
(1982) 12 MAD CK 0003
In the Madras High Court
Case No : Comp. P. No. 31 of 1981

T. Chinnathambi

APPELLANT

Vs

Drivers and Conductors Bus Service Private Limited

RESPONDENT

Date of Decision : 16-12-1982

Acts Referred:

Companies Act, 1956 — Section 397, 398, 433(e), 433(f)

Citation : (1982) 12 MAD CK 0003

Hon'ble Judges : Shanmukham, J

Bench : Single Bench

Advocate : Habibulla Basha and K.P. Sivasubramanian, for the Appellant; A.S. Venkatachalnamuthy for the company, M/s. S. Gopalarathnam and J. Krishnamachary, for the Respondent

Final Decision : Dismissed

Judgement

Shanmukham, J.—For a petitioning creditor to sustain a winding up petition under S.433 (e) of the Companies Act, 1956 (for brevity

referred as "the Act", he shall produce prima facie proof of the debt) due by the company to him. The two debts relied on by the petitioning

creditor in support of his petition for winding up under S.433(e) of the Act are: (1) the decree debt in O.S. No 62 of 1973 on the file of Sub-

Court, Erode (vide Ex.P1) and, (2) the balance due on a promissory note, dated 1st April, 1977 for Rs. 12,000 (vide Ex.P2). The other ground

urged by the petitioning-creditor is S.433 (f). I will be referring to this at the appropriate time. It is necessary to notice even at this stage that though

the company remained neutral, the winding-up is opposed by the contributory, namely, one of its share holders who owns 65 shares of Rs. 100.

2. Regarding the decree debt, it is seen from Ex.P1 that the defendants are S.

Ramaswami, S.R. Subramaniam and S.S. Razool (R.W. 1 in this case). The company as such is not the defendant. Therefore, it is patent that the company has not suffered any decree. It follows, therefore, the petitioner's claim in this regard must fail.

3. About the proof of the other debt under Ex.P2, besides examining himself as R.W. 1, the petitioner had examined Chenniappa Gounder, the

Manager of the company itself as P.W. 2. Exts.P1 to P7 were marked through P.W. 1, while Exts.P9 to P15, all records of the company through

P.W. 2. As Mr. Habibulla Basha, learned counsel for the petitioner laid very great emphasis on the data that the company had admitted the

petitioner's claim and further submitted that in the face of such admission by the company the Contributor's resistance shall not stand in the way of

the company being wound up, it is necessary to look at the counter filed by the company. A reference to the counter filed in the form of an affidavit

of Senniappan (who is since examined by the petitioning-creditor as P.W. 2) will reveal that there is neither an admission of the debt referred to in

the company petition nor is there a specific denial. While paragraph 6 in the company petition refers to this debt under Ex.P2, the counter has

avoided any reference to paragraph 6. At the same time the company's counter-affidavit is wound up with a request that this Court might be

pleased to dismiss this proceeding. Therefore, it is not correct to contend that there is an admission of the debt under Ex.P2 by the company in the

counter statement. The other factor is the manner in which the company participated in this proceeding. P.W. 1 was cross-examined by the learned

counsel representing the company and the suggestion to P.W. 1 in the cross-examination by the said learned counsel is: ""I put it to you that in order

to spoil the company you filed this petition?"" Thus the stand as explicit from such cross-examination is that the company is opposing the winding

up. However, it is strange that on the company's behalf no attempt was made to cross-examine P.W. 2 for obvious reason because P.W. 2 is now

in the management of the company, and also that in the course of argument, Mr. A.S. Venkatachalamurthy learned counsel for the company

represented that the company is not taking any sides and that it is left to the court to pass such orders as might be just and necessary. In either

case, it is clear that the company does not support either the winding up sought

for by the petitioning-creditor nor is there any admission of the debt due under Ex.P2 on the part of the company in the pleadings and in the course of arguments.

4. Therefore, let me now turn to the evidence adduced by the petitioning creditor in his attempt to prove prima facie the balance said to be due

under Ex.P2. It is the admitted case of the petitioning creditor that Ex.P2 is a renewal of Ex.R1. It is common ground that the debt due under Ex

R1 by the company to the petitioning-creditor is not disputed even by the opposing creditor; the case of the opposing creditor is that the debt due

under Ex.R1 was discharged in 1974, while the petitioner would contend that the same was renewed under Ex.P2. The text in Ex.P2 does not

support the case of renewal. The most important factor is that a plain reading of Ex.P2 will reveal that it is S. Ramaswami, son of Sengoda

Gounder Managing Director of Driver and Conductor Bus Service Private Ltd., Erode, residing at Erode District has executed the promissory

note in favour of T. Chinnathambi (petitioning-creditor), son of Thalai Achari, residing at Thillainagar, Erode Town. I am also extracting the Tamil

part of it for better appreciation of my analysis:

5. The above reading finds support from the further recital in the document, namely

(emphasis supplied by me). According to the plain reading of the promissory note, Ex.P2 the borrower is S. Ramaswami and the loan was for his

business necessity. I have not overlooked the fact that S. Ramaswami has signed as Managing Director of Driver and Conductor Bus Service

Private Ltd. at the bottom on the stamps. But that by itself will not help the petitioning-creditor that it is the company that had made the

borrowings. I must emphasise here that as long as there is no intrinsic evidence in Ex.P2 that it was a renewal of Ex.R1, such text in Ex.P2 gains

great significance and cannot be slightly brushed aside as was attempted by the learned counsel for the petitioning-creditor. There is another vital

factor which will support my above approach, that is, the contrast between the writings in Exts.R1 and P2. It is better to extract Ex.R1:

6. In the above document, it is categorically stated that the borrowing is by the company and also for the benefit of the company. Further, Ex.R1

was also executed by S. Ramaswami. Therefore, S. Ramaswami is quite aware as

to what should be written in the promissory note if the debt is taken for the company. Both Exts.P2 and R1 are printed forms and the matters filled up in Ex.R1 in contrast to the matters filled up in Ex.P2 will indisputably indicate that the borrower under Ex.P2 is not the company but only S. Ramaswami, in his individual capacity. If S. Ramaswami taking advantage of his position as Managing Director should use and affix the rubber stamp of the company, I am of the view it will not in any way help the petitioning-creditor to support his case that the borrower was the company. Viewed from the foregoing factors, namely, that Ex.P2 by itself does not support the case of the renewal of Ex.R1, my above approach gets strengthened. I must here own that no argument was advanced by the learned counsel for the opposing creditor. But, I cannot avoid what is obvious from these exhibits, viz., Exts.P2 and R1 considered with the other evidence touching this matter. The further circumstance to be noticed is the recital in Ex.P2 that Rs. 12,000 was paid in cash. The evidence of the petitioning-creditor is that such recital is not correct, because it was executed for the balance due under Ex.R1. Thus, the oral testimony of P.W. 1 does not fall in line with the recitals in Ex.P2. In the foregoing circumstances, I fail to understand as to how the learned counsel for the petitioning-creditor can call to his aid the legal presumption envisaged under the Negotiable Instrument Act. As long as the promisee himself states that what is written in the document is not what really took place, he forfeits the legal presumption as stated above. These are not all. There are also other indisputable circumstances which excite suspicion about the transaction reflected in Ex P2. There was an earlier proceeding for the winding up of the company in C.P. No. 8 of 1976. In that proceeding P.W. 1 had filed an affidavit marked as Ex.R2. Then he opposed the winding up of this company. In that affidavit he had stated he is one of the creditors of the company having advanced a sum of Rs. 10,000 and it is conspicuous to note that the date of the loan is left blank in the affidavit. It is necessary to state here that Ex.R2 was after this affidavit was filed. Then what must have been referred to in Ex.R2 by P.W. 1 is Ex.R1. Ex.R1 was for Rs. 13,000 and how Rs. 10,000 was due on the date when P.W. 1 filed his affidavit Ex.R2, he cannot explain. His evidence in cross-examination is, that he never advanced Rs. 10,000 at any time to the company and also ""I

could not furnish at the time when I signed the affidavit. I was not sure about the amount advanced by you to the company because the members of my family were gone out of station and I could not get at the promissory note." Again in paragraph 6 of the petition it is stated as follows:--

The Respondent company has renewed the promissory note on 1st April, 1977 for a sum of Rs. 12,000 which was the sum outstanding on the said date.

When in the witness box he was confronted with the following question in cross-examination:

If calculation is made at the contract rate from the date of the first borrowing, giving credit to a remission of Rs. 2,000 what would have been due is Rs. 15,015 and not Rs. 12,000?

his answer is that:

The company Managing Director represented that their company was incurring loss and that his company could not execute a promissory note for more than Rs. 12,000 and, therefore, the promissory note was executed for Rs. 12,000 and I wanted the interest rate should be enhanced.

He has also further stated in cross-examination that "at the time of Ex.P2 he had given a remission of Rs. 2000". Such case of remission and such

request on the part of the Managing Director that the company would not execute a promissory note for more than Rs. 12,000 are neither stated in

Ex. 13 copy of the notice nor in the company petition. On the other hand, the allegation in the extracted portion will, without any ambiguity,

indicate that the promissory note for Rs. 12,000 was renewed on 1st April, 1977 for the sum outstanding on that date This allegation in the original

petition thus runs counter to the testimony of P.W. 1 admits he is an income tax assessee, but yet he would expect this Court to believe that he had

not maintained any books of accounts. At any rate, he could have produced his income tax assessment order wherein the debt due by company

should have been shown. But, for reasons best known to P.W. 1 he had suppressed these vital documents.

5. Nevertheless, the learned counsel for the petitioning-creditor strongly relied upon the evidence of P.W. 2, the present Managing Director of the

company and Exts. R6 to R16. Ex.R6 is the account book, Ex.R6(a) is the relevant entry showing the payment of Rs. 2510 to Chinnathambi on

4th December 1978; Ex.R7 is the ledger for the year 1980-81 Ex.R7(a) is the relevant entry showing that the balance due to Chinnathambi is Rs.

13,920; Ex.R1 is the ledger for the year 1979-80 wherein Rs. 8,13,920 is shown as due to the said Chinnathambi (petitioning-creditor), Ex.R9 is

the minutes book of the respondent company; Ex.R9(a) is the entry at page 5 relating to the proceedings held on 28th June, 1979; Ex.R9(b) is the

relevant entry relating to the business of the Board Meeting when the balance sheet was approved, Ex.R10 is the copy of the balance sheet

approved by the Board of Directors of the company; Ex.R11 is the income tax return which Ex.R12 is the assessment order passed by the income

tax Authorities. In Ex.R11 the petitioning creditor is shown as one of the creditors and the amount due to him is shown as Rs. 13,920. Ex.R13 is

the income tax return for the year 1980-81. At first sight, these documents appear to support the claim of the petitioning-creditor as the creditor of

the company, but a closer examination of all these documents will reveal that these documents have no evidentiary value and it is equally hazardous

to place any reliance on these documents. For, P.W. 2 the Managing Director of the company who was examined as a witness of the petitioning-

creditor, admits in cross-examination that he does not know as to what are the transactions reflected in the books of accounts for the year 1977-

78. His further evidence is that he knows that the transaction relating to Chinnathambi are reflected in the books of accounts of the company for

the year 1977-78 from the typed statement of accounts furnished to him by Ramaswami Gounder. Therefore, two things emerge. The first is P.W.

2 is not personally aware of the renewal under Ex.P2. His knowledge that in the books of accounts for the year 1977-78 was shown as a creditor

is from the typed statement of account furnished to him by Ramaswami Gounder. Therefore, his evidence that the company was owing to

Chinnathambi according to its books of account maintained for the year 1977-78 is purely hearsay. Above all, he does not know as to how the

copy of the statement that was furnished to him by Ramaswami Gounder came into existence, nor had he cared to produce that typed copy of the

statement of account. He would conveniently tell the court that it is with his auditor, not even with the auditor of the company. Quite significantly

though P.W. 2 had admitted that he has the accounts for the year 1977-78, he had not produced them into court. While there is the suppression of

the material account books, viz., account books for the year 1977-78. P.W. 2 has no personal knowledge of the transaction said to have taken

place under Ex. P2. It is relevant to state at this juncture that as early as 2-3-1979 S.R. Subramaniam and S.S. Rasool (R.W. 1, the opposing

creditor) had presented C.P. No. 18 of 1979 under Sections 397 and 398 against the company, C. Senniappen, (P.W. 2), S. Ramaswami

(executant of Ex.P2), P. Sambaiyan, C. Shanmugasundaram and M. Moorthy for various reliefs. It is the admission of P. W. 1 that when Ex. P2

the renewal promissory note was executed in 1977, he was aware that disputes had arisen between S.R. Subramaniam on the one hand and

Ramaswami on the other. Thus, it turns out: (1) the relevant account books wherein the renewal under Ex. P2 should have been reflected are not

produced, but are suppressed; (ii) P. W. 2 does not personally know about the transaction reflected under Ex.P2 (iii) P.W. 2 had not seen the

account books of the year 1977-78 in person; (iv) P. W. 2 who is prepared to sacrifice the interest of the company has tendered evidence on

behalf of the petitioning creditor; (v) later account books marked as exhibits and referred to above are maintained during the management of P. W.

2 and (vi) P. W. 2 admits prior to 1978, he had no idea about the affairs of the company, except the monetary transaction, he had with the

company. In the above conspectus, the account books referred to above and the income tax return submitted on the basis of such account books

and the order passed by the income tax Officer will be of no avail to the petitioning-creditor to ground a prima facie proof of his debt. On the top

of it all, P. W. 2 admits in cross examination that none of these books bear any initial of the income tax Officer. His evasive answer ""I gave those

books to the auditor. I do not know whether it was produced before the income tax Officer by auditor or not"" to the question. ""These account

books have not been produced before any office?"" will reveal his incredibility. Further, Ex. R6, the day book starts from 3-11-1978 and stops

abruptly with 5-12-19/8. I will be further referring to this exhibit adverting to the payment of Rs. 2,510 which is relied on by the petitioning creditor

for the purpose of saving limitation of a debt under Ex. P2. Though there are about 20 pages still available in the said book of account (Ex. P6)

why the accounts were not continued is unexplained. P.W. 2 made no attempt to offer any explanation, but simply answered in the affirmative

when he was asked, ""the account also stopped as on 5.12.1978 and though several pages were left, the account book was not continued."" I,

therefore, find that the criticism by the learned counsel for the opposing creditor, viz., the entire account books and income tax return have all been

made up for lending support to Chinnathambi in this case appears to be well-founded. Indeed, the income tax return Ex.R11 was filed only on 27th

August, 1981. Further, from the foregoing materials I am persuaded to hold these account books are not maintained in the regular course of

business. Also the amount reflected in this doubtful books of account now produced by P.W. 2 to support P.W. 1 do not tally with the actual

figure that is now claimed by the petitioning-creditor. It therefore, follows that neither the oral testimony of P.W. 2 nor the several documents

produced by him will render any help to the petitioning-creditor in his establishing prima facie proof of a debt due under Ex.P2.

6. Yet another circumstance relied on by the petitioning-creditor is his lawyer's notice said to have been served on the company. The copy that

was filed along with the petition was not available in the course of trial, but later on it was discovered it was marked as Ex.P-3 (a). It is pertinent to

notice that the copy of the notice containing the acknowledgment of the company is also accompanied by the original. Even here the evidence of

P.W. 1 is not satisfactory. He would say even in chief-examination that he might have obtained acknowledgment while he served personally the

original on the company. Even the notice of demand Ex.P-3 (a) and the acknowledgment are surrounded with suspicious circumstances. It is seen

from Ex.P-3 (a), the notice was prepared by the lawyer at Madras on 4th May, 1981 and according to the endorsement purported to have been

made by the company, the same was received on 4th May, 1981. That means P.W. 1 came all the way from Erode to Madras, got this notice

prepared at Madras and then again went back to Erode to serve it personally on the company. Further, P. W. 1 does not say in the witness box

that he served the notice on the company on the same date. It looks rather unnatural that P.W. 1 should have taken the trouble of coming all the

way from Erode to Madras for the simple purpose of preparing a notice and then carrying the said notice from Madras to Erode to serve it on the

company. Why such an unusual course was adopted remains a mystery because P.W. 1 offered no explanation. The address of the company given

in Ex.P3 (a) is 19-C, Nehru Street, Erode. But, according to P.W. 1, the registered office of the company was at Agilmedu Street, Erode. But

when he was confronted in cross-examination with the particulars given in Ex.P3 (a) it does not fall in line with his evidence, he would conveniently

take shelter under failure of his memory. That is a vain attempt made by P.W. 2 is so obvious because he is a permanent resident of Erode; if,

therefore, he had personally served on the company at its registered office, there could have been, no room for his mis-statement as to the

registered office of the company. There is also intrinsic evidence of Ex.P3 (a) and the accompanying original filed along with the company petition,

which is most disadvantageous to the petitioning-creditor. It is the testimony of P.W. 1 that the original of Ex.P3(a) was served on the company. But

the original has accompanied the said copy and was filed along with the original petition. The other copy was also marked as Ex.P3 at the time

when Ex.P3(a) was not traced. Besides neither the original was signed by the learned counsel who had issued it nor was the copy initialed by the

counsel. On the other hand, I find at the bottom "sd. K.P. Sivasubramaniam" both in the original and in Ex P-3(a) as also in Ex.P3, If really the

original containing the signature of the learned counsel was served on the company, the carbon copy of that original must have been produced into

court. A comparison of the original referred to above, with Exts.P3 and P3(a) will disclose that the two copies are carbon copies of the above

original. It means, therefore, that the petitioning-creditor had produced both the originals said to have been served on the company as also a copy

containing the acknowledgment. The inference is so patent that the person now in management of the company, namely, P.W. 2 could oblige P.W.

1 at the cost of the company. I must own that this was not noticed by both the learned counsel and in fact no argument was addressed by either

side. The further important factor is when P.W. 1 had called upon the company to produce several documents under Ex P5. It had scrupulously

avoided any reference to the original notice, a copy of which is said to have been served on the company. The outcome from the foregoing

circumstances is an irresistible finding that the alleged notice of demand, the alleged personal service and the acknowledgment are all got up for the

occasion and were not genuine transactions.

It is here I must again emphasise that P.W. 2 and P.W. 1 had joined even in 1979 to spite the opposing creditor. P.W. 2, in my opinion, had

joined hands with P.W. 1 unmindful of the interest of the company.

In the above set up, I am constrained to hold that the petitioning-creditor had failed to establish the prima facie proof of debt which is a sine qua

non for him to sustain an application under S.433(e) of the Act.

7. There is also another formidable hurdle which the petitioning-creditor had not successfully overcome. The debt under Ex.P2 is dated 1st April,

1977. This company petition was presented on 17th July, 1981. Therefore, the debt under Ex.P2 was barred by time when the company petition

was presented. In order to maintain that the debt was alive on the date of presentation of the company petition, it is alleged in the company petition

that on 4th April, 1978 the company has paid a sum of Rs. 2,510 towards interest to the petitioner herein,"" I must straightway state here that when

it is the duty of the petitioner to plead, specifically the circumstances, which, according to him, would keep the debt alive, the learned counsel for

the petitioning-creditor was so vociferous to criticise the opposing creditor and submitted that in the absence of a pleading, the opposing creditor

is not entitled to contend that the entry Ex.R6(a) does not specifically correlate to the debt due under Ex.P2. The argument suffers from very many

fallacies. These books of accounts and P.W. 2 were examined after the entire evidence was over and just about the commencement of the reply

argument, at the instance of the petitioning creditor. Therefore, there was no opportunity for R.W. 1 to speak about these documents. As a matter

of fact, in order to have all cards on the table, on an oral application by the petitioning-creditor, I did permit the petitioning-creditor to adduce

additional evidence, both oral and documentary. It was thus P.W. 2 came to be examined after the evidence of R.W. 1 was over. Secondly, there

is absolutely no pleading, and no reference in the petition, that the alleged payment of Rs. 2,510 on 4th December, 1978 is reflected in the books

of accounts of the company and in the balance sheets, etc. Then, it is unjust and unfair on the part of the petitioning-creditor to contend that the

defects in the account books are not disclosed in the counter statement. Now, let me turn to examine the truth or otherwise of the alleged payment

by the company on 4th December, 1978. In the foremost, the evidence of P.W. 1

even in chief-examination is very vital. To the question ""Was any amount repaid under Ex.P 2,"" his answer was ""they did not pay any amount"" But when he was put a leading question "I find from the petition that the company has paid Rs. 2,500"", his answer was ""on 4th December, 1978 they have paid Rs 2,500."" It is not Rs. 2500 that was paid but it is Rs. 2,510. Thus, the evidence of P.W. 1 is totally unsatisfactory and unworthy of acceptance. In my opinion this alone will suffice to reject the petitioning-creditor's story that there was payment by the company on 4th December, 1978. To fill up the void that is created by himself, P.W. 1 had now fallen back upon the evidence of P.W. 2 and the account books, income tax return, etc., referred to already. But, the evidence of P.W. 1 and P.W. 2 is quite contradictory about the receipts said to have been passed by P.W. 1 regarding the alleged payment of Rs. 2,510. For, while P.W. 1 would state I have not passed any receipt and neither Ramaswami Gounder nor Senniappan asked me any receipt, according to P.W. 2, he had obtained receipt from P.W. 1. When he was further cross-examined, P.W. 2 had stated that he had not produced that receipt in court, but that receipt is with the Advocate. The non-production of the alleged receipt and P.W. 1's statement that no such receipt was issued are enough to reject the theory of alleged payment of Rs. 2,510 on 4th December, 1978. Far from P.W. 1 corroborating P.W. 2, there is utter contradiction. Even if we look to Ex.R6(a) the entry it recites as ""Chinnathambi's debit Rs. 2,510."" There is no indication whatever that that payment to Chinnathambi was in respect of the debt due under Ex.12. The burden is on the petitioning creditor not only to allege the circumstances which are relied on by him to claim an extended period of limitation, but also to prove satisfactorily the said circumstances. But, I find the petitioning creditor has miserably failed to discharge the said burden. It is here I must recall about my criticisms about Ex.R-6. The entries in this book start from 3rd November, 1978 and stop abruptly with 5th December, 1978 There were other pages in the books of accounts from 26 to 46 which are left blank. P.W. 2 admits that the book is not continued and offers no explanation for such unusual and unhappy manner in maintaining the books of accounts. The only inference is that the account book must have been prepared only for the occasion and just to bolster up P.W. 1's claim. The

books stop with the entry on 5th December, 1978--a day subsequent to 4th December, 1978. It is not the evidence of P.W. 2 that there were no transactions done by the company thereafter. Then why was this book discontinued? The absence of an explanation is a strong circumstance to reject this document as unworthy and unreliable. The non-production of the alleged receipts said to have been issued by P.W. 1 to P.W. 2 and said to be in the possession of the learned counsel will serve as a supplemental force to the said inference. It is equally important to notice the evidence of P.W. 1 in cross-examination. His answer is ""I have no records, but I remember the company has issued a receipt for that sum"". To the question, ""with respect to the payment of Rs. 2,310 towards interest on the renewed promissory note, it is not borne out by any records. Have you got any records,"" here again, while P.W. 2 had stated that P.W. 1 had passed on a receipt, P.W. 1 would state that he remembered to have obtained a receipt from the company. Thus, there is no satisfactory evidence that the company made a payment of Rs. 2,510 on 4th December, 1978. I have already rejected the books of accounts, income tax return and the balance sheet produced by P.W. 2. I need not repeat the reasons for my such rejection. The resultant position is that if there is no payment on 4th December, 1978 as claimed by the petitioning-creditor the debt under Ex.P2 even if it be true, is barred by time on the date of the presentation of this company petition.

8. There remains to be considered Ex.P6. Ex.P6 is a true copy of the notice said to have been issued by an Advocate on behalf of S. Ramaswami and S.S. Rasool (R.W. 1). It is also true that in that notice, among the list of creditors, the petitioning creditor is also shown as one. This is very much relied upon by the learned counsel for the petitioning creditor and it is vehemently contended that even on 27th February, 1976 R.W. 1 had admitted that the company owed the petitioning-creditor a sum of Rs. 10,000 For the following reasons, I find Ex.P6 will not really help the petitioning creditor. R.W. 1 had explained that Ramaswami Gounder was in management of the company at the time when Ex.P6 was issued and that it is the said Ramaswami Gounder who gave instructions to the counsel to prepare that notice. The next is that the figure disclosed in Ex.P6 does not tally with the amount that was then due to P.W. 1 under Ex.R1. Above all, the present claim is not based on Ex.R1 but under Ex.P2,

Therefore, as long as the reference in Ex.P6 could be only to Ex.R1. I fail to see how such an entry in Ex.P6 will support the present claim of the

petitioning creditor that Ex. P2 was a renewal and that it was revived by virtue of payment on 4th December, 1978.

9. What would follow from the above analysis by way of repetition is that the petitioning creditor had not established that the company is owing a

debt more than Rs 500 so as to enable him to sustain his petition under S. 433(e) of the Act.

10. There can be no quarrel over the proposition that ""A creditor who cannot obtain payment is entitled as of right to a winding up order, subject

only to the court's power on the hearing of the petition to give effect to the wishes of a majority of the creditors on the question whether a winding

up order shall be made, and whether the petition shall or shall not stand over"", as submitted by the learned counsel for the petitioning creditor

relying upon the passage in paragraph 1033 of Halsbury's Laws of England, Volume 7. Fourth Edition. Nor is there any occasion to apply the

principle referred to in page 41 of Palmer's Company Precedents, Seventeenth Edition, which states, ""A creditor whose debt is presently due, and

who cannot get paid, is entitled, ex debito justitiae, as between himself and the company, to a winding-up order even though the company has

appealed from the judgment giving rise to the debt on which the petition is founded."" If the petitioning-creditor has not succeeded in proving that

the company prima facie owes any debt, he ceased to have any locus stand to maintain any proceeding under the Companies Act as against the

company. It follows, therefore, that he cannot maintain the winding up petition under S.433(f).

11. Even on merits, the petitioner has failed to establish that the company is liable to be wound up under S.433(f). The only paragraph that makes

any reference to this ground is paragraph 9 in the company petition. None of the allegations mentioned therein is ever spoken to by P.W. 1. Nor

was anything elicited from this partisan witness P.W. 2 on the subject. None-the-less, the learned counsel for the petitioning-creditor relied upon

the averments made in the company petition, C.P. No. 18 of 1979, marked as Ex.P7 by consent of parties, Ex.P7 proceeding, as already referred

to, is by one S.R. Subramaniam and R.W. 1, the opposing share-holder as against the company and five others, including P. W. 2. It is true in

paragraph 56 of the said company petition, it is stated thus:-

It is further submitted that the respondents herein have transferred the stage carriage permits of the two vehicles belonging to the company, namely,

MDE 5902 and MDH 2209 to the 6th respondent herein who is said to be a sole proprietor of Sri Devi Bus Service. He is only a name lender for

the second respondent. The second respondent it is who is actually administering and managing the affairs of the said Sri Devi Bus Service. The

purported sale, which however it is submitted is illegal and not binding on the petitioner or the company goes to defeat the object for which the

company was incorporated besides causing the company serious prejudice, resulting in the denial of further permits on Route Nos. 22 and 14, for

which application is pending. The company has been made to lose its substratum for which it was incorporated which would amount to a voluntary

liquidation of the company itself. The petitioners state that the same is detrimental to the interest of the share holders of the company and the

petitioners.

A strong reliance is placed on the underlined portion, to substantiate that there is an admission on the part of R.W. 1 himself in the company

petition that there are circumstances which would establish that it is just and equitable that the company should be wound up within the meaning of

section 433(f). There are serious hurdles to countenance the above argument. In the first place, the entire allegations in Ex.P7 have to be read and

if it is so read, it would mean that the above statement is not an unqualified one, but is made in an attempt on the part of the petitioners therein to

sustain the proceeding under sections 397 and 398 of the Act. It is needless to state that to ground a petition under S.397 of the Act, the petitioner

therein shall allege and establish that there are grounds to commend winding up under S. 433(f), but then at the same time the winding up will not

be in the interest of the company as also in the interest of the shareholders. Besides, the primary duty of the court, while dealing with a company

petition for winding up, is to safeguard as far as possible the interest of, the company. It is useful to quote the following observation from a decision

of a Division Bench of this Court in Syed Mohamed Ali v. M.R. Sundaramurthy and others A.I.R 1958 Mad. 587:71 L.W. 595: The interests of

the company are paramount. The proceedings should not be conceived as a mere

dispute between the individuals. If the minority in a company complains of an oppression and disclosed certain grounds of complaint in the petition which are made the basis for the reliefs the court-should ordinarily investigate the charges. Further, the allegation in paragraph 56 of Ex. P7 was made out of necessity to sustain the proceeding under sections 397 and 398 of the Act, not with the object of winding up the company, but in promoting the interest of the company. Therefore, the petitioning-creditor is no more entitled to rely upon paragraph 56 in Ex. P7 as an admission on the part of R.W. 1. Significantly, the counter filed by the company is ""the petitioner is put to proof of averments in paras 8 and 9 of the petition. It is true that the Company is not carrying on any business for the past two years. But I state that the company has no idea of secreting the assets of the company or cheat any creditor"". Thus, the petitioning creditor was put to strict proof by the company of the allegations made in paragraph 9. As already pointed out by me no attempt was made by P.W. 1 to place any proof, even the interested testimony on this subject, Then, there is no hesitation in holding that the petitioning creditor has placed no iota of evidence to project his case u/s 433(f) .

12. While concluding, I must point out here that the documents marked through P.W. 2, though a witness produced by the petitioner, were given R Series, giving an impression that these documents are filed on behalf of the respondent. Factually, the documents were exhibited on the side of the petitioner. In the end, the petition fails and is dismissed with costs of the opposing shareholder The company will bear its costs.