(2009) 02 MAD CK 0162

Madras High Court

Case No: Company Petition No. 274 of 2004

Technology Development Board	APPELLANT
Vs	
Alpha Anims P. Ltd.	RESPONDENT

Date of Decision: Feb. 5, 2009

Acts Referred:

- Companies Act, 1956 - Section 433, 434, 434(1), 439, 442
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2009) 152 CompCas 690

Hon'ble Judges: P. Jyothimani, J

Bench: Single Bench

Advocate: R. Murari, for the Appellant; Raghul Balaji, for the Respondent

Judgement

P. Jyothimani, J.

This company petition is filed under Sections 433(e), (f), 434(1)(a) and 439 of the Companies Act, 1956, for winding up of the respondent-company and consequently for appointing the official liquidator as liquidator of the said company.

2. The respondent is a private limited company having authorised capital of Rs. 175 lakhs consisting of 1,75,000 equity shares of Rs. 100 each as on March 31, 1999. The issued, subscribed and paid-up capital of the respondent as on the said date was Rs. 95,20,000 divided into 95,200 equity shares of Rs. 100 each. The petitioner-board is formed for providing financial and other facilities to entrepreneurial start-ups and technology based industries for developing and commercialising their products and M/s. ICICI Venture Funds Management Co. Ltd. (subsequently changed, as M/s. ITCOT Consultancy and Services Ltd.) is the asset manager in respect of several loan accounts. On the respondent approaching the petitioner to part finance the technological upgradation of process technology of DL-2 Amino Butanol at its factory at Gummudipoondi, Tiruvallur District, a loan agreement was entered into on February 4,1998, for the borrowal of a sum of Rs. 1,50,00,000 for the above said

project as part-finance.

3. As per the said loan agreement, the respondent-company was to pay interest at 6 per cent, per annum from the date of first disbursement of loan and the repayment of loan and accrued interest would commence from June 30, 1999. Under Clause 1.4 of the agreement, the respondent as a borrower has agreed to repay the principal amount of loan due in five annual instalments as per Schedule III, which, formed part of the agreement and in default of such payment, the respondent has agreed to pay an additional interest of 10 per cent, per annum. In addition, as per Clause 1.9, the respondent was to furnish to the petitioner-board a corporate guarantee, which should be on a format acceptable and also irrevocable and unconditional personal guarantees from the directors of the company.

4. As per Clause 4.1 of the agreement, the respondent-company was to pay to the board a royalty at the rate of 0.70 per cent, of annual sales turnover of the products developed by the board''s assistance for a period of 5 years commencing from June 30,1999, subject to a minimum aggregate amount of Rs. 25 lakhs or a maximum aggregate amount of Rs. 33 lakhs. It is seen that pursuant to the said agreement, the respondent-company has executed a corporate guarantee and the directors have also separately executed the deeds of guarantee in favour of the petitioner, which are irrevocable and unconditional. In addition, the deed of hypothecation of movables has also been entered.

5. After disbursement of the said loan of Rs. 1,50,00,000, the petitioner and the respondent entered into another loan agreement dated May 31,1999, for a further sum of Rs. 1 crore, the terms of which are similar to the earlier agreement dated February 4,1998, in respect of payment of interest, royalty, etc.

6. The respondent-company paid amounts by way of cheques in respect of royalty as per the clauses of the agreement and the said cheques were returned dishonoured, in respect of which proceedings u/s 138 of the Negotiable Instruments Act, 1881, are pending. According to the petitioner, the respondent-company has paid only an amount of Rs. 49,18,964. After the petitioner informing the respondent about the appointment of M/s. ICICI Venture Funds Management Co. Ltd., as the asset manager of the petitioner by letter dated September 25, 2003, the respondent-company addressed a letter to the said M/s. ICICI Venture Funds Management Co. Ltd., agreeing to resume repayment of loan amount from the last quarter of the year 2003-04 and requested for waiver of interest. It is also stated that the respondent would resume repayment soon after restructure of finance.

7. By a subsequent letter dated September 25, 2003, the respondent explained some difficulties, however, agreed to liquidate the loan liability within three years commencing from 2004-05, requesting for waiver of penal interest. The scheme proposed by the respondent was not acceptable and therefore, the petitioner by notice dated May 5, 2004, called upon the respondent to pay a sum of Rs.

1,79,53,931 with interest from January 2, 2004, within 21 days and that was the notice given u/s 434(1)(a) of the Companies Act. Since there was an inadvertent mistake in not mentioning both the loan agreements, by a further notice dated June 21, 2004, the petitioner has informed that the amount due under both the loan agreements was Rs. 3,14,54,425 instead of Rs. 1,79,53,931. However, the respondent has given a reply dated June 23, 2004, disputing the liability for the first time.

8. It is also stated that the petitioner has already filed a summary suit in the Delhi High Court for recovery of the amount and the filing of the said suit does not prevent the petitioner from filing an application for winding up. It is also stated that the claim of the respondent that the petitioner was due to pay a sum of Rs. 4 crores to the respondent is fictitious. The petitioner has authorised the ICICI Venture Funds Management Co. Ltd., as its asset manager to initiate proceedings and accordingly, winding up proceedings have been initiated. Therefore, as per the calculation given in the petition, the petitioner claims that under the first loan agreement dated February 4, 1998, a sum of Rs. 1,91,07,374 is outstanding and in respect of the second loan agreement dated May 31, 1999, an amount of Rs. 1,53,36,596 stands due, totalling a sum of Rs. 3,34,43,970 and the royalty amount as per the agreements has to be paid and according to the petitioner, as per the correspondence, the respondent has admitted the liability and the suit filed by the petitioner on the civil side of the Delhi High Court in Civil Suit (OS) No. 1028 of 2003 against the respondent for recovery of money is still pending. In the circumstances, the petition for winding up has been filed.

9. In the counter affidavit filed, the respondent has raised a preliminary objection on the maintainability of the suit filed by the ICICI Venture Funds Management Co. Ltd., since there is no authorisation given by the petitioner. The respondent has also resisted the company petition on the ground that the petitioner having instituted a civil suit in the Delhi High Court for recovery of the amounts, for which the company petition is also filed, cannot maintain two parallel proceedings on the same cause of action. It is also stated that in respect of the dispute or difference that arises between the parties regarding the construction or implication of any provision of the agreement, when there is a clause for arbitration in the loan agreement, without resorting to the same, filing the present winding up petition is not maintainable.

10. On the substantial aspect of the defence, the respondent has stated that it has made substantial payments which have not been duly credited. It is also stated that the respondent developed a new indigenous technology for commercialisation of DL2 Aminobutanol used for manufacture of antituberculosis drug called Ethenobutol Hydrochloride and for that purpose purchased certain specified machinery apart from putting up construction on the plot from SIPCOT and it also availed of a loan of Rs. 16 lakhs from the Indian Overseas Bank, Kaverapettai branch. It is the case of the respondent that the industry is a technology oriented industry with thrust on research and development and there was theft of know-how

of the respondent industry, about which proceedings are pending.

11. It is the complaint of the respondent that since the petitioner has not taken effective steps to trace the culprits, there is a breach of contract committed by the petitioner. It is further stated that the respondent has requested the consent from the petitioner for creation of second charge on the plant and machinery in favour of the Canara Bank, which offered to restructure the loan and infuse capital and that was not consented to by the petitioner, with the result, the working capital limit could not be raised and there was a huge suffering during 2003-04. It is also stated that there was a fall in price of products in European and American markets, which has crippled the business of the respondent and according to the respondent, due to the non-availability of the adequate working capital which could not be raised due to the petitioner''s refusal to give no objection for the second charge in favour of the Canara Bank, repayment could not be made.

12. According to the respondent, even it is admitted by the petitioner that up to Rs. 50 lakhs, the amount has been paid. It is also specifically stated that there is a positive growth, in the respondent-company as it is evident from the balance-sheet of the company for the past three years. It is stated that the respondent has a counter claim against the petitioner for the omission and commission of the petitioner. It is also the specific case of the respondent that there is no erosion of assets or loss in value of assets. It is also stated that the petitioner is not bona fide, apart from the fact that the financial status of the respondent-company is not on the negative side.

13. In the additional counter affidavit filed by the respondent dated February 28, 2007, the respondent has raised another issue that the relationship between the petitioner and the respondent is not like that of an ordinary creditor and debtor and it was only for the purpose of promoting development of technology that the technological and financial assistance has been provided by the petitioner in the national interest and that cannot be termed as an ordinary loan. It is stated that the object was the indigenous development and commercialisation of technology for the manufacture of an important anti-tuberculosis drug intermediate DL2 Amihobutanol (DL2AB), introduced for the first time in the country. It is also stated that the respondent is the only unit in the entire world manufacturing DL2AB through Butene-1 route, the other unit being a multi-national corporate, Dow Chemicals of the USA.

14. Apart from reiterating that the pendency of suit in the Delhi High Court is a bar for filing the company petition, the respondent in the additional counter affidavit has stated that without prejudice to the above said points raised, a letter was issued on July 13, 2006, by the respondent for re-scheduling all the loans, for which the petitioner board has required certain particulars, even though there was no further communication thereafter. It is also stated that the suit filed by the petitioner in the Delhi High Court was dismissed on July 18, 2006, accepting the stand of the

respondent that there is an arbitration clause in the contract, and a sole arbitrator was appointed subsequently who has commenced the proceedings, however, the petitioner has not yet filed any claim statement before the arbitrator.

15. In the additional counter affidavit the respondent has stated that the thrust of the agreement is for the technology development and financial assistance. It is also stated that the petitioner ought to have monitored the project which includes granting of further funding or enabling the respondent to raise further funding. It is also stated that inasmuch as the petitioner has not even filed its claim statement before the arbitrator, the arbitration proceedings will get jeopardised, if the present petition is taken up.

16. It is the contention of learned Counsel for the petitioner Mr. R. Murari, that the contents of the loan agreements are unequivocal in terms and the respondent having availed of loan facilities to the extent of Rs. 2,50,00,000 under two loan agreements dated February 4,1998 and May 31,1999 and failed to repay as per the terms of the agreements including the payment of royalty, etc., in spite of the demand made by the petitioner, especially in the circumstances that in two of its letters addressed to ICICI Venture Funds Management Co. Ltd., which is the asset manager of the petitioner dated September 25, 2003 and October 25, 2003, admitting to repay the amount the petitioner is entitled to maintain the petition for winding up, since there has been a total inability to pay the amounts in spite of the demand made as per the provisions of the Companies Act.

17. It is also his contention that either filing of a civil suit for recovery of the amount due or referring the matter for arbitration does not prevent the petitioner from maintaining the winding up petition which is a different one. He would also submit that ICICI Venture Funds Management Co. Ltd., has been authorised as the asset manager of the petitioner as per the power of attorney executed on June 22, 2004. He would submit that the petitioner has never disputed the liability of loan amount and the contention raised in the additional counter affidavit that it is only an assistance and not a loan is nothing but vexatious and imaginary.

18. To substantiate his contention that any parallel proceedings like a suit or arbitration would not be a bar for seeking the relief of winding up, he would rely upon the judgment of the Karnataka High Court in State Bank of India v. Hegde and Golay ltd. [1987] 62 Comp Cas 239, apart from Madhya Pradesh Iron and Steel Company Vs. G.B. Springs (P) Ltd. and Mohta Bright Steel (P) Ltd., . He would also rely upon the judgment of the Supreme Court in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., .

19. It is his submission that the conduct of the respondent shows that there is commercial insolvency on the part of the respondent-company and there is debt in existence and the amounts have not been repaid in spite of statutory notice issued. According to him, the company petition is in admission stage and by admitting the

company petition the respondent is not going to be affected.

20. On the other hand, Mr. Raghul Balaji, learned Counsel for the respondent would submit that there is no debt determined as on date. According to him, under the said two agreements which are termed as loan agreements dated February 4, 1998 and May 31, 1999, there were no loan transactions and only financial assistance was given by the petitioner on behalf of the Government of India in the larger public interest for the manufacture of anti-tuberculosis drug by the respondent by using a peculiar technological system. He would also refer to various clauses in the loan agreements, wherein it is stated as "assistance" and submit that only for commercialisation of technology, the petitioner has encouraged the respondent by way of the said agreements. He would also submit that as per the agreement, the monitoring is done by the monitoring committee in the larger interest of the public and the respondent cannot be said to be a debtor. According to him, as per Clause 8.4 of the agreement, there is a provision for termination and there is no provision for winding up and therefore, without resorting to the proceedings for termination, filing a petition for winding up is not maintainable.

21. His second limb of arguments is that, it is due to the lack of assistance by the petitioner, the project could not be successfully continued by the respondent. He would submit that when the alternative remedy of arbitration proceedings have been resorted to, the winding up petition has been filed only as a device for making recovery of the amount, which cannot be done unless the arbitration is completed. It is his submission that it will not be just and equitable to allow the company to be wound up, especially taking into consideration the public interest involved, viz., the respondent-company is manufacturing anti-tuberculosis drug based on a peculiar technology.

22. While fairly admitting that filing of arbitration or a suit may not prevent the petitioner from proceeding with the company petition, learned Counsel for the respondent would submit that it is not just and equitable to proceed with the company petition at this stage, especially when the debt amount is not determined. He would rely upon the judgment of a Division Bench of this Court in Neg. Micon A/s Alsvoj 21 DK 8900 Rangers Denmark Vs. NEPC India Limited 1678 Trichy Road Ramanathapuram Coimbatore - 641045, , apart from the judgment of the Supreme Court in Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, .

23. On hearing the contentions of both the parties and going through the entire pleadings and taking into consideration that the company petition which is in admission stage, the crucial points which are to be decided in this case are:

(i) After the dismissal of the suit filed by the petitioner in the Delhi High Court, when the respondent has resorted to arbitration proceedings which is pending, whether this company petition for winding up is maintainable; and the same is just and

equitable in the peculiar circumstance of the case that the respondent is involved in the manufacture of a particular medicine based on a distinct technology for tuberculosis?

(ii) Whether the suit filed by the petitioner through the ICICI Venture Funds Management Co. Ltd., is maintainable in the absence of any authorisation?

(iii) Whether by the conduct of the petitioner in not giving no objection to the respondent to raise additional loan from the Canara Bank resulting in financial instability of the respondent-company could be a ground to defend a petition filed for winding up under the Companies Act?

24. As far as the maintainability of the petition on the ground that the ICICI Venture Funds Management Co. Ltd., cannot represent the plaintiff in the absence of proper authorisation is concerned, it is seen that by a document of power of attorney executed on June 22, 2004, the petitioner has nominated the ICICI Venture Funds Management Co. Ltd., with due authorisation to receive the moneys such as, principal, interest, royalty, etc., due to the plaintiff company from time to time. The power of attorney also entitles the ICICI Venture Funds Management Co. Ltd., to commence and prosecute any action or proceedings in any court of law or through arbitration or any other manner for the recovery of debts, etc. In view of the said fact that the power of attorney executed by the plaintiff empowers the ICICI Venture Funds Management Co. Ltd., to act on behalf of the plaintiff, the issue relating to the maintainability of the company petition cannot be sustained.

25. Then, the issue to be decided is, as to whether the amounts liable to be paid by the respondent are payable as per the Companies Act when the arbitration proceedings are pending. Section 433 of the Companies Act categorises the instances wherein a winding up of a company can be ordered by the court. Under Clause (e), it is made clear that "if the company is unable to pay its debts", the same can be a ground for ordering the winding up petition. That apart, under Clause (f), "if the court is of the opinion that it is just and equitable that the company should be wound up", such order of winding up can be passed. As to when the company is deemed to be unable to pay its debts is explained u/s 434 which is as follows:

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

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

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

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

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

(2) The demand referred to in Clause (a) of Sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm.

26. Therefore, what is required for the purpose of passing a winding up order is the acceptance of liability on the part of the company and making a statutory demand and delivery of the same at the registered office giving three weeks'' time for repayment.

27. While dealing with the nature of duty cast on the company, the court for proceeding with the winding up proceedings, has to be prima facie satisfied that the company is unable to pay the debts as contemplated u/s 434(1)(a) of the Act. In a circumstance wherein the existence of debts is not disputed, and when the statutory formalities required under the provisions of the Act are followed, the defence of the company that it is able to pay the debts cannot be a ground for not ordering the petition for winding up, if it is proved that the company has in fact not paid the debts. The details of the debts and the nature of inability on the part of the company are to be ascertained from the facts and circumstances of each case. In fact, the Karnataka High Court in State Bank of India v. Hegde and Golay Ltd. [1987] 62 Comp Cas 239, after referring to the judgment of the Supreme Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd. [1972] 42 Comp Cas 125, has held as follows (page 247 of 62 Comp Cas):

If one were to assume that this petition and the suits filed are not barred by limitation, then a plea of counter-claim and loss and damages suffered by the company loses much significance as tenable defence having regard to the totality of the conduct of the company and its directors, namely, Shankar Hegde and Shyla S. Hegde, who are the other defendants in the suits. I am unable to find substance in the first contention that the defence is not vague but substantial and that the defence is bona fide. I have already expressed that this is not a final adjudication of the suits. That is for the appropriate court to decide. But, I have come to the above conclusion for the limited purpose of testing whether the defence put forward in this petition is such that the company court should countenance it as valid and tenable defence and bona fide in character and no more. The company court, therefore, can proceed with the winding up proceedings once it has come to the conclusion that there has not been a case made out of bona fide and tenable defence. This is the well-settled law in England as well as in India and the authorities

are too many to be recited here.

One should not overlook the fact that in regard to the first of the suits Mr. Sen did concede that the company would certainly be owing quite a large amount even if the counter-claim was allowed but only pleaded that having regard to the solvency of the company, the court should direct the company to pay the sum within a suitable time and manner and not to proceed to wind up the company. In other words, there is practically an admission that some money in excess of Rs. 500 is owed by the company to the bank as a debt and that in spite of demand by statutory notice, the same has not been paid. That is sufficient to give jurisdiction to this Court to proceed with the winding up proceedings u/s 433(e) of the Act.

In the case of Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd. [1972] 42 Comp Cas 125, the Supreme Court has ruled as follows (at page 131):

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 A Company, In re [1894] 2 Ch. 349; 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 Tweeds Garages Ltd., In re [1962] 32 Comp Cas 795 (Ch. D) : [1962] 1 Ch 406). The principles on 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.

From the above, it is clear that where the exact amount of debt is disputed, the court could proceed to make the winding up order without requiring the creditor to quantify the debts precisely. The said ruling is one of the more recent cases decided by our Supreme Court and in the light of that decision and in the light of the admission of a certain debt owed by the company to the bank despite the suits filed in that behalf, this Court should lean in favour of the bank and allow them to maintain the petition and proceed further.

I must, in this connection, notice one other argument of Mr. Sundara Swamy. It is that the relief claimed in the suit is distinct and different from the relief claimed in proceedings u/s 433(e) of the Act. The civil court can no more than decree the suit if the plaintiff proves his case. That decree may not be realisable in execution for various other reasons. Whereas in the case of a winding up order being made in proceedings under the Act, the creditor is in a position to prove his debt and stand in line for such amount as he may realise. Therefore, he contends that it is not a bar for maintaining both a civil suit for recovery of debt and also a claim for a winding up order in separate proceedings. I think this argument should be upheld.

(emphasis Here printed in italics supplied)

28. Similarly, the Delhi High Court in Madhya Pradesh Iron and Steel Co. v. G.B. Springs P. Ltd. [2003] 117 Comp Cas 327, has considered almost a similar circumstance as seen in the present case, viz., dismissal of earlier suit and the pendency of arbitration proceedings, and after relying upon various judgments including that of the Supreme Court in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., , the Delhi High Court has held that the mere pendency of arbitration proceedings is not a bar for maintaining the petition for winding up, except, of course, in cases where the existence of debt or the amount due are in dispute, which are to be determined in the arbitration proceedings. The Delhi High Court has ultimately held that the claim made in the winding up petition is not for money, and the order of winding up has to be passed by the court, if it is satisfied that the company has become commercially insolvent. The relevant portion of the judgment is as follows (page 332 of 117 Comp Cas):

The contention of Mr. Krishnamani, that the petition should be rejected since a civil suit has been filed, is per se not appealing. Indubitably, his contention that if the respondents were to obtain ''leave to defend'' in the pending summary suit then the consequence would be a dismissal of the present petition, is certainly correct. The obverse, however, does not appear to be logical; viz., that the admission of the winding up petition would jeopardise the defence in the suit, whether under the summary or ordinary procedure envisaged under the Civil Procedure Code. It must be borne in mind that the admission of a winding up petition does not necessarily and invariably result in the recovery of the amount due. Therefore, the filing of a civil suit or a recovery of money action is essential since the decree is executable. My attention has also been drawn to Section 442 of the Companies Act, 1956, which enables a party, at any time after the presentation of the winding up petition and before a winding up order has been made, to apply for a stay of proceedings in the suit. The person having locus standi to seek this relief includes the company in liquidation or any of its creditors or contributors. It will be immediately deducible that the Legislature contemplated the simultaneous existence and continuance of a winding up petition as well as a suit for the recovery of money on the same cause of action. No provision in the Companies Act has been shown to me mandating that on the filing of a suit for recovery, the winding up petition must be dismissed.

Mr. Krishnamani had also briefly argued that an arbitration clause exists between the parties. This argument is predicated on a blank pro forma document filed by the respondent, which has not been admitted by the petitioner. The impact of an arbitration clause on winding up jurisdiction has been dealt with in some detail in C.P. No. 303 of 2001 (since reported in Prime Century City Developments P. Ltd. v. Ansal Buildwell ltd. [2003] 113 Comp Cas 68 (Delhi)). I continue to adhere to the view articulated in that case that there is no likelihood of a conflict between the statutory relief of winding up and of the contractual right to have disputes settled by arbitration. Once a bona fide defence is shown to exist, arbitration will be the efficacious and proper remedy; where the defence is mala fide and moonshine,

arbitrable disputes would not exist in actuality and, therefore, the company judge would have unfettered powers to pass appropriate orders. In the connected matter Mr. N.K. Kaul, learned senior counsel appearing for the respondent-company has relied on the observations in the Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, , to the effect that since the claim in those proceedings was also the subject-matter of the ongoing arbitration, therefore, there was no definiteness about it. This really vindicates the view taken by me in Prime Century City Developments P. Ltd. v. Ansal Buildwell Ltd. [2003] 113 Comp Cas 68 (Delhi). The Hon�ble Supreme Court did not intend to state that wherever arbitration proceedings are pending, the winding up petition could not be maintained. Instead, if the debt or dues could be determined only through arbitration, there would logically be no debt available for sustaining winding up proceedings. As has been held in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., , ''the claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court''. Even if an arbitration clause subsists between the parties, this Court has unfettered powers to entertain these winding up petitions. The position would be appreciably different if the party filing the winding up petition is also the very party which initiates the arbitration on the adjudication and quantification of its claims.
(emphasis Here printed in italics supplied)

29. At this point of time, it is relevant to refer to the judgment of the Supreme Court in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., , wherein it was held as follows (page 685 of 97 Comp Cas):

5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred to the arbitration and, therefore, the High Court, in our opinion was right in rejecting the application.

30. In Pradeshiya Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, , the Supreme Court considered a case where the defence for winding up petition was substantial and the debt was prima facie disputed and the agreement on which the debt itself was claimed stood cancelled, and held that there is no debtor-creditor relationship in the following words (page 842 of 79 Comp Cas):

26. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date.

27. What then is inability when the section says ''unable to pay its dues''? That should be taken in the commercial sense, in that, it is unable to meet current demands. As stated by William James, V.C.; it is ''plainly and commercially insolvent--that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain--as to make the court feel satisfied--that the existing and probable assets would be insufficient to meet the existing liabilities, (European Life Assurance Society In re [1869] L. R. 9 Eq. 122, 128 and V.V. Krishna Iyer Sons v. New Era Manufacturing Co. Ltd. [1965] 35 Comp Cas 410 (Ker)).

31. In a recent judgment, while dealing with the petition under Sections 433 and 434 of the Companies Act, a Division Bench of this Court consisting of the Hon'ble Mr. A.S. Venkatachalamoorthy (as he then was) and the Hon'ble Justice Neg. Micon A/s Alsvoj 21 DK 8900 Rangers Denmark Vs. NEPC India Limited 1678 Trichy Road Ramanathapuram Coimbatore - 641045, , held that whether the dispute is bona fide has to be determined on various facts such as, character of the parties, nature of plea, circumstances, etc. In fact, the Division Bench has referred to plethora of decisions of various High Courts as well as the Hon'ble Supreme Court and held that if the debt is disputed bona fide, the defence is a substantiated one. The relevant portion of the judgment is as follows (page 790 of 120 Comp Cas):

16. If the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. In determining whether a debt is disputed bona fide or mala fide, the conduct of the parties, the character of the pleas and the circumstances which will be peculiar to each case will be the contributing factors. The test is whether the dispute is raised only to avoid payment of the debt and not based on the substantial ground.

32. Therefore, various rulings of the courts in India including the Hon'ble Supreme Court with reference to Sections 433 and 434 of the Companies Act make it clear that the totality of circumstance must be taken into consideration for deciding the inability to pay the debts.

33. Applying the above judicial dictum to the facts and circumstances of the case, first of all, the loan agreements dated February 4, 1998 and May 31, 1999, taking as a whole, prove that the amount of Rs. 2,50,00,000 paid under the two loan agreements by the petitioner to the respondent was in the form of borrowing. Merely because various words like, assistance along with the term, "loan" were used at various places of the agreements, that would not take away the creditor-debtor relationship between the petitioner and the respondent. It is true that the said money was lent for a project on the basis of a particular circumstance, viz., the respondent being the borrower must commercialise the project and in the event of failure by the respondent, the petitioner was entitled to compel the respondent to

sell the technical know-how of the project to it.

34. It is also no doubt true that the intention of lending by the petitioner to the respondent was for spreading the technical know-how in respect of a particular medicine and merely because the agreement contains the constitution of a monitoring committee to monitor the project being implemented by the respondent in its premises, it does not take away the relationship of creditor-debtor and on the other hand, the Monitoring Committee was constituted in the larger interest of the society since the preservation of health is the basis of the very project itself. On the Monitoring Committee being not satisfied about the implementation of the project by the respondent, certainly, the petitioner would be entitled to compel the respondent to sell the technical know-how to it. That does not mean that in the event of the respondent failing to repay or in case of inability to pay the debts, the respondent-company cannot be dealt with u/s 433(e) of the Companies Act. The peculiar nature and circumstance of the contract is only relating to the object of the manufacturing process to keep the public interest at the higher level and that does not take away the character of the contractual relationship between the petitioner and the respondent as that of creditor-debtor, which, in my considered opinion is an independent contractual obligation between the parties.

35. It is also true that Clauses 8.4 and 8.5 of the agreement deal with "termination" and the said clauses read as under:

8.4. Termination:

If any of the events described above as also in Clause 3.6 of Article III hereof has been continuing or if the borrower has not availed of the loan/assistance by the date referred to in this loan agreement or such later date as may be agreed to by the board, then in such event, the board may, by notice, in writing to the borrower terminate the right of the borrower to make withdrawals. Upon such notice, the unavailed portion of the loan/assistance shall stand cancelled, and the borrower shall immediately refund to the board the unutilised portion of the loan/assistance received from the board. Notwithstanding any cancellation, suspension or termination pursuant to the aforesaid provisions, all the conditions shall continue to be in full force and effect as herein specifically provided.

8.5. The board, in the event of its terminating the loan agreement as hereinabove provided, shall be entitled to sell, lease or otherwise dispose of either by public auction or private negotiations or otherwise, the borrower''s assets, including any know-how, patent right, documentation, etc., and utilise the proceeds thereof towards the outstanding dues and charges under these presents.

36. The petitioner-board is entitled to terminate the contract particularly with reference to the respondent''s right to make further withdrawal. That is, where the project which is the subject-matter of contract is not successfully implemented or the results are not satisfactory to the petitioner, the relationship is terminated

prohibiting the respondent from further withdrawing the amount from the petitioner as per the loan agreements. The non-following of the said procedure for termination under the said clause cannot be a defence for the respondent in a petition for winding up when it is proved that in the circumstances, the respondent is unable to pay the debts, after the requirements contemplated u/s 434(1)(a) of the Companies Act have been complied with. In such view of the matter, it is not possible for this Court to accept the contention of learned Counsel for the respondent that there is a peculiar circumstance existing in respect of the object of the contract in question and therefore, it should not be taken as an ordinary case of creditor-debtor relationship.

37. As far as the determination of debts is concerned, on the facts and circumstances of the case, even before the statutory notice was given by the petitioner to the respondent, the respondent-company in its letter dated September 25, 2003, expressed its inability to pay the amounts due to certain reasons, but, making it very clear that the respondent will repay the amounts from the last quarter of the year 2003-04. In the said letter, it is also admitted that the respondent has so far paid Rs. 50 lakhs. It is true that the respondent has been pleading for waiver of penal interest as per the terms of the loan agreements. Further, in the subsequent letter dated October 25, 2003, the respondent has again admitted the loan liability and sought permission, to repay the due amounts within three years commencing from 2004-05. The various cheques given by the respondent towards the royalty, issued on December 3, 2001, for an amount of Rs. 6,248 and the various cheques subsequently given in December, 2001 and January and February, 2002, towards the royalty amount for the year 1999-2000 for a total amount of Rs. 74,949 were dishonoured. It was, in those circumstances, by issuing the statutory notice dated May 5, 2004, the petitioner has sought the respondent to pay an amount of Rs. 1,79,53,931 with interest as per the terms, giving 21 days'' time as required u/s 434(1)(a) of the Companies Act and subsequently, a correction has been issued demanding the actual amount of Rs. 3,14,54,425.

38. Peculiarly, for the first time, it is seen that after the statutory notice was issued, the respondent in the reply notice dated June 23, 2004, has taken a stand as if the petitioner is liable to pay Rs. 400 lakhs on account of nonperformance, of its contractual obligation. Very strangely, the respondent has taken a stand that the Canara Bank, Thousandlights branch has agreed to finance on the petitioner giving consent for creation of second charge in respect of the properties in favour of the bank and that the petitioner has not helped for the same and that has resulted in the failure of the project. On the reference to the terms of loan agreements, there is no legal obligation on the part of the petitioner to facilitate the respondent to raise any further loan from third parties. In the absence of such covenant, certainly the petitioner is not liable to give consent for the same since the petitioner is entitled to have the security of the properties which have already been put on charge in respect of the loan intact. Therefore, the excuse given for non-performance of the

contractual obligation, on the face of it and on the facts and circumstances of the case as narrated above, is not with any bona fide intention and can never be stated to be a substantial defence available to the respondent. The conduct of the respondent throughout is that it has not denied the existence of debts and the minimum liability as required under the statutory provision is also not disputed. In such view of the matter, it is not for this Court at the time of admission stage of the company petition to decide about the quantum of liability.

39. A reference to the provisional profit and loss account for the year ending March 31, 2008, filed by the respondent itself shows that the respondent-company has been facing loss throughout. In fact, the petitioner has waited fairly for a long time before issuing statutory notice and approaching this Court. It is also relevant to point out that the company petition is still in the admission stage and in the circumstances, as I have narrated above, there is absolutely no bona fide in the defence raised by the respondent and as I have decided, there is no substantial defence available to the respondent against the claim made by the petitioner as per the loan agreements, I reject the contention raised by the respondent that there is no debt determined.

40. As it is seen on records, the petitioner has filed the suit against the respondent for recovery of the amount as per the loan agreements and ultimately, the Delhi High Court after ascertaining the presence of arbitration clause, has dismissed the suit, based on which, it is stated, the respondent has resorted to arbitration proceedings which is pending. As per the legal dictum laid down as explained above, the mere pendency of a suit or arbitration proceedings is not a bar for invoking Section 433 of the Companies Act for winding up, especially at this stage, when this Court is to decide the prima facie existence of grounds available for winding up, as explained u/s 434(1)(a) of the Act. In such circumstances, when the statutory formalities as required under the Act are complied with and there is no substantial defence shown by the respondent against its inability to pay the debts, the company petition stands admitted and issue:

(i) Notice on the court notice board.

(ii) Notice to the respondent.

(iii) Notice to the Registrar of Companies, Madras.

(iv) Affixture of notice at the premises of the registered office of the respondent-company.

(v) The petitioner is directed to publish the company petition in one issue of Tamil daily Daily Thanthi, in one issue of English Daily The New Indian Express and in the Tamil Nadu Government Gazette fixing the date of hearing on March 9, 2009.

(vi) The petitioner is directed to publish the company petition giving at least fourteen days clear advance notice.

(vii) The Official Liquidator, High Court, Madras is appointed as the provisional liquidator and is directed to take charge of the assets of the respondent company. The ex-directors of the respondent-company is directed to file their statement of affairs before the official liquidator within a period of 21 days. The company shall deposit a sum of Rs. 10,000 towards initial expenses before the official liquidator in this matter.

41. Call the company petition on March 9, 2009.