
(1988) 04 KAR CK 0020

Karnataka High Court

Case No: None

State Bank of
Hyderabad

APPELLANT

Vs

Varson Chemicals
Private Ltd., and
Another

RESPONDENT

Date of Decision: April 15, 1988

Acts Referred:

- Companies Act, 1956 - Section 434
- Contract Act, 1872 - Section 151

Citation: (1989) 3 KarLJ 222

Hon'ble Judges: M. P. Chandrakantharaj Urs, J

Judgement

@JUDGMENTTAG-ORDER

M.P. Chandrakantaraj Urs, J.-This is a petition filed under Section 439(1)(b) read with Sections 433(c), (e) and (f) and 434 of the Companies Act, 1956, (hereinafter referred to as the Act). The petitioner is the State Bank of Hyderabad a Banking Company which is a subsidiary of the State Bank of India having its head office at Hyderabad and among other places a branch office at J.C. Road, Bangalore, represented by the Branch Manager of the aforementioned branch (hereinafter referred to as the Bank). The prayer in the petition is for an order of this Court winding up the 1st respondent-Varson Chemicals Pvt Ltd., a company registered under the Act having its registered office at 9th Mile, Hosur Road, Bangalore-560068 (hereinafter referred to as the Company).

2. It is alleged by the petitioner that in consortium with the 2nd respondent-Canara Bank having its head office at No. 112, J.C. Road, Bangalore, and a branch office at No.142, 5th Cross, Rajmahal Vilas Extension, Bangalore-560080 together advanced certain sums as cash credit loan upto a limit of Rs. 46,00,000/- a term loan upto a limit of Rs. 20,00,000/- and a term loan of Rs. 7,00,000/- between August, 1981 and March, 1982. In

October, 1983 it is further alleged, at the request of the 1st respondent-Company, the petitioner-Bank in consortium with the 2nd respondent-Bank released a letter of credit facility upto a limit of Rs. 1,60,00,000/- to enable the 1st respondent-Company to import raw materials from foreign suppliers. It is further alleged that in consideration of the sanctioning of the loans and other banking facilities as described above, the 1st respondent-Company executed relevant loan documents agreeing to pay interest at rates agreed upon, having hypothecated the plant, machinery, book debts etc., belonging to the Company as well as mortgaged the immovable properties of the Company by deposit of title deeds. It is claimed that on account of the above transactions a total sum of Rs. 1,37,12,518-81 is due as detailed below:

"(1) Cash Credit Hypothecation (2) Medium Term Loan Account No.I (3) Medium Term Loan Account No.II (4) Letters of Credit Facility

Total:

Rs. 45,82,880-29) Exclusive of interest

Rs. 7,72,791-30 from 1-7-1985

Rs. 4,66,580-67

Rs. 78,90,266-55 Exclusive of interest charges from 10-1-1984

Rs. 1,37,12,518-81"

3. Certain documents being the extracts of respective statements of the four accounts mentioned above and the balance confirmations, letters dated 2-6-1982 and 11-3-1985 have been filed along with the petition as annexures thereto.

4. It is further alleged that the 1st respondent-Company has closed its business in the year 1984 and has not resumed the business thereafter. It is also alleged that the registered office of the 1st respondent-Company is also locked up continuously as evidenced by the postal cover bearing the endorsement "Door locked". It is also alleged that the 1st respondent-Company has lost its capital and has thus become bankrupt thereby losing its substratum. It is also alleged that the 1st respondent-Company has suffered continuous losses and has totally become unviable, insolvent and bankrupt as evidenced by the balance sheet for the year ending 31st October, 1984 which is produced as one of the annexures to the petition.

5. The statutory notice was issued demanding payment, as the Company failed and neglected to deposit the amounts due under the letters of credit and the other loans and therefore without prejudice to its rights to realise its security, the Bank has prayed for winding up order against the Company under the Act.

6. Before advertng to the objections filed by the Company it would be necessary to state that 2nd respondent-Canara Bank is arrayed as 2nd respondent and it has filed its objections, only technically to be so-called, and actually it is no more than another creditor"s support to the prayer in the petition. At this stage, nothing more need be said about the 2nd respondent-Canara Bank.

7. The objections statement filed by the Company is extremely lengthy and several documents have been annexed to the said statement of objections to some of which a reference will be made in the course of this order hereafter when it becomes necessary. It is stated by the 1st respondent-Company that it was incorporated in the year 1972 in the name of Johar and Sathya Chemicals Pvt. Ltd., and in the year 1979 the name of the Company was changed to Varson Chemicals Pvt. Ltd. On 5-1-1981 the Company was taken over by purchase of the shares by Shri V.P. Shah and his Associates. The earlier management was manufacturing some inorganic chemicals. But after taking over, the new management prepared a fresh project report for manufacturing bulk drugs and drug intermediates and pharmaceutical fine chemicals. The Company made an application to Canara Bank, Rajmahal Vilas Extension Branch, the 2nd respondent herein, for financing the unit in accordance with the project report prepared by the Company. After considerable delay, the 2nd respondent-Canara Bank agreed to finance the 1st respondent-Company subject to the condition that the Company should find a consortium Bank who were willing to finance the project. Therefore, the Company approached the State Bank of India with the project report, but even there, there was considerable delay and in that circumstance approached the State Bank of Hyderabad. Ultimately, after holding consultations with the Canara Bank and being convinced about the technical feasibility and economic viability of the project for manufacturing the bulk drugs like Tetra Cycline Hydrochloride, Ethambutol Hydrochloride and drug intermediate 3, 4, 5-Trimethoxy Benzaldehyde, the Bank and the 2nd respondent agreed to finance the project. A lot of other details are set out in regard to the feasibility of the project as submitted to the Banks in question before the credit facilities were extended and it is unnecessary to set them out in detail. It has high-lighted the fact that in the year 1981 when the project report was submitted and the Banks consented to finance the project there was not any restriction in the import and export policy of the Government to import the intermediate Tetracycline Urea Complex. In 1981-82 the Company had imported 30,000 Kgs of the raw-material from Italy and 19,000 Kgs through Tata Exports Ltd. directly opening letters of credit through the petitioner-Bank. After processing the material, the Company was able to sell the end product between December 1981 and March 1983 and earned gross profit of Rs. 44,41,000/-. Out of the said profits the Company cleared the amounts due under the letters of credit, established for the import of the raw-material and met all the over-head charges including Bank interest of Rs.28 lakhs covering the period from 1981 to June 1983. The Company has therefore emphasised its excellent performance from August 1981 up to February 1983. It has asserted, it has performed all its contractual obligations with the two Banks that financed it.

8. In 1983 the production was planned and therefore the Company opened letters of credit for importing 32,000 Kgs of Tetracycline Urea Complex from Italian supplier, Porter SPA Italy to be shipped during the period January 1983 to June 1983. The foreign supplier commenced shipment of the raw-material and the first consignment arrived from Italy in February 1983 at Bombay. The objection was raised in regard to the validity of the import of the raw-material Tetracycline Urea Complex and the Assistant Collector of Customs issued a show cause notice asking for explanation as to why the goods should not be confiscated on the ground that the imported material itself was a drug. That show cause notice was challenged before the Collector of Customs. There was a delay in the adjudication and there was an indication that the Collector of Customs may initiate confiscation proceedings. The Company learnt from the Customs Officers that they were being guided in their action by the Circular instructions of the Ministry of Commerce dated 3rd January 1983 in which it was stated that item Tetracycline in the canalised list also included Tetracycline Urea Complex and the same should be canalised through the State Trading Corporation. In that circumstances, in order to safeguard the interests of the Company and of the Banks, the Company filed a writ petition in the High Court of Judicature at Bombay. It was numbered as writ petition No.1601/1983 and admitted on 8-7-1983. At the time of admission, the High Court of Bombay directed release of the material as an interim measure subject to the Company furnishing a Bank guarantee for possible levy of duty and penalty. In that context, it is asserted by the Company that the Circular challenged in the High Court of Judicature at Bombay, as subsequent events disclosed, had been issued at the instance of the Indian Drugs and Pharmaceuticals Limited (IDPL), the Government of India undertaking. This assertion of the Company is based on the unstarred question in the Rajyasabha bearing No. 1568(c) and (d) and the answer given thereto that is produced as Annexure-D to the petition.

9. In the meanwhile, the High Court of Judicature at Bombay, it is alleged, gave interim order by which the customs authorities were directed to release the goods subject to the Company furnishing bank guarantee for specified amount of duty which the customs claimed for the chemical imported. The bank guarantee was furnished by the Bank. But the customs authorities did not accept the same on the ground that the bank guarantee should be issued in the proforma prepared by the customs authorities. The Bank being approached by the Company, delayed the issue of fresh bank guarantee in the proforma demanded by the customs authorities and ultimately did not issue the same at all. On the other hand, the Bank and the 2nd respondent-Canara Bank called the Company for a meeting on 8-5-1984 to discuss the problems of the Company and find a solution. At that meeting, the Bank suggested that the shipments of chemical which had arrived by then should be disposed of to I.D.P.L. in view of the financial inability of the Company to release the same from the customs authorities. It is averred by the Company that the Company was willing to sell the chemical to I.D.P.L. at cost price despite losing considerable profit had it processed the chemical itself. The Company wrote to the Banks agreeing to dispose of the material to I.D.P.L. The minutes of the said meeting of 8-5-1984 and the letter of 12-5-1984 have been produced as Exhibits E and F to the

statement of objections. Ultimately, the High Court of Judicature at Bombay allowed the writ petition quashing the circular which had been challenged. Whatever that plea may be, the net result was, the chemical imported was never released from the customs authorities.

10. It was at the time of hearing the petition, the learned Counsel for the Company submitted that one batch of chemicals had been auctioned by the customs authorities realising a hopelessly low price and the Company was not aware as to what had happened to the amounts so realised or the other consignments of the chemicals that had arrived. They are said to be lying with the customs authorities at Bombay even as on the date of the hearing of the petition.

11. It is alleged further that the Bank tried to clear from the customs authorities the consignments held by the customs authorities. But later changed its mind as evidenced by the correspondence with the clearing agents.

12. It is in these circumstances, the Company has taken the stand that the Bank is guilty of not servicing the loans properly after sanctioning the same and not acting upon the letters of credit, as the Bank is duty bound to act and that there has been a breach of confidentiality as some officer or officers at the Bank in the credit department had leaked out the information to the rival manufacturers namely, I.D.P.L. a Government of India concern which required the same chemical and therefore the Bank wanted to sell the materials as decided at the meeting of 8-5-1984. It is further alleged that the Bank is liable to pay damages to the Company on account of such breach and deliberate delay in furnishing the bank guarantee etc and therefore the Company is entitled to a counter-claim to the extent of its losses and as such there is no liability on the part of the Company to pay the sums now demanded by the Bank. It is further alleged that even the issuance of circular to the customs authorities was at the instance of the I.D.P.L. who was a rival manufacturer in order to hurt the Company as the sequence of events and the answer given by the Minister on the floor of the House to which reference has been made earlier. In substance the thrust of the allegation is that the Bank as well as the 2nd respondent-Bank together with I.D.P.L. had conspired to break the Company in order to leave the field open only to I.D.P.L. and therefore brought about the whole sequence of events disabling the Company from releasing the imported chemicals from the customs authorities and processing the same at the Company's factory near Bangalore so that profits as shown could have been earned and the loans repaid. Therefore, it is contended that the petition is not maintainable as the debt was a contingent and conditional liability. The Bank having failed to perform its obligation, it could not claim the repayment of the debt. The Bank is liable to pay damages for breach of confidentiality which resulted in the report of the I.D.P.L. to the Ministry of Chemicals and Fertilisers which caused the issue of circular with retrospective effect in turn, enabling the customs authorities to levy duty on the Tetracycline Urea that had been imported. It is further contended that the Bank committed the breach of promise and was in conspiracy with the I.D.P.L. as evidenced by the decision to market the chemicals to I.D.P.L. and though the Company accepted the

proposal to sell, the actual sale did not materialise.

13. In that circumstance, it is further contended, it is the Bank which has to pay the damages and there is no obligation on the part of the Company to repay the loans in the circumstances of the case. The other allegations (to which I need not refer) have no bearing in the light of the arguments advanced.

14. Mr. Amin, learned Counsel appearing for the Respondent-Company submitted that the Bank had committed breach of duty or obligation to maintain secrecy. He drew the attention of the Court to an English decision in the case of *Tournier v National Provincial and Union Bank of England* [1924(1) K.B.461 -473]. Similarly, attention was drawn to Chapter-7 of the Book-Law of Banking by Paget, 8th Edition at pages 166 and 167. The learned author has referred to the aforementioned decision of the King's Bench. The learned author has observed that the duty to maintain secrecy is a legal one, arising out of contract, not merely a moral one. Breach of it, gives a claim for nominal damages, or for substantial damages if injury has resulted from the breach. It is, however, not an absolute duty, as has been contended, but qualified, being subject to certain reasonable, if not essential, exceptions. That proposition was again explained by the English Courts in the case of *Parry Jones v The Law Society and Others* (1968 A.E.R. Vol.I at page 177). Jones' case related to maintenance of secrecy between the Solicitor and his clients. Lord Denning, MR., observed as follows at page 178:

"The second privilege arises out of the confidence subsisting between solicitor and client similar to the confidence which applies between doctor and patient, banker and customer, accountant and client, and the like."

Mr. Amin on the strength of these observations of the English Courts and the Banking Practice wants the Court to draw an inference that in the circumstances stated, namely, an officer of the Bank having leaked out the information relating to the opening of letters of credit caused I.D.P.L. to write a report to the Ministry of Chemicals and Fertilisers and therefore the circular was issued by the said Ministry treating the chemical in question to be one which was not exempt from duty but one which was required to be imported through the channel of the State Trading Corporation, failing which, as a heavy chemical was liable to customs duty.

15. In fact, as rightly pointed out by Mr. S.G. Sundaraswamy, for the Bank, this complaint has been made for the first time in the course of the arguments addressed in this Court i.e., on the basis of the statement of objections filed, and never before, in all its correspondence had the Company raised this question.

16. There is no prima facie proof placed before the Court of such breach of confidence. Mr. Amin wants the Court to draw the inference having regard to the chain of events and the proximity of dates, i.e., the date on which the letter of credit was opened, the date on which the report was made by the I.D.P.L. to the Ministry of Chemicals and Fertilisers and

the issuance of the circular by the Ministry. He, however, contended that it is not possible for the Company to produce, prima facie evidence without further investigation, without the relevant witnesses and documents from several sources to establish the case of breach of confidence which could only be done in a properly framed suit and not in summary procedure which the Company Court is bound to follow and therefore reasonable inference may be drawn to hold that breach of confidentiality affords a tenable defence for a counter claim for damages.

17. In fact, he submitted that during the pendency of the proceedings in this Court a suit indeed had been filed in the City Civil Court at Bangalore claiming damages and the same has since been pending.

18. No doubt, the case law cited is voluminous consisting of both English and Indian decisions to support the principle that if the Company which is sought to be wound up has a tenable defence to resist the claim, it would not be liable to be wound up.

19. But the question is whether on the facts and circumstances of this case and on the material available placed before this Court, it is possible that the defence pleaded on ground of breach of confidence by the Bank and consequently bank being liable to pay damages not yet quantified is a tenable defence in the opinion of the Company Court.

20. In fairness to Mr.Amin some decisions cited in this behalf may be noticed. In the case of Bangasri Ice and Cold Storage Ltd. v Kali Charon Banerjee [A.I.R. 1962 Calcutta, 613] a Division Bench of the Calcutta High Court had occasion to consider the expression "unable to pay its debts" occurring in Section 433 of the Act as well as the expression "neglects to pay" occurring in Section 434 of the Act. It observed as follows:

"It will not do for a creditor merely to put forward a claim. The company may not accept it or may dispute either its factum or validity. Where there is a genuine dispute of this description, it cannot be resolved by having recourse to winding up proceeding. But, just as it will not do for a creditor merely to put forward a claim, it will not do for the company do deny a claim recklessly. If the denial of the dispute is neither bona fide nor reasonable then the Court does not lose its power of granting relief by passing a winding up order.

Under certain circumstances, counter claim against the petitioning creditor may also amount to bona fide claim.

The Court is entitled to investigate the question as to whether a dispute has been manufactured in order to delay and defeat the realisation of the dues of the petitioning creditor and is merely a cloak for the inability of the company to pay its just debts."

21. Apparently, the learned Counsel for the Company wants to rely upon the reference by the learned Judges of the Calcutta High Court to counter-claim against the petitioning creditor amounting to a bona fide claim. But, that observation cannot be taken out of its context without reference to what has been said before and after that observation by the

learned Judges. The passages extracted above clearly indicate the well settled law and the scope of investigation which the Company Court is entitled to make in order to arrive at the conclusion whether disputed liability to pay a debt is a genuine one or the dispute is no more than a cloak to defeat and delay the creditor's just claim.

22. Similarly, reliance was also placed on a decision rendered by me in the case of *Kamadenu Enterprises v Vivek Textile Mills Pvt. Ltd.* [1984 Company Cases Vol.55, 68] On the facts of that case I did no more than hold that the Company Court is not essentially meant for settling money disputes between parties. The jurisdiction of the Company Court was to subserve the object of winding up of companies which have not paid the debts or which are unable to pay their debts and therefore the first pre-requisite must be to establish prima facie a debt against the respondent. But when a claim or debt is disputed, the proper forum is a Civil Court. That is definitely well settled law in this Country as well as in most common law Countries.

23. The learned Counsel also drew my attention to the observation of Lord Denning, M.R., as he then was, dissenting in the case of *In Re Portman Provincial Cinemas, Ltd.* The facts of that case were, secured creditors petitioned for the winding up of a company, claiming to be creditors for upwards of ₹40,000, due under a legal charge of June, 1961. The Company's defence to the petition was based on a cross-claim exceeding the balance of the moneys due under the charge. That claim arose on an alleged oral agreement made in 1955, at the time of the sale of certain cinemas to the Company for ₹175,000, by the petitioning creditors' then managing director, who died in 1962, that the creditors would indemnify the company against any losses which the latter might sustain in the future operation of the cinemas. The company therein had claimed against the petitioning creditors damages for breach of that alleged contract of indemnity. On those facts, the creditors' petition was dismissed. On appeal, Lord Denning observed that there had to be a genuine cross-claim with substance in it before the petition should be rejected. He further observed that in *In Re Welsh Brick Industries Ltd.* (1946)2 All.E.R. 197, it was held that in spite of the fact that unconditional leave to defend had been granted in the King's Bench action, the winding up court could look into the matter and held that there was no substance in the defence. The alleged oral agreement was far too vague and uncertain to obtain recognition by a court of law and therefore he would reject the cross-claim and allow the appeal.

24. However, the majority view was whether the Judge had rightly exercised his discretion. There was at least a chance that the court would believe the story of the alleged oral agreement. Although the question of uncertainty had made him pause, the appeal was liable to be dismissed. Agreeing with Lord Harman's views Lord Russell, L.J. said that he would not say that there could not be a substantial matter on the cross-claim and agreed that the appeal should be dismissed.

25. In other words, in *Portman Provincial Cinema's* case the Court of appeal, by majority recognised that the defence of cross-claim or counter claim to be a matter that should be

settled in the course of normal civil action.

26. In this context, it will not be out of place to refer to what has been stated by the Bank in its counter or reply to the objections filed. Shri S.G. Sundaraswamy, the learned Counsel, drew the attention of the Court that the allegation that some official of the Bank had leaked out information has been denied to be false. There is no positive averment. The suggestion that there may have been a leak so as to promote at best what can only be speculative litigation contemplated by the Company and in entertaining a plea of counter-claim even in winding up proceedings the Company Court cannot lose sight of the fact that the counter-claim is governed by the law of limitation. He drew the attention of the Court to Section 55 of the Limitation Act, 1963. According to him, there has to be specific plea as to when the company acquired the cause of action to make the counter-claim. He pointed out that even in the specific averments the cross-claim of the company is only for Rs.15 lakhs and that is nowhere near the amount due by the company to the Bank against the various loans advanced. The reliance placed on some of the decisions will be adverted to later in the course of this order for convenience for they are decisions of this Court and therefore binding on me.

27. Whatever may be the majority view in the case of Portman Provincial Cinemas Ltd. (Supra) the dissent expressed by Lord Denning, M.R.(as he then was) is the more logical and pragmatic view which the courts in India have generally followed. In almost similar situation in the case of State Bank of India v Hegde and Golay Ltd [I.L.R. 1987 Karnataka, 2496] the Court had occasion to examine a similar plea of the respondent-company therein. Relying upon the decision of the Supreme Court of India in the case of M/S Madhusudan Gordhandas and Co., v Madhu Woollen Industries Private Ltd. [A.I.R. 1971 S.C. 2600] Court emphasised the view that the Company Court must be satisfied that the Company adduces prima facie proof of the facts on which the defence depended before the matter could be left to the Civil Courts to decide the disputed debt, among other reasons given for recording a finding, preliminary though it was, that the Company Court could proceed with the winding up petition despite a plea of counter-claim. That conclusion reached by the Court was affirmed by a Division Bench of this Court and later Bopanna, J., as Company Judge after considering every aspect of the resistance put up by M/s Hegde and Golay Ltd. passed the winding up order inter alia holding that the Company therein had not proved its substantial counter-claim against the Bank (See I.L.R. 1987 Karnataka, 2364). Therefore what we in India have come to accept falls in line more with the view of Lord Denning, M.R.(as he then was) that there must be substance in the plea of cross-claim or counter-claim. Mr.Sundaraswamy relied upon the decision of the Supreme Court in the case of Union of India v Raman Iron Boundary [A.I.R. 1974 S.C. 1265] to the effect that claims of damages are really not to be taken note of till they are quantified. In the case on hand process of quantification has commenced only during the hearing of the case.

28. So far the Court has been concerned with the plea of breach of confidentiality by the Bank giving rise to the cause of action for damages resulting in the counter-claim. There

is not an iota of proof that there has been breach of confidentiality, placed before the Court. The Court is pressed to draw inferences from the nexus that exists between certain events which affected the company following the report by I.D.P.L. and the questions asked in Parliament on account of the proximity of dates. That cannot be prima facie proof of tenable defence which is likely to succeed on a point of law or of a defence with substance in it.

29. No doubt, Mr. Amin, the learned Counsel has drawn attention to two or three other decisions rendered by me wherein I relegated the parties to civil suits for recovery of debts, being satisfied that plea of counter-claims were likely to succeed on the facts of those cases as well as having regard to the small amounts that were claimed by the petitioning creditors clearly demonstrating that the companies in question were being pressurised to pay the debts claimed. That is more or less the settled position in law (See 35 Company Cases, 456). Under Section 433, the Company Court exercises a discretionary jurisdiction and in that sense facts which are not disputed or facts which are apparent in the material placed before it, the Court has necessarily to see the need for a winding up order or to refuse the same.

30. So far the Court has discussed the plea of counter-claim founded on the plea of breach of confidentiality. Learned Counsel for the Company relied on another aspect of the Bank's conduct, a combination of lack of service to the loanee as well as negligence that resulted in losses to the Company giving rise to the cause of action for damages and therefore a counter-claim based on the negligence of the Bank.

31. It is pleaded that the Bank delayed issuing the Bank guarantee in the proforma desired by the customs authorities and finally failed to issue such guarantee resulting in the imported chemicals lying with the customs authorities. The thrust of the argument is that there was no proper servicing of the loan facilities and the letters of credit due to the negligence of the Bank.

32. Pursuant to the interim order of the High Court of Bombay, the Bank did issue a Bank guarantee is not in dispute. That guarantee was not accepted by the customs authorities at Bombay which desired the guarantee in a particular proforma. Mr. Sundaraswamy, learned Counsel for the Bank, therefore contended that the Bank was not negligent and that the Bank was under no obligation to issue bank guarantee according to the whims of a particular authority and therefore was justified in not issuing the bank guarantee. He further pointed out that as per banking practice, bank guarantee was issued in a particular form and once that was issued, it was for the Company to persuade the customs authorities at Bombay to accept the guarantee given; and to accuse the bank now of neglect in servicing the loans and letters of credit was only an after thought which the Court should ignore. There appears to be some force in the contention of Mr. Sundaraswamy. Mr. Amin, learned Counsel for the Company, has not pointed out any rule or banking practice that makes it mandatory for the bank to issue bank guarantee in any form preferred by the one for whose benefit it is given. In this Court no attempt was

made to show in what way the bank guarantee given was not acceptable to the customs authorities. One cannot but realise that banks must conform to a particular form of issuing bank guarantee in the general interest of banking and not cater to the whims of any one in particular. It would create unhealthy precedents and disrupt general banking practice apart from leading to possible litigation, Court therefore cannot accept the Company's contention that the bank was negligent in servicing the loans or in not issuing the bank guarantee in the form desired by the customs authorities. As will be pointed out hereafter the real reason why the bank refused the bank guarantee appears to be one of substance and not merely of form.

33. The second aspect of negligence, pointed out by Mr. Amin, learned Counsel for the Company, is the failure of the bank as well as the second respondent Canara Bank to conclude the sale of the chemicals lying in the docks of Bombay after the company had agreed to the sale in favour of I.D.P.L. as suggested by the banks. Court's attention was specifically drawn to what is claimed to be the minutes of the meeting between the representatives of the two banks in question and the Company. A true copy of it is produced as Annexure-E to the statement of objections.

34. A careful reading of the minutes discloses some of the following: the meeting was first only between the representatives of the banks (petitioner and respondent-2), the banks took the decision that bank guarantee should not cover "interest clause" to cover interest at 12% p.a. till the disposal of the case for the reasons recorded by the banks; it was agreed that it would be prudent to approach the Government of India to agree for the release of the consignments to I.D.P.L. at cost subject, to the views of the party (company). After further discussing the Company's deficit in cash credit account and the future course of action and arriving at a tentative decision, the representatives of the company were invited to join the meeting. Company was informed of the gist of the discussion the banks had and the company's representative appreciated the stand taken by the banks and in turn disclosed the outcome of his discussion with the Ministry of Chemicals and Fertilisers, New Delhi. It was the company which offered to sell the entire consignments to I.D.P.L. at CIF cost, demurrage and container charges even offering to absorb the interest on the bills. But the company failed to give the same in writing because of the pending case. Many other decisions were taken at the meeting which were in the interest of the company and to assist it to be in production. This Court need not concern itself with them, except to notice that the bank and the second respondent had not in any way undertaken the responsibility to sell the consignments to I.D.P.L. It was the company which had taken the initiative left with no other alternative. The bank therefore cannot be held to be guilty of negligence in the matter of sale of consignments to I.D.P.L. On the other hand, Annexure-E squarely establishes that the company was anxious to sell the consignments to I.D.P.L. If it was not sold the company must assume the full responsibility in the absence of any other evidence.

35. The third aspect of negligence attributed to the Bank is founded on the fact that the consignments were hypothecated to the bank when letters of credit were opened and

therefore the bank as hypothecated had an obligation in law to preserve the value of the consignments hypothecated to it, and the bank not having done, it cannot saddle the company with the losses. In support of the above Mr. Amin relied upon some authorities and they will be dealt with hereafter.

36. Attention of the Court was drawn to a passage in Paget's Law of Banking (Eight Edition) at page 566 which reads as follows:

"This difficulty in the way of owner's being in a position to pledge goods in his own possession has been circumvented by the institution of letters of lien or letters of hypothecation.

The distinction seems a narrow one, but it is clear that an owner, though he cannot himself pledge, may, by agreement, change his possession into that of bailee for the pledgee, and that the instrument constituting him such is "one used in the ordinary course of business as proof of the possession or control of goods" within the exception to the Bills of Sale Act, and takes the goods out of his "order and disposition".

Similarly attention of the Court was drawn to Section 151 of the Indian Contract Act which casts a duty on the bailee to take as much care of the goods bailed to him as a man of ordinary prudence would take of his own goods of the same bulk, quality and value as the goods bailed.

37. Mr. Amin, therefore, contended that the bank being the pledgee or the hypothecatee of the consignments in question should have taken proper care of the same and preserved its value, more so after making an effort to do so as evidenced by the letter addressed by the bank to the clearing agents on June 23rd 1986 as well as the letter addressed to the Collector of Customs dated 28-12-1984, copies of which were produced as Annexure "Q" to the reply to the rejoinder of the bank. On the other hand, Mr. Sundaraswamy for the bank contended that lien on the goods hypothecated is to be exercised at the option of the bank and there was no compulsion, i.e., legal compulsion to exercise the power of lien and failure to do so did not absolve the hypothecator to discharge the loan.

38. It is difficult to see how the passage in Paget's Law of Banking or Section 151 of the Contract Act assists the company. The bank after opening the letters of credit handed over the documents relating to the consignments either to the company or its clearing agents. As long as the documents remained with the company or its clearing agents, bank could not be said to be in possession of the consignments actual or constructive and therefore was under no obligation under Section 151 of the Contract Act. The fact that the company was the sole petitioner in proceedings under Art.226 of the Constitution in the High Court of Bombay in W.P.1601 of 1983 clearly establishes that the company alone was responsible for the clearance of the consignments and none other. Any other view in this behalf would lead to disastrous results in Commercial Banking and Industry.

Banking and Commercial Practice should prevail over hypertechnical legal interpretations of duties and obligations under law when as in the present case the efforts of the bank to protect the consignments as evidenced by the letters in "Q" series met with resistance by the clearing agents and as correctly contended by Mr.Sundaraswamy the hypothecatee's right of lien is optional and not compulsory.

39. Another limb of the same contention was that the company had no obligation to discharge its liabilities under the letters of credit opened in respect of the consignments in question as legally the bank had the possession of the consignments as they were hypothecated to it and therefore it should sell the consignments and realise its security and cannot be permitted to retain the pledged goods as well as sue for the price thereof. Reliance in this behalf was placed on a few decided cases and the observations made therein.

40. In the case of Lallan Prasad v Rahmat Ali and another [A.I.R. 1967 S.C. 1322] the Supreme Court ruled that pledgee cannot maintain a suit for recovery of debt as well as retain the pledged property. In the case of Bank of Bihar v State of Bihar and others [A.I.R. 1971 S.C. 1210].our Supreme Court ruled that Pawnee"s right to goods pawned or hypothecated against letters of credit opened with the bank would prevail over the rights of others. In RE S.Y.C.W. & S. Mills [A.I.R. 1969 Mysore 280] this High Court took the view that hypothecation is only an extended idea of a pledge, the creditor permitting the debtor to retain possession either on behalf of or in trust for himself (creditor) and so far as movables actually covered by the hypothecation deeds were concerned, there could be no doubt that the bank was entitled to retain possession and also to exercise the right of private sale.

41. It is not possible to see how the rulings further the contention of the company. In Lallan Prasad"s case the Supreme Court was stating what has been well settled law in India as well as in England. A person in possession of the pledged article cannot retain possession and sue for the debt. Debt is the result of the pledge. Express or implied term of the pledge is that the pledger forfeits his right to regain possession of the pledged article if he does not repay the debt. Similarly all that the pledgee is entitled to by the same terms express or implied is the right to retain possession of the pledged article. This presupposes actual physical possession of the goods with the pledgee which is not the case on hand.

42. In Bank of Bihar"s case the Supreme Court was ruling on the right to possession of sugar hypothecated to the bank against letters of credit issued to the hypothecator which was disputed by other creditors including the State of Bihar. No such dispute to possession of the consignments arises for consideration here.

43. Similarly the decision of this Court speaks of the right of private sale without the intervention of the Court by the pledgee of the articles pledged which again presupposes possession with the Bank. Learned Counsel for the Bank pointed out, the Bank was not

the importer and there was no contractual obligation to take possession of the imported chemicals and further question of private sale etc did not arise as there was legal prohibition to sell the imported goods as the bank was neither the importer nor the consumer-importer. He further pointed out that the bank had no motivation to commit any breach of confidence resulting in the bank itself destroying security and locking up over Rs.80 lakhs. He derived support for the same from the conduct of the company itself as evidenced by Annexure-E, the minutes of the meeting produced and relied upon by the company. There is much force in the submissions on behalf of the Bank. As already noticed in Annexure-E to the statement of objections it was the company which was prepared to sell the imported chemicals and made the offer but failed to give the offer in writing as the case was pending in the High Court. This Court is not now apprised what course of action the company pursued after the pending matter was disposed of by the High Court of Bombay in February 1986, when there was no impediment to give the offer in writing.

44. Apart from the conduct of the company which establishes that it claimed not only title to the imported chemicals but also right to exclusive possession of the same, the laws governing imports would definitely prohibit a non-consumer importer like the bank from exercising the right of lien. Banks business is Banking and not to carry on trading or manufacturing activities, notwithstanding the fact that bill of lading is issued generally in the name of the banks that open the letters of credit as part of import-export trade.

45. Therefore, the Court has no hesitation to reject the contention advanced for the company.

46. Mr.Amin, learned Counsel has advanced several other contentions in regard to maintainability of the petition. They are; (1) the secured creditor cannot maintain a winding up petition having regard to Sections 434(1) and 529 of the Act, (2) the company is not liable to be wound up at the instance of a secured creditor when the winding up is not going to benefit the general body of creditors, (3) the substratum of the company has not disappeared and the closure has been due to the conduct of the creditor banks and the company is viable, (4) there is duplication of claims and certain loans or repayment schedules have been suspended as part of the decisions taken at the meeting evidenced by Annexure-E and therefore those loans have not yet become due and payable.

47. In the first of the contentions there is no merit. The locus standi of the petitioning creditor depends not on Section 434 or 529, read together or apart but on the express provision made in the Act in Section 439. Sub-section (2) of Section 439 inter alia provides that secured creditor is a creditor as per sub-section (1)(b) of Section 439. Therefore, Court will look at the specific provision made in the Act to determine the persons who may present a petition for winding up and not resort to exclude them by a process of devious interpretation of other sections in the Act to exclude those who have locus.

48. The second and third contentions noticed above need not detain the Court long. The manufacturing process has come to a stop is not in dispute. Therefore, the claim that substratum of the company has not disappeared though true in the physical sense, total lack of financial viability has rendered the company unable to carry on its manufacturing activities, its main objects, and in that sense the substratum should be held to have disappeared. Reliance placed on Annexure-P to prove viability, in my opinion does not merit consideration. If the banks have not accepted the proposal contained in Annexure-P the Company Court has no jurisdiction to impose it on the petitioning creditor. Similarly that general body of creditors will not benefit is only an assumption as the petition being advertised, no other creditor has come forward to oppose the winding up of the company. That should be sufficient guidance to the Court to make up its mind to wind up or refuse to wind up.

49. There is some force in the 4th contention but then despite that, certain loans are due and payable, particularly the loans arising out of letters of credit opened and paid for the chemicals imported which have been the harbinger of evil fortune to the company. The company in its letter dated 28th July 1986 (Annexure-M to statement of objections) addressed to the bank and others apart from not agreeing to have the chemicals sold to I.D.P.L. insisted upon rehabilitation assistance from the bank on the basis of the proposal made soon after the judgment of the High Court of Bombay, admitted its liability in following terms:

"At this juncture, we wish to emphasise on the fact that at no point of time have we ever denied our liability to the Bank, and despite all efforts and convincing proposals, representative bank officials had preconceived decision of negation and surely distorted and damaged our reputation.

We have only requested for a reasonable and considerable attitude and financial assistance towards the unit so that we would be able to rehabilitate the unit and pay back the dues to the bank from generated profits."

50. The above acknowledgment of liability in positive terms defeats the contention both in regard to the claim that certain loans are not yet due and also the feeble attempt made by Mr. Amin for the company to disown total liability to repay the loans inter alia on ground of limitation.

51. In any event the quantum dispute is a matter which can be gone into in the event the bank decides to enforce its security and at this stage the Company Court need not be impeded by that quantum dispute when it is satisfied that the company is unable to pay its debts which are substantial.

52. In the light of the discussions as above, the objections of the respondent-Company are over-ruled. The petitioner is entitled to a winding up order by this Court.

53. This Court both hereby order that the respondent-Company be wound up in accordance with the provisions of the Act and the Official Liquidator attached to this Court is hereby appointed the Liquidator of the respondent-Company. The petitioner is directed to advertise the winding up order in one issue of "Deccan Herald" of Bangalore within 14 days from today and the petitioner shall also file a copy of this order with the Registrar of companies in Karnataka, Bangalore, within 30 days from today in accordance with Section 445(1) of the Act. The Official Liquidator shall take all steps to recover the debts and the amounts due to the respondent-Company from its debtors in accordance with the details available in the books and records of the Company. All persons who are liable to make out or concur in making out a statement of affairs of the Company under Section 454 of the Act shall appear before the Official Liquidator on such date as he may appoint and furnish to him all the particulars that he may require within the time specified by him and in accordance with law. The petitioner and 2nd respondent together shall deposit a sum of Rs.5000/- each with the Official Liquidator to meet the initial costs of taking charge of the assets, books and records of the company now ordered to be wound up within one month from today. The Official Liquidator shall cause a sealed copy of this order to be served on the Company by pre-paid registered post.

54. The amounts deposited by the petitioner as well as the 2nd respondent as directed hereto before will form part of the costs of this petition. The costs of the petition be taxed and paid out of the assets of the company.

55. Order accordingly.