1680 Sq. meters, but he did not know the cost of construction of this building ; the book value of the land was given as Rs. 1,01,175 as on 30-6-1980 and the book value of the building was given at Rs. 5,88,862 ; the buildings were constructed in the year 1972 and he valued the buildings calculating depreciation on the basis they were new constructions on the date of valuation. According to him, there was escalation in the price between the time of construction and the time of valuation.

16.2 Regarding the machineries installed in the premises of HGL, he said they were two types ; one relating to watches and time machines and the other relating to printed circuit boards; that most of these machineries were imported and the import cost of these machineries is Rs. 62 lakhs, but he did not verify the import cost with reference to import licences or with reference to invoices. Likewise, he did not verify the value of indigenous machineries with reference to the invoices or delivery notes. He also did not write to the manufacturers and suppliers of both foreign and indigenous machineries as to what exactly the cost was to buy these machineries in about the year 1980. Therefore, the valuation of the machineries made by him rested on the information furnished by HGL, but that information was not tested or verified with reference to invoices or delivery notes. Even assuming that he was justified in valuing the plant and machinery at twice the acquired value on the basis of the Journal of Indian Valuers, it has come in his evidence that it was the first time he was valuing machineries pertaining to horological manufacture and therefore, he could not have acted on the mere ipse dixit of HGL which was definitely interested in showing a high figure for the purpose of this case and it is not in dispute that the report was submitted by RW-2 when the matter was pending in this Court for the purpose of this case. The sophistication in watch technology should have put him on guard when he made the valuation of these imported and indigenous machineries, on 30-3-1980.

16.3 Likewise, he had valued technology and personnel at Rs. 50 lakhs. According to him, this Rs. 50 lakhs reflects the value of technology acquired by 6 engineers and 163 technicians who were sent abroad for acquiring watch technology. He admitted that this valuation was his estimate and not with reference to the books of account. He worked out an average at Rs. 30,000/-per person on the basis of the information furnished by HGL. He admitted that this information did not give the breakup of the expenses of travel abroad, the

number of days those personnel stayed abroad and the cost of their training there ; that he had no idea as to how many of these technicians who were trained abroad were working for HGL ; that he could not say in what particular branch of manufacture these personnel received training abroad ; that he valued the import licence held by HGL at Rs. 50 lakhs, but he was not aware whether those import licences remained valid on the date of submission of the report or on 2-1-1984; that on 15-4-1980 there were three import licences of Rs. 4,90,70,988 but he did not know in what manner HGL made use of these licences; that he could not vouch the correctness of the figures 2,20,49,000 of item-7 in Ex. R.4, i.e.. the value of stock as on 30-4-80 consisting of raw-materials, components, work-in-progress, stock-in-trade, stores, spares, tools and accessories, since the same was taken from the certificate of the Cost Accountant of the firm of Prabhanand & Co. He admitted that he did not have the curiosity of verifying this figure from the books of account and he was not in a position to give the break up value of the raw-materials and other several items mentioned in the report except the break up given in the report of the Cost Accountant.

16.4 Regarding the book debts due to the company, he said that they were taken from the balance sheet as on 30-6-1980, but he did not take into account the credit worthiness and the realisable value of these debts, and he did not verify whether the debts mentioned in that balance sheet had been realised when he submitted the report Ex. R.4.

16.5 The valuation of the land made by him at Rs. 2,50,000 per acre calls for some comment. On the date he made the valuation it was still leasehold land, but he had treated this as freehold land. The lands are admittedly situate outside the Municipal limits of Bangalore City on the Kanakapura Road and the market value of Rs. 2,50,000 per acre appears to be on the higher side in the absence of any documentary material to show that other lands at the place had been sold at that rate. He appears to have equated the market value of these lands to the market value of the lands situate at Peenya Industrial Estate, Bangalore, which is an industrial belt. Even then, he has not seen the registered sale deeds of the properties in that area.

16.6 Mr. Sundaraswamy, made a comment that this report of RW-2 is not worth the paper on which it was written, I would not condemn the report in toto. The report may be good in parts. But, I am of the view that this witness RW-2 did not bestow the attention that was required of him in making his valuation in a matter like this knowing fully well that this report was sought to be produced by HGL in these proceedings. It was, however, submitted by the learned Counsel for HGL that his valuation report in another case had been accepted by me in toto. In Company Petition No. 30/1984 filed by Karnataka Scooters in the matter of amalgamation of that Company with Brooke Bond Limited, his report filed in this Court by the transferor company had been approved by the transferee company. But, in this case RW-2 was subjected to cross-examination and some of the

deficiencies in his report have been brought out effectively in cross-examination. Therefore, this Court is bound to take notice of those deficiencies for the purpose of appreciating his evidence.

16.7 The valuation of the machineries imported and indigenous without any reference to the vouchers or invoices or import licences, the valuation of technology and personnel without reference to the books or ether records pertaining to the technical personnel, but merely on the basis of the information furnished by HGL, the valuation of land without any reference to documentary evidence, the valuation of stocks based on the report of the Cost Accountant to which a reference will be made presently and also the valuation of book debts without ascertaining the realisation of the debts as on the date of submission of the report has, to a large extent, vitiated the correctness of his report.

16.8 RW-4 is the Cost Accountant who submitted the report Ex. R-11 pertaining to valuation of stocks. The physical stocks of the HGL were taken from the bin cards, as no stock books were maintained and his verification was only with reference to the bin cards and he did not verify the correctness of the figures given by him in Ex. R11 with reference to the financial records maintained by HGL.

16.9 It is seen from his evidence that he admitted that no stock register was maintained by HGL, but he made the valuation on the basis of the entries in the bin cards. The bin card is only a stock card or bin tag showing a quantitative record of receipts, issues, and closing balances of the material kept in the corresponding bin. The bin card is placed in the bin or shelf or is hung over the almirah or the rack otherwise known as "Bin". Generally, a specimen bin card shows the name of material, location, store ledger folio number, maximum level, minimum level, ordering level ordering quantity and unit. The working sheets this witness obtained from HGL being destroyed, it is not possible to ascertain the accuracy of the value of the inventory made by him. Stores ledger is a record of stores both in quantity and value. It is similar to Bin card with the main difference that value of material is shown in the stores ledger. Stores ledger is an important book and the account of each item of stores is maintained separately. While bin cards are maintained by the store keeper in the store, store ledger is maintained in the accounting department by the stores accountant. Generally, stores ledger is kept for each individual item and the ledger is posted once a fortnight or month and the account is posted after each transaction. The posting and balancing of the stores ledger account is a difficult affair. Stores ledger account is helpful in reconciling the balances with the bin card. The variations in rates and consumption of materials could be noted well in store ledger account, (See Cost Accounting, Theory & Prastice, II Edn. by M. L. Agarwal pp 54, 55, 60, 61.

16.10 Therefore, in the absence of the stores ledger account, the valuation of the work-in- progress on the basis of the entries in the bin card, without knowing what these entries are, cannot be said to have been properly made. For a

satisfactory valuation of the work-in-progress, it is not the bin card but the store ledger account would have been a better record and in the absence of the same, physical stock verification should have been done. Therefore, it is rather difficult to accept the report of the Cost Accountant in toto on the valuation of the work-in-progress, specially when his evidence discloses that he got the information from the director of the units, who would be hardly conversant with the value of each material and that information could have been properly given by the stores accountant in charge of maintaining the stores ledger account. These materials will have no resale value in the absence of any evidence to show that there are other competitors in the industry who make the same model of watches as HGL. He admitted in further cross examination that the correctness of the figures given by him in Ex. R-11 was not verified with reference to the financial records maintained by HGL. Therefore, the evidence of this witness is not of much help to establish the solvency of HGL to meet the debts due to the Bank. Accordingly, the value of HGL securities cannot be said to have been satisfactorily established by RWs 2 and 4.

16.11 It should also be noted that in the balance sheet of HGL Fx. P-132 for the year ending 30-6-82 the value of land as lease-hold land is shown at Rs. 1,00,613/-, buildings at Rs. 5,43,184/-, plant and machinery at Rs. 78,94,098/-. This valuation was made by the auditors of HGL on the basis of books of accounts maintained by HGL and therefore, the valuation made by RW-2 cannot be taken at its face value in the absence of any material to support the figures, more particularly found in items 1, 2, 3, 4, 7 and 8 in Ex. R-4 pertaining to land, buildings, plant and machinery, technology, personnel, stock and book debts. Therefore, it cannot be said that HGL was possessed of assets worth more than 6 crores of rupees as stated by RW-2. If that valuation were to be accepted, it is highly improbable that RW-6 would have purchased 26,000/- shares of HGL of the face value of Rs. 100/- at Rs. 3 per share. His evidence in this regard requires to be noticed which reads as :

"I am unable to say for how many shares I had subscribed to start with and how many I had acquired subsequently. Each of the ancillary companies held 1000 shares in Hegde and Golay Co., Ltd. I acquired all these shares of 18 companies on 29-11-1982. The face value of each of these shares was Rs. 100/-. I acquired them at a price of Rs. 300 per share. Ex. P. 133 is the register of members disclosing the share transfer.

Question by SGS : Was it a fair price to pay for these shares ? The witness has no answer to this question."

In the circumstances, though the Bank is a secured creditor the securities held by it are not sufficient to meet the liabilities of HGL.

17. Point regarding maintainability :- This point has been raised on the plea of HGL that the Bank being a secured creditor, without giving up the security or estimating the value of the security it cannot maintain the winding up petition. In

support of this contention the learned Counsel for HGL relied on the decision of Allahabad High Court in *Hansraj and Others Vs. Official Liquidators Dehra Dun Mussoorie Electric Tramway Co. Ltd.* the provisions of the Provincial Insolvency Act, viz., Sections 9(2) 28(6), 47 and the provisions of the Act, viz., Section 529 read with Section 442, the decision of the Supreme Court in *M.K. Ranganathan and Another Vs. Government of Madras and Others*, and *Mulla's Insolvency*, 3rd Edition, page 125, Elaborating this contention the learned Counsel for HGL maintained that in winding up of a Company, by virtue of Section 529(1) of the Act, the rules of insolvency relating to the rights of the secured creditors are attracted. Accordingly Section 9(2) of the Insolvency Act, 1920, requiring the creditor to state in the petition that, it is either willing to relinquish the security or give an estimate of its value and offer to prove for the deficiency is attracted. Therefore, in the instant case the Bank which is admittedly a secured creditor has not complied with the exercise prescribed u/s 9(2) of the Insolvency Act and hence the petition is not maintainable. Though this question was not raised by HGL in the statement of objections, as the question was one of law both parties were permitted to address arguments on this point by the Division Bench in the appeal of HGL against the order of advertisement made by this Court. That point is raised before me in view of the order of the Supreme Court in the appeal by special leave granted by the Supreme Court, Mr. Sampat Kumaran, submitted that it is well-settled that a secured creditor is outside insolvency and in the present case the Bank having approached the winding up Court as a secured creditor Section 529(1) of the Act attracts the rules of insolvency to the winding up of insolvent companies. Thus, Section 9(2) of the Insolvency Act, 1920, became applicable to the facts of the case. Section 9(2) of the Insolvency Act reads as under :

"..... If the petitioning creditor, is a secured creditor, he shall in his Petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent, or given an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor."

That sub-section requires a secured creditor to state in his petition that either he is willing to relinquish the security for the benefit of the creditors in the event of the debtor being adjudged insolvent or gives an estimate of the value of the security and offers to prove for the deficiency. According to the learned Counsel, in proceedings of bankruptcy as well as winding up cases, the principle is the same, namely, while a secured creditor is permitted to present the Petition he should go through the exercise of Section 9(2) of the Insolvency Act and exercise its option at the very early stage of filing up of the petition. As a corollary a secured creditor cannot be compelled to come to the winding up Court but if he chooses to do so he must go through the exercise provided under the Insolvency Act. To appreciate this contention Section 529 of the Act should be noticed. It

reads as under :

"(1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to :

(a) debts provable ;

(b) the valuation of annuities and future and contingent liabilities, and

(c) the respective rights of secured and unsecured creditors, as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent."

17.1 Section 529 comes under Chapter V of the Act which is applicable to every mode of winding up whereas Section 433 of the Act comes under Chapter II of the Act which provides for winding up by the Court. Section 433 is the provision which enables the Court to wind up the company on the grounds more particularly stated therein. Whereas Chapter V under which Section 529 appears, relates to proceedings after winding up relating to proof and ranking of claims. This, in my view, is the scheme of the Act relating to winding up and that is the reason Sections 433 and 529 come under different Chapters of the Act. If the scheme of the Act is properly understood it is difficult to accept the contention of the Learned Counsel that the words "in the winding up of an insolvent company" are wide enough to cover not only the stage relating to proof of debt but also other stages of the proceedings including the presentation of the Petition u/s 433. In AIR 1929 Allahabad, 353, AIR 1929 Allahabad 353 the Full Bench of the Allahabad High Court was dealing with the provisions of the repealed Act of 1913. Dealing with Section 229 of the repealed Act, the Full Bench opined that :

"The phrase "the same rules.....as are in force for the time being under the law of insolvency" in Section 229 is wide enough to include rules contained in the sections of the Provincial Insolvency Act, rules made under any power conferred by that Act and the rules of practice unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rule which it is proposed to import.

No secured creditor need, or can be forced to prove his debt, and such a creditor can stand wholly outside the winding up proceedings if he so elects and rely upon his security or his decree if he has obtained one, provided he has obtained leave to proceed from the winding up Judge.

Although the winding up Judge has jurisdiction to refuse leave absolutely it cannot under colour of refusing leave or otherwise, annul or modify a secured creditor's security or decree. The winding up Judge should refuse leave absolutely only in exceptional cases. Ordinarily he should refuse leave only for such time as may be necessary to enable him in the particular circumstances of each case to determine whether he will direct the liquidator to pay off the claim and thus save unnecessary costs to the estate or whether he will give leave to proceed, or whether he will direct the liquidator to take such steps as may be

open to him to get the decree set aside."

17.2 This decision does not deal with the effect of Section 229 of the repealed Act of 1913 on the provisions relating to compulsory winding up u/s 162 of that Act. A reading of this decision shows that Section 162 did not come up for consideration at all and therefore I am unable to get any assistance from this decision for accepting the contention of the learned Counsel. Section 162 comes under Part V of the Act relating to winding up, but Section 229 comes under supplemental provisions and thus understood the words in the winding up of an insolvent company occurring in Section 229 of the repealed Act do not control the power of the Court to wind up the company u/s 162 of that Act. In *M.K. Ranganathan and Another Vs. Government of Madras and Others*, , it is observed as follows :

"The secured creditor is outside the winding up and he can realise his security without the intervention of the Court by effecting a sale of the mortgaged premises by private treaty or by public auction. It is only when the intervention of the Court is sought either by putting in force any attachment, distress or execution within the meaning of Section 232(1) or proceeding with or commencing a suit or other legal proceedings against the company within the meaning of Section 171 that leave of the Court is necessary and if no such leave is obtained the remedy cannot be availed of by the secured creditor."

17.3 In this case also, the right of a secured creditor to present a winding up petition u/s 162 of the repealed Act did not come up for consideration. Halsbury's Laws of England 3rd Volume, on the chapter relating to Bankruptcy does not throw any light on the question as posited by the learned Counsel. In my view, if the provisions of Section 439(2) are read with the provisions of Section 49(1)(b), it is clear that a secured creditor is also a creditor u/s 439(1)(b) of the Act and therefore he is entitled to file a petition u/s 433 of the Act on the ground that the company is unable to pay its debts. When Section 439(2) of the Act specifically deals with the case of a secured creditor and Section 439(1)(b) says that he can present a petition subject to other provisions of that section, it is futile to contend that Section 439(1)(b) is further subject to the provisions of Section 529 of the Act. That is the very reason Section 529 comes under Chapter V of the Act. In the provisions of Section 529 are read with the provisions of Section 528 of the Act it is clear that Section 529 has reference only to proof of debts and ranking of claims after winding up and does not in any way control or hedge the ambit of the provisions of Section 433 read with Section 439(1)(b) of the Act. The authorities on Company Law are clearly against HGL on this point. In *Palmer's Company Law*, 23rd Edition, paras 46.17 and 85.13 it is stated as under :

"A debenture holder to whom the company is indebted in a sum presently payable can demand payment, and, if default is made, can Petition for the winding up of the company, and this whether he is the registered holder of the security, or the holder of a security to bearer. The mere fact that he has obtained

the appointment of a receiver does not preclude him from applying for a winding-up order The holder of a mortgage debenture who applies for a winding-up order is not bound to give up his security"

"A creditor (including a contingent or prospective creditor) has locus standi to present a winding-up Petition (1948 Act, Section 224(1)). The Companies Acts do not define who is a creditor but it appears from the cases that the following will be regarded as creditors :.....

(3) A secured creditor, even after obtaining the appointment of a receiver in an action

In Pennington's Company Law, 4th Edition, page 677, it is stated as under :

"A creditor of a company may Petition for a winding up order whatever the amount of his debt, whether it is immediately payable or is payable only at a future time or on the fulfilment of a contingency, and whether it is secured or unsecured".

In Halsbury's Laws of England, 4th Edition, Volume 7, at para 1003 it is stated :

"Who may Petition as creditor :--The following persons are entitled to Petition as creditors ; the assignee of a debt, if the assignment is not made while the creditor's Petition is pending ; the equitable assignee of a part of a debt ; the executor of a creditor, even before probate ; a creditor in respect of a debt incurred by voluntary liquidators ; a secured creditor ; a judgment creditor ; the holder of a debenture, including a bearer debenture ; and the holder of an investment bond (of an insolvent company) which has not yet matured for payments."

Further, in para 1277 dealing with the applicability of Bankruptcy Rules, it is stated :

"Bankruptcy rules not applicable : -- The following bankruptcy rules do not apply in winding up, namely those relating to (1) reputed ownership ; (2) a landlord's right to distrain for rent accrued due before the winding up ; (3) the avoidance of unregistered bills of sale as against the trustee in bankruptcy ; (4) the limitation of the trustee's power in relation to copyright ; or (5) the necessity for a petitioning creditor who is a secured creditor to offer by his Petition to surrender his security or to estimate its value at an amount less than his debt."

17.4 Both Pennington and Halsbury's Laws of England have relied on the decision in *Moor v. Anglo-Indian Bank* for the proposition that the secured creditor could maintain a petition for winding up and he cannot be restrained by an injunction from prosecuting such proceedings. That decision lays down that "there is no rule in bankruptcy that a petitioning creditor who omits in his petition either to give an estimate of the value of his security or to state that he will be ready to give up his security for the benefit of the creditors in the event of his debtor being adjudicated bankrupt, thereby forfeits the benefit of his security." It

is further held that "the rules in bankruptcy contained in Section 6 of the Bankruptcy Act, 1869, are not by Section 10 of the Judicature Act, 1875, made applicable to the winding-up of companies." Though there was considerable argument on the correctness of this proposition before the Division Bench when the earlier order made by this Court was challenged in appeal, the learned Counsel for HGL did not make an attempt to say that both Pennington and Halsbury's Laws of England had wrongly understood the law in Moor's case, (1879) 10 Ch.D. 681. Further, the decisions of the Madras High Court in AIR 1965 Madras 682 (Paras 3 and 5), In Re: The India Electric Works Ltd., , In the matter of India Electric Works Ltd. (1973)43 Company Cases 556 at 559 and 560, Techno Metal India (P) Ltd. v. Premnath Anand, (1972) 42 Company Cases 359 at 364, Calcutta Safe Deposit Co. Ltd. Vs. Ranjit Mathuradas Sampat, , D.D. Italia and J.D. Italia Vs. Free Press Journals (Madras) Ltd., , Italia & Italia v. Free Press Journals (Madras) Ltd., and AIR 1954 T.C. 519, Guruswami Pillai v. Sri Chitra Cardamom Co-operative Society Bank Ltd., support the case of the Bank. In the circumstances, I have no hesitation in holding that the Bank being a secured creditor does not have to go through the exercise u/s 529 of the Act for maintaining this petition.

17.5 Proof of debt:- It was further contended by the learned Counsel for HGL that it is not sufficient for this Court to rely upon the statement of accounts of the Bank marked as Exs.P.52 to P.62 or the ledger book Ex.P.111 when HGL has disputed the correctness of the entries therein. He maintained that u/s 4 of the Bankers' Book Evidence Act a mere entry in the Pass Book account or a mere copy thereof is not sufficient to charge a person with liability when he does not accept the correctness of the entries. In support of this contention he relied on the decision of the Supreme Court in Chandradhar Goswami & Ors. v. Gauhati Bank Ltd. AIR 1967 SC 1056. The Supreme Court dealing with the provisions of Section 4 of the Bankers' Book Evidence Act and Section 34 of the Evidence Act observed as follows:

"It will be clear that Section 4 gives a special privilege to banks and allows certified copies of their accounts to be produced by them and those certified copies becomes prima facie evidence of the existence of the original entries in the accounts and are admitted as evidence of matters, transactions and accounts therein, but such admission is only where, and to the same extent as, the original entry itself would be admissible by law and not further or otherwise. Original entries alone u/s 34 of the Evidence Act would not be sufficient to charge any person with liability and as such, copies produced u/s 4 of the Bankers' Books Evidence Act obviously cannot charge any person with liability. Therefore, where the entries are not admitted it is the duty of the bank if it relies on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence. But no person can be charged with liability on the basis of mere entries whether the entries produced are the original entries or copies u/s 4 of the Banker's Books

Evidence Act.

17.6 But the facts in this case rest on a different matrix. The ledger entries were proved by PW-2 so also statement of accounts of the company issued from time to time regarding the loan transactions. No suggestion was put to this witness that these documents either were forged or fabricated for the purpose of the case. No such defence was taken by HGL in its statement of objections. The books have come from proper custody and the debits in these books are corroborated by the figures in the balance sheets of HGL for the relevant period and also admitted by their own witness RW-4, that is, the Chartered Accountant of HGL. HGL having accepted these balance sheets and having adopted them at the meeting of the shareholders I will be creating a dangerous precedent if I were to accept the contention of the learned Counsel for HGL and come to the conclusion that the Bank's books cannot be relied upon. He said that the grocer's book would have looked better. But he had no comment on his clients' balance sheets which reflected the amounts due from the company to the Bank. The powers and duties of the auditors are enumerated in Section 227 of the Act. u/s 227(1) he has a right of access at all times to the books and accounts and the vouchers of the company whether kept at the head office of the company or elsewhere and would be entitled to require from the Officers of the Company such information and explanations as the auditor may think necessary for the performance of his duties as auditor. u/s 227(1A) he has to inquire-

(a) whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are not prejudicial to the interests of the company or its members ;

(b) whether transactions of the company which are represented merely by book entries are not prejudicial to the interests of the company ;

(c) where the company is not an investment company within the meaning of Section 372 or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company ;

(d) whether loans and advances made by the company have been shown as deposits ;

(e) whether personal expenses have been charged to revenue account ;

(f) where it is stated in the books and papers of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading."

17.7 u/s 227(2) of the Act he has to make a report to the members of the company on the accounts examined by him and on every balance sheet and profit and loss account etc. The auditor having complied with the provisions of

Section 227 in respect of the balance sheets marked as Ex.P. 127 to P. 132, the attack on the statement of accounts and the ledger entries as incorrect and not in accordance with the requirement of Section 34 of the Evidence Act read with Section 4 of the Bankers' Books Evidence Act does not advance the case of HGL. The decision of the Supreme Court in Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd., must be understood on the facts of that case. There was no other corroborative evidence excepting the entries in the books of account which had been denied by the defendant in that case.

18. The next point for consideration is whether there are substantial counter-claims by HGL against the Bank which come in the way of this Court to exercise its discretion in favour of the Bank. The counter-claims are made by HGL in the Civil Court where certain suits are pending against it. The first suit is OS. No. 7303/1980 filed on 26-5-1980. The suit claim covers Account No. 3. Two more suits were filed in O.S. 2233/1982 and O.S. 2069/1982 on 9-7-1982. O.S. 2233/1982 covers Account Nos. 1 and 2. O. S. 2069/1982 covers Account No. 5 The total amount claimed in these three suits aggregate to Rs. 8 and odd lakhs. However, in O.S. No. 7303/1980, HGL has made a counter-claim for Rs. 15 lakhs for damages on account of the alleged delay by the Bank in the release of cash credit amounts. It is not in dispute that no suits have been filed in respect of the other three cash credit accounts, namely, item Nos. 4, 6 and 7. In the statement of objections HGL had no doubt disputed a large part of the debts. But no evidence has been let in to prove the counter-claims. Though it has claimed a total sum of Rs. 190.50 lakhs as against the claim of the Bank, having not produced its books of accounts its counter-claim does not merit serious consideration. That apart, even its claim for Rs. 15 lakhs for which it had not paid any Court-fee in the Civil Court, is a claim for damages for breach of contract and therefore not a claim for a sum presently due and payable. In the circumstances, the pendency of the suit in the Civil Court and the counter claim made by HGL against the Bank will not be a bar for granting the relief prayed for (See Union of India (UOI) Vs. Raman Iron Foundry, That apart, the nature of the reliefs claimed in the suits and in the winding up petition being different, the pendency of the suits does not affect the maintainability of the company petition. This position is well-settled in the light of the following observations in Buckley on Company Law, 14th Edition, page 323 :

".....At one time Petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the Petition was dismissed. The modern practice has been to dismiss such Petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the Petition and make the order...."

19. Placing reliance on the number of suits filed by the Bank, the learned Counsel for HGL further submitted that there is a defence in good faith under the provisions of Order II, Rule 2 C.P.C., in that all the seven cash credit accounts

constituted one transaction as the dealing with the Bank was a package deal for financing the industrial complex of HGL. According to the learned Counsel, these seven accounts are the result of a single agreement between the Bank and the company and therefore the cause of action for the Bank is also single, as a result the Bank not having included all the sums claimed to be due under the seven accounts in the first suit, the Bank must be held to have split the cause of action and relinquished all claims which were omitted without express leave of the Court in the first suit. This contention of the learned Counsel runs counter to its own pleadings. Even otherwise, the documents and the evidence do not disclose that these seven accounts came into existence out of a single agreement between the parties. The material on record speaks the other way. Every time HGL wanted additional finance, it made a request either in writing or in person and Ex. P.36 etc., namely, the sanction letter issued by the Bank and the Board resolutions for the relevant cash credit accounts clearly make out that these accounts were separate and distinct and omission to file the suits in respect of certain accounts does not give rise to a plea that the Bank had relinquished its claims in the other accounts not included in the first suit. Therefore, the plea of relinquishment of the debt cannot be said to be a defence either in good faith or tenable.

20. Just and equitable ground :- However, it was contended by the Counsel for HGL that the various pleas/ contentions taken by HGL in its correspondence raise sufficient grounds for negating the case of the Bank for an order of winding up under the just and equitable ground. According to him, the discretion to be exercised under the just and equitable clause depends upon the facts of each case and the facts could be ascertained or gathered from the correspondence between the parties. The facts that could be gathered from the correspondence between the parties in the instant case, he says, would show that there were serious differences between HGL and the Bank regarding the manner of disbursement of the loan amounts, adequacy or inadequacy of (he amounts sanctioned and the unhelpful attitude of the Bank in not going to the rescue of HGL to meet the financial constraints and therefore these facts should be sufficient to negative the case of the Bank for pressing the just and equitable ground in these proceedings.

20.1 No doubt, these documents disclose certain difference of disputes between the Bank and HGL regarding the manner in which the loan amounts were disbursed or adjusted and the manner in which HGL had utilised these amounts. But there are other circumstances, on record which will enable this Court to come to the conclusion that the discretion under the just and equitable ground could be exercised in addition to the discretion u/s 433(e) of the Acts The "just and equitable" ground came up for consideration by the Supreme Court in the case of Needle Industries (India) Ltd. and Others Vs. Needle Industries Newey (India) Holding Ltd. and Others, It observed ;

"In an application u/s 210 of the English Companies Act, as u/s 397 of our Companies Act, before granting relief the Court has to satisfy itself that to wind

up the company will unfairly prejudice the members complaining of oppression, but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up. The rule as regards the duty of utmost good faith, on which stress was laid by Lord Keith in *Meyer*, received further and closer consideration in *Ebrahimi v. Westbourne Galleries Ltd.*, wherein Lord Wilberforce considered the scope, nature and extent of the "just and equitable" principle as a ground for winding up a company. The business of the respondent-company was a very profitable one and profits used to be distributed among the directors in the shape of fees, no dividends being declared. On being removed as a director by the votes of two other directors, the appellant petitioned for an order u/s 210. Allowing an appeal from the judgment of the Court of Appeal, it was held by the House of Lords that the words "just and equitable" which occur in Section 222(f) of the English Act, corresponding to our Section 433(f) were not to be construed ejusdem generis with Clauses (a) to (e) of Section 222 corresponding to our Clauses (a) to (e) of Section 433. Lord Wilberforce observed that the words "just and equitable" are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own ; and that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure :

The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the Court to dispense him from it. It does, as equity always does, enable the Court to subject the exercise of legal rights to equitable considerations ; considerations, that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way.....

A company, however small, however domestic, is a company not a partnership or even a quasi partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

Finally, it was held that it was wrong to confine the application of the just and equitable clause to proved cases of mala fides, because to do so would be to negative the generality of the words. As observed by the learned Law Lord in the same judgment, though in another context :

"Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances."

20.2 Though in the statement of objections HGL had sought to paint a vary healthy picture of the state of its business at one point of time, the evidence on this aspect is wholly unsatisfactory. Very important personalities like a former Prime Minister to Industrialist to Mandarins in the corridors of power who visited HGL and had showered their encomiums in the visiting book did not come

forward to substantiate what they stated, in these proceedings. RW-6 had to fend for himself and on behalf of HGL. His evidence, I have already commented is absolutely unreliable. His witnesses did not support him and like Casabianca, the boy on the burning ship, he has stood the ground alone in this proceeding, but unlike him he has not covered himself with glory.

20.3 For the last 15 years HGL had not declared any dividends. Though it had earned some profits for a couple of years, it had not paid Income Tax on those profits. It is represented that they are pending in appeal. There is no evidence to show that the working of HGL on this date are in any way better. The shares of HGL on his own admission have hit the rock bottom line. It has come down to Rs. 3/-per share. The balance sheet discloses that he had no formal education and technically not qualified in any trade. The company with whom he- had collaboration, i.e., Golay S.A has also gone into liquidation. He appears to have received a gift by one Fern and Perruthn, the purchaser of the assets of Bernard Golay Ltd. That gift was received in cash but was not put in the Bank and he had shown himself as a creditor for HGL for this amount. This appears to be the only tangible investment by him and his family.

20.4 HGL had not shown any profits since the commencement of production but as per the balance sheet for the year 1982, it had made a profit of Rs. 34,67,0112/-. That amount was arrived at without taking into account the amounts due to SBI. Apart from the share capital of Rs. 50 lakhs and the amount of Rs. 26 lakhs given to him as gift, the other amounts came "from various other source"s which he was not able to identify at this stage". He did not have any cash in the Bank. The minute books for the years up to 1-7-1977 were not produced though he was called upon to do so, as, according to him, his own company Secretary RW-1 must have given them to PW-2, but he had not lodged a complaint to the police regarding the loss of these book"s. Therefore it is evident that he has suppressed those books in these proceedings. He as Chairman and Managing Director has also disowned the Board resolutions of HGL.

20.5 Though the workmen have opposed the winding up petition, they have not examined themselves in order to support the case of RW-6 that HGL is commercially a viable unit and it is in a position to stand on its own legs and meet the liabilities of the Bank if it is given more time. No other financial institution has come forward to support HGL in order to overcome the financial crisis faced by it. But one of the units in Company Application No (sic)08/1980 has prayed to come on record to oppose the winding up petition. This application was ordered to lie over till the disposal of the main petition. However, its Counsel retired on 22-9-1983, None appeared for it to press the application.

20.6 In the circumstances, the just and equitable clause would apply to the facts of this case notwithstanding the provisions of Section 443(2) of the Act The pending suits in the Civil Court are for a sum of Rs. 80 lakhs and they were necessitated by the bar of limitation against the guarantors, Sri & Smt. Hegde. But on the facts before me, it cannot be said that the Bank is acting

unreasonably in seeking to have the company wound-up. RW-6 could not say how much credit balance HGL had in the Banks in which it had accounts. Though he stated that HGL employs 400 to 500 workers, he could not say how many of them are apprentices and how many are regular workers. He has asserted that the monthly wage bill has come down to Rs. 2 lakhs, but he did not produce the muster rolls or wage registers of the workers to prove this assertion. He also does not know the sales turnover of HGL. He admitted that he was not taking much interest in the company after his heart attack. His demeanour in the witness-box was impeccable, but most of his answers on oath were downright prevarications. This is also clear from his evidence in the other Company Petitions disposed of to-day by a separate order.

20.7 It is not in dispute that HGL and its 16 units which are the subject matters of the connected petitions are all managed by one single person RW-6. Apart from huge amounts due to the Bank, there is the income tax arrears of Rs. 41 lakhs being the latest demand, besides Rs. 7,39,923 for 1978-79, Rs. 2,18,239 for 1979-80 and Rs. 5,87,660 for 1980-81 which are under dispute. There is also a demand for Excise duties resulting in search and seizure of certain papers from HGL's office by the authorities concerned. One such paper is marked as Ex. P. 142 but I am not inclined to place any reliance on the same, since there are other materials before me to, invoke the just and equitable ground. Therefore, it is just and equitable in the interest of general public that HGL should be wound-up, otherwise the chances *State Bank of India v. Hegde & Golay Ltd.* 2491 are HGL would incur further more monetary liabilities and thereby seriously jeopardising the interests of other public financing institutions and also the general public.

21. There is some evidence on record to show that some of the accounts had been closed and therefore it was sought to be made out by the Learned Counsel for HGL that no amounts were due under those accounts. But, on a close scrutiny of the ledger entries, it is seen that the following accounts were closed in the ledger maintained at the Rajajinagar Branch :

(i)

Pledge Cum Guarantee

A/c. No. 28044

(ii)

Temporary Cash Credit

A/c No. 28045

(iii)

Cash Credit Guarantee cum Hypothecation

A/c No. 28027

(iv)

Account No. 1 - Clean Cash Credit

A/c No. 28032

(v)

Account No 2 - Clean Cash Credit

A/c No. 28038

(vi)

Account No. 3 Clean Cash Credit

A/c No. 28030

and then they were transferred to the ledger maintained in the city branch and those accounts are reflected as continuing accounts in the city branch office.

22. In the light of the foregoing, I hold that :

POINT NO. 1 :

The Bank has proved a substantial amount out of Rs. 2,93,62,036-09 as due from HGL as on 31-3-1980.

POINT NO 2 :

There is an admission of the substantial portion of debt by HGL.

POINT NO. 3 :

Does not arise in view of my answer to point No. 1.

POINT NO. 4 :

There is no bona fide dispute regarding the debt due from HGL but the dispute relates only to the rate of interest and therefore, on the admitted amount there is no plausible defence in good faith in support of HGL.

POINT NO. 5 :

HGL has not proved its substantial counter claim against the Bank.

POINT NO. 6 :

The bona fide dispute, if any, is only confined to rate of interest on the amounts advanced by the Bank and not on the principal amount.

POINT NO. 7 :

The Bank is entitled to an order of winding up on the principal amount due and the admitted rate of interest at 12 1/2%.

POINT NO. 8 :

Though the Bank is a secured creditor, it is entitled to an order of winding up since HGL has not proved that it has sufficient security to pay back the debt due.

POINT NO. 9 :

The petition is maintainable despite the filing of the suits against HGL and despite the fact that the Bank has not given-up its securities.

POINT NO. 10 :

The filing of the suits would not disentitle the Bank to an order of winding-up in these proceedings.

POINT NO. 11 :

This petition cannot be thrown-out in view of the provisions of Order II Rule 2 of C.P.C.

POINT NO. 12 :

The documents executed by HGL in favour of the Bank are not forged documents and therefore they could be relied upon for proving the debt due.

POINT NO. 13 :

HGL is liable on the basis of these documents since it has ratified and adopted those documents in favour of the Bank by its conduct.

POINT Nos. 14 & 15 :

This petition is not barred by time.

POINT NO. 16 :

The plea of limitation does not raise any substantial question of law which has to be determined only by the Civil Court in the pending suits between the parties.

POINT No. 17 :

The acknowledgment in writing claimed by the Bank is an acknowledgment in the eye of law, viz., revival letters and the balance sheets though Sri & Smt. Hegde were acting in a fiduciary position of creditors of HGL.

POINT No. 18 :

HGL is not commercially solvent and therefore it is just and equitable to wind up the same.

23. The facts in this petition and the other connected petitions (which are disposed of to-day by a separate Judgment), unfold the saga, or more appropriately, the exploits of one individual in his singular attempt to build, in his own words, "a multi-billion dollar trade name export-oriented watch industry". He went about this by setting-up a Parent Company, a number of ancillary companies to feed the parent company, a building company to take care of the

works of the parent and ancillary companies, a selling company to handle the sales of the parent company, a registered society to consolidate the operations of the ancillary companies, and an assortment of other private companies and enterprises thrown in for good measure to crown the industrial complex envisaged by him, under his sole control. Very little of the money in this enterprise was his own. But he was the monarch of all he surveyed. Whether there was a proper appraisal of his project when he obtained finances from the petitioner Bank and other financing institutions is not clear from the record. How he sustained his credibility in the financial market when his foreign collaborator went into bankruptcy before his project took off is also not clear from the record. However, with no formal education and starting his life in a humble way, he made a bold bid to achieve industrial fame.

23.1 A few years ago, we had heard of the rise and the demise of a stainless steel automobile wizard, also known as "De Lore an Incorporated, in Northern Ireland. John De Lorean, an automotive wizard, was a genius, jet- setter and rebel, who became a driven man. But he failed in selling his gull winged glittering stainless-steel dream car and went into bankruptcy. His febrile management style, impolitic brilliance and impatience with bureaucracy worked against him.

23.2 Sri B.T. Shankar Hegde can take solace from the life of this man who said "that some of the really big things in life are achieved by those who refuse to conform" now that his Horological empire is reduced to shambles in the light of the following order.

24 In the result, this Petition is allowed and there shall be an order winding up the respondent company- Let a formal order be drawn-up in Form No. 52 and sent to the Official-Liquidator with such variations as may be necessary. The petitioner shall deposit a sum of Rs. 10,000/- provisionally to meet the contingent expenses of the Official Liquidator in the account of the Official Liquidator within four weeks from this day.

24.1 The Official Liquidator shall forward a copy of this order to the Registrar of Companies and to HGL in compliance with Rule 111 of the Companies (Court) Rules, 1959.

24.2 The petitioner Bank shall within 14 days from the date of this order take-out advertisement of this order in one issue each of Deccan Herald and Prajavani of Bangalore. The Petitioner Bank shall also serve a copy of this order on the Registrar of Companies within 30 days from the date of this order.

25. In the circumstances of the case, parties to bear their own costs.

ORDER UNDER ORDER 41, Rule 5(2) C.P.C., READ WITH Rule 9 OF THE COMPANIES (COURT) RULES, 1959.

After the pronouncement of the order in this case, the learned Counsel for the respondent-Company filed an application under Order 41, Rule 5(2) C.P.C., read with Rule 9 of the Companies (Court) Rules, 1959, praying that since there are

some important questions of law to be decided by the Division Bench it is just and necessary that operation of my order should be stayed till the respondent Company prefers an appeal before the Division Bench.

2. These questions of law have been considered in great detail by me and that fact by itself is not a ground for staying the operation of my order. Further, the sums due from the respondent-Company in this case excluding the disputed rate of interest to the petitioner-Batik would amount nearly to Rs. 10 crores as on this date and the interests of other public financial institutions who have supported the winding up are also involved in this case. Their interest would be seriously prejudiced if I were to stay the operation of my order.

3. Hence the application for stay stands rejected.