In Re: Maheshwary Ispat Limited and Tata Capital Financial Services Limited

Court: Calcutta High Court

Date of Decision: Oct. 12, 2012

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 9
Civil Procedure Code, 1908 (CPC) â€" Section 151
Companies Act, 1956 â€" Section 433, 433(e), 434, 434(1), 434(1)(a)
Contract Act, 1872 â€" Section 128
Specific Relief Act, 1963 â€" Section 41(b)
State Financial Corporations Act, 1951 â€" Section 29, 31

Citation: (2013) 1 CALLT 171 : (2013) 113 CLA 636 : (2012) 175 CompCas 107 : (2013) 1 CompLJ 560

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Tilak Bose, Mr. Ratnanko Banerji, Ms. Manju Bhuteria and Ms. Shrayashee Saha, for the Petitioner and Mr. Abhrajit Mitra, Mr. Jishnu Chowdhury, Ms. Rajashree Kajaria, for the Company, for the Appellant;

Judgement

Sanjib Banerjee, J.
The parties are not to blame for this creditor"s winding-up petition having lingered for an unnecessary length of time

and there being a more protracted hearing than is ordinarily called for in a matter of this kind. It was only an observation of the court that led to a

relatively innocuous matter being blown out of proportion upon the court considering it to be significant that subsequent to the present petition

being instituted the creditor applied elsewhere for an order in the nature of attachment before judgment against the company and the persons who

guaranteed repayment of company"s dues to the petitioner. Further, the fact that the petitioning creditor obtained a substantial order in its favour in

the subsequent proceedings also weighed with the court at the initial stage of the final hearing. The cobwebs have, hopefully, now been cleared and

the matter seen in proper perspective. The petitioning creditor is a non-banking financial company which claims to have granted credit facilities in

excess of Rs. 4 crore to the company in terms of a sanction letter of September 17, 2009 and the subsequent loan agreement of October 5, 2009.

The agreement recognised a maximum credit of Rs. 5 crore being granted by the petitioning creditor to the company at an interest of 12.50 per

cent per annum with 3 per cent per annum additional interest being payable in case of delayed payment of installments. The agreement was backed

by the personal guarantees executed by two directors of the company and the purpose of the loan was to enable the company to meet its working

capital requirements. The loan was partly secured by the company by a pledge of a fixed deposit held in the name of the company in HDFC Bank

Limited for a sum of Rs. 75 lakh. The tenure of the loan was extended on September 28, 2010 and in January, 2011 the company requested the

petitioning creditor to renew the facility for a further period of six months to which the petitioning creditor acceded by its letter of January 27,

2011.

2. The petitioning creditor claims to have disbursed the sums of Rs. 1,08,38,891, Rs. 1,65,83,561 and Rs. 2,25,37,125 in three tranches. The

payments are said to have been made in February and March, 2011 to creditors of the company on the written instructions of the company.

Cheques issued by the company in purported repayment of such sums and the interest thereon were dishonoured upon presentation in June and

July, 2011. In July, 2011 the company requested the petitioning creditor to liquidate the fixed deposit and adjust the proceeds therefrom against

the amount outstanding from the company to the petitioner. The company has adjusted such sum of Rs. 92.54 lakh from the amount disbursed of

Rs. 4,99,59,577 and claims the balance principal sum of Rs. 4,07,05,062 and the interest thereon at the rate of 15.50 per cent per annum.

3. In the company''s affidavit-in-opposition to the petition, there is an admission of the payments made by the petitioning creditor to the other

creditors of the company on the company''s instructions. There is also an admission of the cheques issued by the company being dishonoured on

presentation, though the company has contended, in an apparent show of desperation on its part, that there was some unwritten arrangement

between the parties that the cheques would not be presented without prior intimation to the company. The company has also alleged that the

presentation of the cheques by the petitioning creditor was ""incorrect and illegal"" but it has, understandably, not been able to elaborate on such

assertion. There is, indeed, no shred of defence to the claim of the petitioning creditor indicated in the company''s affidavit. The company,

however, proclaims that since there is an arbitral reference which is pending and since the petitioning creditor has obtained orders in respect of

properties belonging to both the company and its guarantor-directors, the present unabashed attempt by the petitioner to reduce the machinery of

winding-up to extract its pound of flesh is improper and should be repelled. The company says that the petitioner enjoys substantial security upon

affidavits of undertaking being filed by the guarantor-directors, binding their properties to discharge any debt that may be found due and owing

from the company to the petitioning creditor at the conclusion of the arbitral reference. The company suggests that the present petition is

scandalous in that it seeks to extract money from the company or subject the company to the humiliation of the petition being advertised. The

company claims that if the petition is received and directed to be advertised, all other creditors of the company who have otherwise not pressed for

immediate payment would jump in and cause irreparable prejudice to the company.

4. The petitioner has also relied on a letter of dated July 14, 2011, wherein the company appears to have unequivocally admitted the three lots of

payments having been made by the petitioner to the company or to its order. The company has merely glossed over such admission and says that

the petitioner forced the company to issue the letter. The company has not denied the receipt of the statutory notice of August 19, 2011 by which

the petitioning creditor claimed the principal sum of Rs. 4,07,05,062 together with interest thereon at the rate 15.50 per cent per annum. The

company did not reply to the statutory notice and the presumption u/s 434(1)(a) of the Companies Act, 1956 has arisen. It is such presumption

that the company seeks to rebut by referring to the pendency of the arbitral proceedings and the order obtained by the petitioning creditor from the

Bombay High Court on a petition u/s 9 of the Arbitration and Conciliation Act, 1996. Indeed, the company has filed CA No. 1084 of 2011

seeking dismissal of the creditor''s winding-up petition on the ground that there are disputes between the parties and it cannot be said that the

company has neglected to pay the sum due or to secure or compound for it to the reasonable satisfaction of the petitioning creditor.

5. After the present petition was filed in or about September, 2011, the petitioning creditor invoked the arbitration clause contained in the

agreement of October 5, 2011 and applied to the Bombay High Court u/s 9 of the 1996 Act. It is not necessary to notice the ad interim order of

November 22, 2011 since the petition u/s 9 of the 1996 Act has been disposed of by an order of March 12, 2012. The order of the Bombay High

Court was effective till June 13, 2012, but pursuant to the liberty granted by the court, the arbitral tribunal has continued the order till the disposal

of the reference. The company refers to the affidavits filed by the guarantor-directors before the Bombay High Court and says that there is

substantial security furnished by the company and the guarantors which would make the continuation of the present petition inequitable. The

petitioning creditor has, however, referred to the balance-sheet of the company for the year ended March 31, 2011 and, in particular, to Schedule

III to the said balance-sheet to demonstrate that the company''s immovable properties in respect of its two units in West Bengal and in Odisha

have been mortgaged to banks and other financial institutions, its moveable assets are hypothecated to such banks and financial institutions and its

current assets are also hypothecated. The petitioner says that the company is unable to pay its debts in the sense that its present liabilities are in

excess of the funds available to it and insinuates that even the value of the company''s assets would fall short of its liabilities. The final aspect of the

petitioner''s submission cannot be gone into in the absence of relevant material, but it is otherwise unnecessary to embark on such exercise since it

is only the commercial insolvency of a company that has to be assessed in proceedings of this kind and the fact that the company may have

blocked assets or investments which are not immediately available to be encashed to liquidate the company''s present debts may be of no

relevance at all.

6. There is a bit of wild goose chase that appears to have been undertaken in the petitioning creditor''s anxiety to disabuse the court of what was

perceived to be an impression that the petitioner had exposed the company to double jeopardy in instituting seemingly parallel proceedings for

realising its claim and in the petitioning creditor apprehending that its obtaining orders in the Bombay High Court during the pendency of the present

petition may weigh heavily with the court to dismiss the petition or adjourn the matter till after the conclusion of the arbitral reference. Though the

petitioner has referred to several authoritative judicial pronouncements on matters where the creditors had invoked the jurisdiction on grounds

other than what is recognised in Section 434(1)(a) of the Act, the petitioner concedes that its prayer for winding-up is based exclusively on such

provision. The petitioner endeavours to demonstrate that even a secured creditor can seek winding-up of a company by invoking the legal fiction

recognised in Section 434 of the Act on grounds other than the one under clause (a) of sub-section (1) thereof. The petitioner argues that even if it

enjoyed substantial security and even if the value of the security was in excess of the petitioner''s claim, it would not preclude the petitioner from

seeking an order for the debtor company being wound up. The issue does not squarely arise in this petition and the petitioner may have been

inspired to address the court on the larger issue since this matter has been heard analogously with another creditor''s winding-up petition where the

right of a secured creditor to seek an order of winding up against a debtor company, relying only on the legal fiction in Section 434(1)(a) of the

Act, was involved. Since the judgment in the other matter (Eastern Spinning Mills and Industries Ltd. and Kotak Mahindra Bank Ltd.) has been

delivered immediately prior to this judgment, it is unnecessary to dwell on the larger issue in course of this judgment; but a key aspect of a

petitioner''s submission has to be noticed here since the creditor in the other matter has not alluded to the same.

7. The petitioner says that high authorities have held that the legal fiction contained in Section 434 of the Act is only a red herring. The petitioner

suggests that nothing in the Act, or in the comparable English Acts which contained similar provisions as Sections 433, 434 and 439 of the Indian

Act of 1956, precludes a creditor from applying for winding up a company on the ground of its inability to pay its debts even if the claim of the

creditor does not exceed Rs. 500 (in England, Ã¯Â¿Â½50 at one time and Ã¯Â¿Â½750 now) and even without serving a written demand at the registered

office of the company affording the company an opportunity to pay off or secure or compound for the claim within a period of three weeks from

the date of receipt thereof. The petitioner is right and there can be no argument on such score. Section 439 of the Act expansively indicates the

classes of persons who may present a petition for winding up a company and Section 433 of the Act comprehensively specifies the circumstances

in which a registered company may be wound up by court. Both Section 433 and Section 439 of the Act are exhaustive; in the sense that a

registered company may not be wound up by court on any ground not included in Section 433 of the Act and no person other than those

recognised by Section 439 of the Act, and subject to the qualifications therein, may present a petition for winding up a registered company.

Section 434 of the Act is only a deeming provision and how the legal fiction of the inability of a company to pay its debts within the meaning of the

expression ""unable to pay its debts"" in Section 433(e) of the Act arises. At first blush, there appears to be an anomaly in Section 434 of the Act. A

deeming provision, in the context of the meaning of a word or a provision in a statute, facilitates the fulfillment of the condition embodied in the

relevant word or expression or circumstance in the statute and, generally, sets a lesser test for the inference relevant for the word or the expression

or the circumstance to be drawn than the word or the expression or the circumstance may otherwise demand. Section 434(1)(c) of the Act,

however, requires the inability of the company to pay its debts to be proved to the satisfaction of the court. It is not usual for a deeming provision,

in the context of the meaning of a relevant word or expression in the statute, to require such condition to be complied with as the ordinary meaning

of the relevant word or expression would also demand. The anomaly may be resolved by referring to the words ""it is proved to the satisfaction of

the court"" and understanding such expression to imply to confer a discretion on the court to arrive at a subjective satisfaction - obviously on

objective and judicially recognised criteria - that the company is unable to pay its debts whether or not it actually is unable to pay its debts. It is in

the understanding of such expression and the element of subjectivity on the court''s part involved therein that may be a key to some of the decisions

cited on behalf of the petitioner. It is not difficult to gauge why courts have over the years regarded the expression ""unable to pay its debts"" that

appears in the relevant provisions relating to winding-up of companies by the court to imply commercial insolvency. There is a clue to such

understanding in Section 434(1)(c) of the Act which, in one form or the other, has adorned both the English and the Indian statutes for more than a

century and a half. While Section 433(e) of the Act when it refers to a company being unable to pay its debts may appear to imply actual

insolvency and not merely commercial insolvency and there may be myriad ways of establishing the inability of a company to pay its debts other

than the company''s admission thereof, the legal fiction envisaged in Section 434(1)(c) of the Act is established upon it being proved to the

satisfaction of the court that the company is unable to pay its debts. The statutory history of such clause would reveal that in the earlier times the

matter was left completely to the court as to how it would be satisfied that a company was unable to pay its debts; but for the most part in the last

hundred and fifty years, the law-makers imposed a condition as to how the satisfaction of the court on a company''s inability to pay its debts could

be arrived at. Significantly, the expression ""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"" does not refer to the court being required to weigh the liabilities of the company against its

assets. It is, thus, evident that the company court is not required to set off the liabilities of a company against its assets in ascertaining whether it is

unable to pay its debts; the inability has to be determined only with reference to the liabilities of the company. Hence, the inability of a company to

pay its debts has been understood and interpreted as the company''s commercial insolvency rather than its actual insolvency. But the relevant

expression in Section 434(1)(c) of the Act does not altogether preclude the court from assessing the company''s ability to pay its debts upon the

concerned company asserting and establishing the availability of worthwhile assets that may be efficaciously and immediately liquidated to meet the

liabilities of the company. But the statutory manner of determination of a company''s inability to pay its debts, pointedly, does not make any

reference to the assets of the company since, ordinarily, the assets would be deployed in the company''s business activities and would not be

available for being liquidated for the purpose of discharging the company''s debts. A company could be the owner of vast tracts of land on which

its manufacturing facility stands, but neither the book value nor the market value of the land may of any relevance in considering whether the

company is unable to pay its debts since the business of the company would have to be stopped if the land were to be sold in discharge of the

company''s debts. The inference of commercial insolvency is based on facts; the manner in which such inference is arrived at will depend on the

facts asserted by the parties; and, the basis for asserting a company''s commercial insolvency must be there in the creditor''s winding-up petition

itself.

8. The expression ""unable to pay its debts"" in Section 433(e) of the Act should not mean anything vastly different from how that expression is

understood to imply in Section 434(1)(c) of the Act. In either case, the expression would mean that the company did not have liquid assets to

discharge its liabilities as at the date of consideration. It may be accepted that even if a company had assets by way of blocked investments or

immovable properties, those may not be taken into account to assess whether it was in a position to pay its immediate debts, but the expression

requires the company''s inability to pay its debts to be established and it connotes debts generally and not the petitioning creditor''s debt in

particular. It follows that the failure or negligence of a company to pay an indisputable debt may be regarded in a case to be symptomatic of the

company''s inability to pay its debts for the subjective assessment of the court to be made as to the general inability of a company to pay its debts

based on its inability to pay the petitioning creditor''s debt. Section 434(1)(c) of the 1956 Act is a verbatim reproduction of Section 163(iii) of the

Indian Companies Act, 1913. But the comparable provision was once quite different in its wording and, consequently, in its import. The English

Companies Act of 1862 contained the relevant provision in Section 80(4) thereof:

80. A company under this Act shall be deemed unable to pay its debts,

1. ...

2. ...

3. ...

4. Whenever it is proved to the satisfaction of the court that the company is unable to pay its debts.

9. In the Indian Companies Act of 1882 (VI of 1882) the corresponding provision was contained in Section 129(c) thereof:

129. A Company under this Act shall be deemed to be unable to pay its debts -

(a) ...

(b) ...

(c) whenever it is proved to the satisfaction of the court that the company is unable to pay its debts.

10. Under the relevant provision as contained in the English Act of 1862, the leading cases where such provision was made the basis for creditors''

petitions for winding up the relevant company are Globe Steel Co. (20 Eq. 337); Yate Collieries Co. [W.N. (1883) 171]; Flagstaff Mining Co.

(20 Eq. 268) and Pavy''s Fabric Co. (24 WR 91). In Globe Steel Co., which has been placed by the petitioner here and is referred to in greater

detail hereafter, a bill of exchange accepted for payment by the company was dishonoured; and it was held to be sufficient proof of the insolvency

of the company. In Flagstaff Mining Co. and Yate Collieries Co. it was held that if the company had given notice to a judgment-creditor that it had

no assets on which the judgment creditor could levy execution, it was sufficient proof of the company''s inability to pay its debts and the judgment-

creditor need not actually proceed to execute the decree before he can petition for winding up the company. In Pavy''s Fabric Co. the view taken

was that if the company admitted insolvency, a shareholder could not prevent the winding-up order on the petition of a creditor by offering to pay

the petitioner''s debt.

11. In another decision of the same vintage, Phoenix Bessemer Steel Co. (4 Ch. D. 108), the facts were not regarded to amounting to sufficient

proof of insolvency under the relevant provision. A meeting was called in that case by the principal directors of the company, stating that the

company was carrying on business at a loss and was short of working capital and in need of credit. This did not satisfy the court that the company

was unable to pay its debts. In two other matters dating back to the same time, it was held that a bare statement of a director that the company

was unable to pay its debts was not enough to meet the satisfaction of the court (2nd Jur. N. S. 94); and, to prove the insolvency of the company,

the court would not order it to produce documents (European Assurance Society [18WR 9]).

12. The first case carried by the petitioner on such aspect is the judgment in Globe Steel Co. Trade creditors of a company applied for an order of

winding-up on the ground that they had sold and delivered goods to the company, and had taken in part payment of a bill of exchange for

Ã¯Â¿Â½1150, at three months'' date, drawn by the petitioners and accepted by the company which was dishonoured upon it falling due. The creditors

claimed that the company had neglected to pay the amount due under the bill of exchange, together with interest and incidental costs, despite their

repeated demands. The company asserted in defence that since no demand in writing u/s 80(1) of the 1862 Act (which corresponds to Section

434(1)(a) of the Indian Act of 1956) had been made and the debt was disputed, no winding-up order could be made. It is necessary to see the

entirety of the short judgment to appreciate its purport:

That case appears to me to be rather in the Petitioners'' favour. I have no hesitation in saying that sub-sect. I has no application to sub-sect. 4. A

company may be wound up by the Court whenever it is unable to pay its debts; and by sect. 80 a company is to be deemed to be unable to pay its

debts in any of four cases. I think the fourth case includes the other three. The first case is, where a creditor for Ã¯Â¿Â½50 or upwards has served a

demand of payment, and the company for the space of three weeks after service has omitted to pay the debt. The second case is where execution

issued upon a judgment has been returned unsatisfied. The third case is under Scoth law; and the fourth case is where it is proved to the

satisfaction of the Court that the company is unable to pay its debts. The only question for me to decide is this, whether this is proved to my

satisfaction. It appears that the Petitioners sold goods to the company, and took in part payment a bill, which was dishonoured, and continues

unpaid. That is proof which ought to satisfy me, and which does satisfy me, that the company is unable to pay its debts. It was argued that the

Petitioners are not entitled to their order because of the omission to serve the statutory notice demanding payment; but I think their omission to do

so has no bearing on the question. In re Catholic Publishing and Bookselling Company (1) was a different case. Two points were raised in it, first,

whether the Petitioners were creditors of the company at all; and, secondly, whether at the time the petition was presented the company was in

such a position as to make a winding-up order proper; and the Lords Justices decided upon the evidence that the company was not unable to pay

its debts within the meaning of sect. 80. I make the usual winding-up order.

13. In Globe Steel Co. the court held that the dictum in Catholic Publishing and Book Selling Company did not apply. It is necessary to see the

judgment in Catholic Publishing and Book Selling Company (also reported at 46 ER 319) where an order winding up a company was reversed

upon it being found that the period of twenty-one days from the date of the receipt of the written demand had not elapsed before the petition was

presented. The petitioning creditors claimed on account of price of goods sold and delivered. They alleged that the goods had been supplied to a

person who acted as the manager of the company and the company asserted that the supply was to the manager on his own credit and even if the

company may have used the goods, which was also in dispute, the company was liable to the manager for so much of the goods as had been used

by the company. The company paid for subsequent supplies but disputed its liability in respect of the subject consignment. On July 6, 1883, the

petitioner served a statuary demand on the company and presented the winding-up petition on July 9, 1863. The trial court considered it not

established in evidence that the company was unable to pay its debts, but made an order for winding up the company in the event the debt was not

paid on or before a date fixed by the trial court. In the appeal, the company contended that the provision could not be used as a means for

enforcing payment of a disputed debt which ought to be sued for at law. The appellate court held that ""in order to give the Court jurisdiction to

make the (winding-up) order it must, I think, be shown that the inability to pay debts existed at the time when the petition was presented.

14. The dictum in Globe Steel Co. has necessarily to be seen not in the context of a claim for price of goods sold and delivered, but as a claim on

an accepted bill of exchange dishonoured on presentation on the due date. The subjective satisfaction of the court, as to the inability of the

company to pay its debts, in Globe Steel Co. was founded on the presumption of liability that arises upon an accepted bill of exchange. It is such

factor, and not the original claim on account of price of goods sold and delivered, that impelled the court to infer the company"s inability to pay its

debts as the company did not show any justification for the admitted bill of exchange being dishonoured. In the absence of the judgment spelling

out the objective criteria that the court set for the its subjective satisfaction that the company concerned was unable to pay its debts, an inference

must necessarily be drawn that the objective criterion was the presumption in law that an accepted bill of exchange had to be discharged by

payment unless legally established grounds were cited to rebut the presumption; and such grounds were not urged by the company in that case.

15. The petitioner has relied on passages from authoritative texts on company law published in more recent times to jump to some contemporary

decisions following the dictum in Globe Steel Co. Palmer"s Company Law (25th Ed, 1992) has been relied on for a passage at paragraph 14.312

thereof that instructs that ""a debenture holder to whom a company is indebted in a sum presently payable can demand payment, and, if default is

made, can petition for the winding up of the company, and this whether he is the registered holder of the security, or the holder of a security to

bearer... (and the) mere fact that he has obtained the appointment of a receiver does not preclude him from applying for a winding-up order.

Buckley on The Companies Act (14th Ed., 1981) has been carried for a passage at page 534 of Volume 1 on the meaning of commercial

insolvency as envisaged in the equivalent provision in the English Act of 1948 which is in pari materia with Section 434(1)(c) of the Indian Act of

1956 to the effect that the test in assessing commercial insolvency of a company is whether it is ""unable to meet the current demands upon it ...

(and) it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: that is not the test. A company may be

at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have

no assets available to meet its current liabilities it is commercially insolvent and may be wound up."" There is a further comment in the passage that a

secured creditor may present a winding-up petition ""and he does not by presenting one elect to give up his security or in any way lose his right to

it."" Pennington''s Company Law (5th Ed., 1985) has been cited for the recognition therein that under the English statute a creditor of a company

may petition for a winding up order whatever the amount of his debt, whether it is immediately payable or is payable at a future time or on the

fulfillment of a contingency, and whether it is secured or unsecured."" The petitioner has cited the judgment in Tweeds Garages Limited reported at

(1962) Ch D 406 to assert that commercial insolvency of a company may arise and may be demonstrated even if the company has substantial

assets. The latest edition of Halsbury''s Laws of England (5th Ed., 2011) has been brought and paragraphs 394 and 400 cited from Volume 16

thereof for the propositions that a company''s inability to pay its debts may be shown in other ways than by proof of non-compliance with the

statutory demand; and, the quantum of debt is not specified in the statute except in the case of a statutory demand.

16. In support of the commentary that a court may infer that a company is unable to pay its debts as they fall due if it fails to pay an undisputed

debt, the payment of which has been demanded by the creditor, two cases have been noted in the text. The petitioner here has placed both. In the

judgment reported at (1986) 1 WLR 114 (Cornhill Insurance PLC v. Improvement Services Ltd.), the insurance company brought an action to

restrain the defendants from presenting or threatening to present a petition to wind up the plaintiff under the provisions of Section 517(1)(e) and (f)

of the English Companies Act, 1985 and obtained an initial injunction which was vacated by the judgment cited. The court''s approach to the

assessment is captured in the following two paragraphs from page 117 of the report.

The question arises: what should the court do with a threat to present a petition against a company which the court instinctively considers must be

solvent, and as to which there is now evidence before the court that it was solvent to a major degree on 31 December 1984? The point as to

possible abuse of process which particularly concerned me was that every winding up petition must contain an averment that the company is

insolvent and is unable to pay its debts, and the affidavit in support, sworn either by the petitioner or by his solicitor under the winding up rules,

must aver that the statements in the petition are true. Thus it would have been necessary for someone to go on oath that he genuinely believed the

plaintiff to be insolvent, and I for a considerable time was much concerned that that was an impossible allegation for anyone conscientiously to

make. It seems to me that it could well be an abuse of process to make an impossible allegation.

I have been convinced in argument that that approach is wrong. In my view the statutory demand itself is something of a red herring. It is, maybe,

an unfortunate red herring because it demands Ã¯Â¿Â½1,581.83 without quantifying how that figure is arrived at, but that figure is not, it is put forward,

an undisputed amount due - Ã¯Â¿Â½1,154 is the undisputed amount - and the form of the statutory notice is less than normal to satisfy what is now

section 518(1)(a) of the new Companies Act 1985. As I have said, I believe that the reference to section 518(1)(a) in the statutory demand is a

red herring, because, as it was put to me, in my view rightly, there is equally appositely, 518(1)(e), ""If it is proved to the satisfaction of a court that

a company is unable to pay its debts.

17. There are two features of that judgment that require special mention. The first is the reference therein to Section 518(1)(e) of the English

Companies Act, 1985 which is discussed later in this judgment. The second aspect is that a suit for the same relief cannot be lodged in any Indian

court by reason of Section 41(b) of the Specific Relief Act, 1963 as no civil court entitled to receive a suit - including High Courts exercising

original jurisdiction - can restrain a defendant from instituting or prosecuting any proceedings in a court not subordinate to that court from which the

injunction is sought; and, a winding-up petition can only be filed before a High Court and no High Court is subordinate to any other High Court.

The Supreme Court has recognised such position in the judgment reported at Cotton Corporation of India Limited Vs. United Industrial Bank

Limited and Others, where it held that no court has jurisdiction, either u/s 41(b) of the Specific Relief Act or u/s 151 of the Code of Civil

Procedure, 1908, to grant temporary or perpetual injunction restraining a person from instituting any proceedings which such person is otherwise

entitled to institute in a court not subordinate to that from which the injunction is sought. This second feature, the distinction between English law

and Indian law, in the application of similar statutory or equitable principles may have a bearing in the present discussion.

18. In the judgment reported at [1990] BCLC 216 (Taylors Industrial Flooring Ltd. v. M&H Plant Hire Ltd.), the two alternative limbs that were

cited in support of the petition for winding up the company were that the company was unable to pay its debts and that the court should form an

opinion that it was just and equitable that the company should be wound up. It is evident that the Court of Appeal relied on Section 123(1)(e) of

the English Insolvency Act, 1986 which reflected Section 518(1)(e) of the English Companies Act, 1985 [""if it is proved to the satisfaction of the

court that the company is unable to pay its debt as they fall due (and, in determining that question, the court shall take into account the company''s

contingent and prospective liabilities).""] The following passages from pages 219 and 220 of the report are relevant:

There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who

seek to petition for the winding up of companies do not serve statutory demands. The practical reason for that is that if a statutory demand is

served, three weeks have to pass until a winding-up petition can be presented. If, after the petition has been presented, a winding-up order is

made, the winding up is only treated as commencing at the date of the presentation of the petition; thus, if the creditor takes the course of serving a

statutory demand, it would be giving the company an extra three weeks'' grace in which such assets as the company may have may be dissipated in

attempting to keep an insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So there are practical reasons for

not allowing extra time, particularly where commercial conditions and competition require promptness in the payment of companies'' debts so that

the creditor companies can manage their own cash flow and keep their own costs down.

The short answer to the judge''s view is two fold. They run together. The first limb is that if a debt is due and an invoice sent and the debt is not

disputed, then the failure of the debtor company to pay the debt is itself evidence of inability to pay. That appears from the judgment of Harman J

in Cornhill Insurance plc v. Improvement Services Ltd. [1986] BCLC 26, [1986] 1 WLR 114.

(page 219)

Therefore it was necessary to consider whether there was indeed a substantial ground of defence and the judge had found that there was not.

Therefore the position was that the company had not paid a debt as it fell due and had no substantial ground for opposing it. Therefore there was

evidence of insolvency.

(page 220)

19. There is a history to the provision on which the judgments in Cornhill Insurance plc and Taylors Industrial Flooring Ltd. hinged that has not

been noticed by the parties herein. What is now clause (c) in Section 434(1) of the 1956 Act was clause (iii) in Section 163 of the Indian

Companies Act, 1913. Such provision in the 1913 Act mirrored the equivalent provision in the Companies (Consolidation) Act, 1908 of England

which was the corresponding statute in force in England prior to the Indian Act of 1913 coming into effect and the Indian statute reflects a

substantial part of the English Act of 1908. The relevant clause was, however, not as it stood modified by 1908 Act at its inception. In the English

Act of 1862 the clause did not contain the words ""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."" As noticed above, the English Act of 1862 on which the Indian Companies Act

of 1882 was based, did not specify, in the relevant clause, the additional factors which the court had to take into account to satisfy itself that the

company was unable to pay its debts. That made a world of difference to the provision.

20. In the English Act of 1985, as enacted, the same provision continued in Section 518 which set the parameters for the legal fiction of a

company''s inability to pay its debts; but the guide to the court on how to determine the company''s inability to pay its debts was marked in

parenthesis in clause (e) of its first subsection. However, upon the matters pertaining to insolvency being consolidated in the English Insolvency

Act, 1986, what was originally contained in Section 130(iv) of the English Act of 1908 and continued in Section 223(d) of the English Act of

1948, was split into two as reflected in paragraph 394 of Halsbury''s Laws of English (5 Ed., 2011) in Volume 16 thereof. Upon the Insolvency

Act of 1986 coming into force in England one part of the original clause is now reflected in Section 123(1)(e) thereof and the other in Section

123(2) of that Act.

21. In the judgment reported at (1892) 2 Ch D 362 (In Re: Borough of Portsmouth Tramways Company, the creditor was a debenture-holder

who had obtained judgment against the company and was regarded by the court as a judgment-creditor of the company. The court noticed that the

creditor in that case had ""exhausted all his remedies except a winding up petition without obtaining payment of its debts. It is not clear from the

judgment as to whether the second limb of Section 80 of the 1862 Act was applied or the reasoning therein was founded on the fourth limb. It

cannot be missed that the judgment-creditor had taken out a summons for the sale of the tramways and other properties and effects comprised in

the company''s undertaking and the hearing on such summons was directed to stand over pending the petition under the Companies Act. If the

inability of the company in that case was inferred on the basis of the second limb, the reasoning is inapposite in the present context. If the basis for

the order was the fourth limb of the relevant provision, it boiled down to a question of fact.

22. In the case of Anglo-Italian Bank, reported at [(1879) 10 Ch D 681)], the decision was rendered on a motion for a declaration in a suit by

debenture-holders of a company which have been wound up against another creditor of the company in liquidation. The court was called upon to

examine the Judicature Act, 1875 and held that the rules in insolvency were to apply to companies wound up under the 1862 and 1867 Acts in the

event the assets of the company were insufficient; and such rule applied not to the cases of all company''s wound up but only to cases of winding-

up on the ground of insolvency. Neither the question that arose in that case nor the proceedings in which the question arose can be of any

relevance in the present case.

23. Before referring to the judgments of Indian courts referred to by the petitioner in support of its contention that the right of a secured creditor to

carry a petition for winding up a company is unfettered by the facts that the creditor enjoys security and the creditor does not either value or

commit to abandon the security, a word must be said on the applicability of the fundamental principles involved in this branch of law as it is

administered in this country and the English authorities that throw light on such principles. There is no denying that company law in India was

introduced by the British during the colonial era and such law in this country has been considerably influenced by the English practice and

authorities in such arena. But there is a danger in following English law and English judgments on legal principles that have been recognised in the

statutes in this country. Ordinarily, a principle in company law or an expression that is duplicated in the Indian and English statutes may be seen or

interpreted in the light of the English authorities on the point, since the body of Indian company law is based on the English law on such aspect. But

it must never be lost sight of that statutory interpretation in this country is based on the constitutional jurisprudence of this land, the interplay

between several statutes in this country which may not be the same case in England and the minor inflections in the other provisions of a similar

statute which might throw a different light on the interpretation of a similar expression in the Indian statute than how it is seen under the English

statute. Every statute in this country and all words contained therein take colour from the Constitution of India and it is possible that similar words

or expressions in two comparable Acts in England and in India are variously interpreted. Moving away from the general and focusing particularly

on the several English authorities that have been cited in the larger context of the circumstances in which the legal fiction of a company''s inability to

pay its debts would arise, the authorities that are based on the English statutes carrying a dissimilar provision in the comparable Section would not

apply in India, just as any Indian judgment based on Section 129(c) of the Indian Companies Act, 1882 would be of no relevance in a matter

where Section 434(1)(c) of the 1956 Act comes into play.

24. The petitioner has emphasised, by referring to the judgments reported at 106 Comp Cas 52 (Canfin Homes Ltd. v. Lloyds Steel Industries

Ltd.) and 156 Comp Cas 108 (Cavendish Shipping Ltd. v. Polaris Marine Management Pvt. Ltd.), that a secured creditor of a company is under

no disability in applying for the company being wound up on its inability to pay its debts merely because it enjoys security; and a creditor may seek

a company to be wound up without seeking recourse to the deeming provision u/s 434 of the Act. A judgment reported at ILR 1987 Kant 2673

(Hedge & Golay Ltd. v. State Bank of India) has been placed for the proposition that a secured creditor can maintain a winding-up petition

without either giving up its security or valuing it. Such legal position is unquestionable as Section 439(2) of the Act permits a secured creditor to

present a petition for winding-up, but the question need not be gone into in this case since the petition was instituted by this petitioner as an

unsecured creditor and it does not appear that the company has been able to secure the claim of the petitioner in course of the undertaking that the

company has furnished or the injunction that it has suffered in the Bombay proceedings. For similar reasons, the judgments reported at 43 Comp

Cas 556 (Techno Metal India (P.) Ltd. v. Prem Nath Anand); Calcutta Safe Deposit Co. Ltd. Vs. Ranjit Mathuradas Sampat, (2001) 2 Cal LT

539 (Maxlux Glass Private Limited v. ICICI Limited) Daulatram Rawatmull Pvt. Ltd. Vs. Peerless General Finance and Investment Co. Ltd., and,

an unreported judgment of a Division Bench of this court of July 23, 2012 in APO No. 211 of 2011 (Rajiv Tandon v. Dena Bank) merit no

elaborate consideration in the present context.

25. The company labours over its unimpressive balance-sheet to suggest that it has substantial assets and submits that since no other creditor of the

company has applied for winding up, the court should not assume that the company''s assets are not enough to meet its liabilities. The company

contends that in assessing whether a company is solvent or not, its net worth ought to be taken into consideration and refers to the emphasis on net

worth in the Sick Industrial Companies (Special Provision) Act, 1985 and the regulations made by the Securities and Exchange Board of India

relating to initial public offers of listed companies and the regulations framed under the Foreign Exchange Management Act, 1999 in such regard.

With respect, the argument does not appeal. The special purpose of the regulations under the Act of 1999 and those issued by SEBI requires net

worth of a company to be taken into account. The concept of net worth is foreign to what the court is required to consider on a creditor''s

winding-up petition where the court only seeks to assess whether the company is commercially insolvent. In the 1985 Act that the company has

referred to, the principle of net worth is applied for the purpose of ascertaining the sickness or the potential sickness of an industrial company; and,

the definition of a sick industrial company u/s 2(1)(o) of the 1985 Act is such industrial company whose accumulated losses at the end of any

financial year is greater than or equal to its entire net worth. The sickness of an industrial company under the said Act of 1985 is a much worse

financial position of the company than its commercial insolvency. It is for such reason that a sick industrial company enjoys a protection, u/s 22(1)

of the 1985 Act, against, inter alia, creditors'' winding-up petitions against it.

26. The company says that the petitioner''s claim is not quantified. Several judgments have been cited for the proposition that the claim of a

creditor has to be quantified before the petition is admitted. The argument is founded not so much on the actual lack of quantification of the

creditor''s claim in the present proceedings, but on the company''s assertion that the quantum of claim in the petition has to be read down by the

value of the security furnished in the Bombay proceedings. The company refers to a judgment reported at 140 Comp Cas 833 (Juneja Chemical

Industrial (P.) Ltd. v. Alam Tannery (P) Ltd.) for the observation in paragraph 10 of the report that in receiving a winding up petition, ""not only

should the factum of indebtedness be affirmatively established, but the quantum thereof needs also to be conclusively demonstrated."" Another

judgment reported at (2008) 82 SCL 277 (In Re: Siddharth Automobiles Ltd.) has been relied upon by the company for the same proposition.

The Supreme Court judgment in Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, and a judgment of this court reported at 144

Comp Cas 419 (SKF South East Asia and Pacific Pvt. Ltd. v. Hi-tech Bearing P. Ltd.) have been cited by the petitioner for the necessity of the

quantification of the petitioning creditor''s claim as recognised therein.

27. A judgment of the Bombay High Court reported at 107 Comp Cas 288 (Manipal Finance Corporation Ltd. v. CRC Carrier Ltd.) has been

brought for the acceptance therein of the securities furnished by the guarantors as a relevant consideration in assessing the admissibility of the

creditor''s petition against the principal debtor company. Paragraph 9 of the report is relevant for the present purpose.

9. I am not all inclined to admit the present petition as the petitioners ought to resort to a civil remedy and they cannot be allowed to take recourse

to this extreme remedy for their doubtful debt which is yet to be crystallised. It is not the case of the petitioners that there are many other creditors

who are knocking at the doors of the company and that the liabilities of the respondent-company have exceeded its assets and that it has lost its''

substratum so that the company should be permanently extinguished from its existence. The petitioners are trying to force the respondent-company

to surrender to the petitioner in spite of being fully secured under the personal guarantees of three guarantors and having security of a flat which

would be worth of Rs. 1,50,00,000 as submitted by Shri Par-mar. The concept of inability of paying the debt cannot be applied in the case where

the creditors are fully secured and they have in fact nothing to do with the alleged inability of the company to pay its debts. A secured creditor can

always realise his securities to satisfy his debt. He cannot say that the debtor is unable to pay the debt.

28. The company in this case says that the combined value of the securities furnished by the company and its director-guarantors in the Bombay

proceedings would be more than the claim of the petitioner herein. The company relies on the dictum in CRC Carrier Ltd. to suggest that a creditor

cannot be heard to say that it would not take into account the security furnished by the guarantors to the transaction in making a claim against a

principal debtor company. The dictum in CRC Carrier Ltd. does not appeal and cannot be regarded as good law. For one, the observation in the

relevant paragraph is made without reference to Section 434(1)(a) of the Companies Act and without reference to the cardinal principle

recognised in Section 128 of the Contract Act, 1872. Section 434(1)(a) of the Companies Act, in its material part, provides for the legal fiction of

the company''s inability to pay its debts being established if, after the receipt by the company of the creditor''s notice of demand at its registered

office for a claim in excess of Rs. 500/-, ""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."" The commercial insolvency of a company is not assessed on the basis of the company''s ability to cause

others to secure the claim of the creditor, but on the company''s ability to pay or secure or compound for the same. If a debt is discharged by

causing a third party to liquidate the claim, there is no claim to be carried forward for the court to assess the possible commercial insolvency of the

company. But if security were caused to be furnished by another, it would not be unreasonable for the petitioner to insist that such fact is not to be

taken into account to assess the commercial insolvency of the company. In this case, it does not even appear that the combined security furnished

under orders of court - not of the volition of the company or the guarantors - is sufficient to match the claim of the petitioner. But even if the

security furnished by the guarantors were adequate to match the claim, the company''s inability to pay its debts can still be ascertained and

established on the company not being able to secure the claim. Section 128 of the Contract Act makes the liability of the guarantor coexistent with

that of the principal debtor, unless it is otherwise provided by the contract between the parties. There is no contract to the contrary that the

company has been able to show. The petitioner has a choice of prosecuting its claim against the principal debtor and not against the guarantors.

Indeed, the petitioner here has sought an order of winding up against the company on the company''s failure to liquidate the petitioner''s claim or to

secure or compound for it to the reasonable satisfaction of the petitioner. The assessment of the company''s inability to pay will, in such

circumstances, not be judged by the security furnished or forced to be furnished by the guarantors who are the directors of the company. At a

more fundamental level, it must be remembered that a petitioner does not seek a decree against a company on a creditor''s winding-up petition.

That a practice has evolved under which the court while admitting a creditor''s petition permits the company to pay off the sum assessed to be due

in course of the order of admission, is only to afford the company a chance to ward off the advertisement of the petition and the consequential loss

of reputation and financial credibility of the company.

29. The company says that the court should exercise it discretion in not admitting the petition and by directing the petition to stand over till the

arbitral reference between the parties is concluded. It argues that since the invocation of an arbitration agreement is the recognition of the existence

of a dispute, the petitioner''s invocation of the arbitration agreement and the initiation of the arbitral reference would militate against its assertion in

the present proceedings that there is no dispute as to the debt due from the company to the petitioner.

30. The company has referred to a judgment reported at Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, for the proposition

that in order to initiate an arbitral reference it is necessary that there should be an arbitration agreement and that there is a dispute between the

parties to the arbitration agreement which is covered thereby. The point has been unnecessarily laboured over. For one, the scope of an arbitral

reference is altogether different from the scope of a creditor''s winding-up petition even though the claim in money in both actions may be founded

on the same cause. The legal issue is all too settled to be reopened. Just as the institution of a suit by a petitioning creditor, whether before or after

the launching of a creditor''s petition founded on the same claim, would have little impact on the winding-up proceedings, the initiation of an arbitral

reference in respect of a claim which is made the subject-matter of a creditor''s winding-up petition will not operate as a bar on the winding-up

proceedings. Indeed, a regular action in furtherance of the claim, particularly when it is instituted, as in this case, after filing a creditor''s petition

founded on the same claim, and a creditor''s winding-up petition on the same claim have never been regarded as parallel proceedings. At times,

particularly in the context of the present delay in the Indian judicial system, a regular action for enforcement of the identical money claim on which a

creditor''s previous winding-up petition has been launched is unavoidable. Since there is an element of discretion available to the company judge at

the stage of admission and, to a much greater extent, at the final stage of the winding-up proceedings in the two-tier practice that is in vogue, a

creditor who has sought an order of winding-up against a company can never be certain that the money claim therein will be realised in course of

such proceedings. If, the creditor''s petition lingers for any substantial length of time, it can be scarcely expected of the creditor to allow limitation

to set in and not launch a regular action in pursuance of the same money claim. The institution of a suit or an arbitral reference, in such a situation,

makes no difference since the arbitral reference has per force to be initiated in place of a suit if the matrix contract on which the money claim is

based is governed by an arbitration agreement. In any event, the mere nonpayment of a money claim is a dispute covered by the arbitration

agreement governing the matrix contract on which the money claim is based. The word ""dispute"" used in the Supreme Court judgment must be

understood in such light and not implying a dispute in the sense of there being a doubt as to the validity of the money claim. It is only a doubt as to

the validity of the money claim which is relevant for the purpose of assessing the negligence of the company in failing to pay or to secure or to

compound for a claim in the relevant expression in Section 434(1)(a) of the Act; and the mere failure to pay which may be regarded as a dispute

under the arbitration agreement for entitling a party thereto to invoke the same is not the same dispute that is relevant in assessing the inability of a

company to pay its debts upon the company failing to pay or to secure or compound for the debt to the reasonable satisfaction of the creditor.

31. The company has referred to a celebrated judgment reported at Karnatak Vegetable Oils and Refineries Ltd. Vs. Madras Industrial

Investment Corporation Ltd. and Another, to suggest that what weighed with the Division Bench of the Madras High Court of that case was that

the creditor had ample security for its debt and there was no averment that its security was insufficient. But even though the judgment recognised

the argument made on behalf of the company that the creditor had ample security for its debt, the decision was based more on the wishes of the

majority creditors of the company who did not support the order of winding-up.

32. As to the definition of security, the company relies on Stroud''s Judicial Dictionary (7th Ed., 2006). A judgment reported at 55 (1994) DLT

674 (Standard Chartered Bank v. M.S. Handa) is cited on the question whether a third party can furnish security in a suit. Two decisions reported

at Kalianna Kounder and Others Vs. Marappa Kounder, and (1932) 2 KB 522 (Temperance Loan Fund Ltd. v. Rose) have also been referred

to, in the same breath, by the company for the proposition that security furnished by a third party can be accepted as security in lieu of an order of

attachment before judgment. The decisions appear not to have any bearing on the present discussion for the same reasons as indicated in declining

to accept the dictum in CRC Carrier Ltd. The decision in Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, for the

proposition that a secured creditor becomes an unsecured creditor by virtue of an order passed under Order XXXVIII Rule 5 of the Code is,

again, of no relevance in the present assessment.

33. The company has also relied on a judgment reported at Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and

another, on the doctrine of election. The question in that case arose in the context of the alternative courses of action available to a financial

corporation under Sections 29 and 31 of the State Financial Corporations Act, 1951. The doctrine of election does not apply between a regular

action for enforcement of a money claim and a creditor''s winding-up petition based on the same claim since, inter alia, the reliefs claimed in the

two sets of proceedings are completely different. In an action for enforcing a money claim simpliciter, the forum - be it a regular civil court or an

arbitral tribunal or any other judicial or quasi-judicial body - would have no authority to entertain a prayer for winding-up the company. Similarly,

in a creditor''s winding-up petition, no relief can be claimed in the nature of a money decree even though a creditor''s winding-up petition is

regarded an equitable mode of executing a money claim. An oft-cited Division Bench judgment of this court reported a SRC Steel (P) Ltd. Vs.

Bharat Industrial Corporation Ltd., has been cited in the same context, but the court recognised, at paragraph 17 of the report, that ""there is no bar

either in the Companies Act or in the general body of our Civil Code governing and regulating suits in Courts, that a person is put to a strict choice,

Whether to pursue the remedy by way of a winding up petition or to pursue the remedy for recovery of its debt by way of a suit."" That is the ratio

in SRC Steel, though on the facts of that case the court found that the counter-claim delivered in the petitioning creditor"s suit by the company was

a bona fide defence, in the nature of confession and avoidance, in the winding-up petition.

34. Three other judgments have been cited by the parties. In the decision reported at (2008) 2 All ER 987 (In re: Cheyne Finance Ltd.), the

change in the English Act in the equivalent provision as Section 434(1)(c) of the Indian statue in the English Act has been noticed. In the judgment

reported at (1986) BCLC 261 (In re: A Company), the claim of a contingent creditor of the company was considered. In the decision reported at

(1987) BCLC 232 (Byblos Bank SAL v. Al-Khudhairy), it was held that in deciding whether a company was unable to pay its debts within the

meaning of Section 223 of the English Act of 1948, it was improper to take into account any hope or expectation that the company would obtain

assets in the future where there was no immediate right to the assets. These decisions have been referred to in the larger context of the argument in

this and the connected matter and are not relevant for the present purpose.

35. There is no dispute as to the claim of the petitioning creditor against the company. The claim is founded on dishonored cheques and even the

primary basis of the claim stands admitted. The company did not reply to the statutory notice and has not indicated anything that would make the

debt disputed or that would detract from the presumption of the company"s inability to pay that arises u/s 434(1)(a) of the Companies Act. That

the company has suffered an injunction in the Bombay High Court is of no consequence since the company cannot demonstrate that the injunction

amounts to a security of value equal to or in excess of the petitioner"s unimpeachable money claim. The order of injunction subsisting on the

guarantors and the undertakings furnished by the guarantors pursuant to the order of the Bombay High Court are matters not relevant for assessing

the company"s inability to pay. As to the decisions cited by the company that a petitioning creditor"s claim must be quantified, it must be

appreciated that the petitioner has quantified its claim both in the statuary notice and in the petition; and it is only the company"s assertion that since

the value of the properties covered by the Bombay injunction against the company cannot be conveniently made, the quantified claim put forth by

the petitioner should be regarded as an unascertained claim. Such argument does not appeal and is rejected.

36. CP No. 560 of 2011 is admitted for the principal sum of Rs. 4,07,05,062 together with interest thereon at the agreed rate of 15.50 per cent

per annum from the date of adjustment of the sum of Rs. 92,54,515 on account of the fixed deposit. If the company pays off the entire amount,

inclusive of interest and costs assessed at 3000 GM, within six weeks from date, the petition will remain permanently stayed. In default, the petition

will be advertised in ""The Statesman"" and ""Bartamaan"" newspapers. The advertisements should indicate that the matter will appear before the court

on the first available working day after the expiry of four weeks from the date of the advertisements being published. Publication in the Official

Gazette will stand dispensed with.

37. CA No. 1084 of 2011 is dismissed without any order as to costs. Urgent certified photocopies of this judgment, if applied for, be supplied to

the parties subject to compliance with all requisite formalities.