Associated Forest Products (Pvt.) Ltd. Vs K.T.S. (Singapore) Pvt. Ltd.

Court: Calcutta High Court

Date of Decision: Jan. 18, 1993

Acts Referred: Arbitration Act, 1940 â€" Section 20
Companies Act, 1956 â€" Section 434, 529A, 530
Contract Act, 1872 â€" Section 62
Foreign Exchange Regulation Act, 1973 â€" Section 47, 47(2), 47(3), 47(3)(b), 9

Hon'ble Judges: Ruma Pal, J

Bench: Single Bench

Judgement

Ruma Pal, J.
This is an application for winding up M/s. Associated Forest Product (P) Ltd. (referred to as the Company) on the ground

that the company is commercially insolvent.

2. The undisputed facts are: The petitioning Creditor (which is a company carrying on business in Singapore) entered into an agreement with the

company on 12th August, 1986 by which the petitioning creditor agreed to supply and the company agreed to purchase Sawn Timber Balau

(referred to as the goods) from Malayasia at the agreed price of U.S. $ 94,875.47. On 2nd October 1986 the goods arrived at Calcutta from

Malayasia by ship and were taken delivery of by the company. Three bills were raised in respect of the goods by the petitioning creditor on the

company. At the request of the company the petitioning creditor agreed to give a discount on the price for the goods so that the total amount

payable by the company to the petitioning creditor was U.S. $ 87,503.37. The company however, did not make any payment of any amount in

respect of the goods to the petitioning creditor. Upon a demand being made on the company, the company sent a telex on 7th January 1988

stating that there had been discussions with the petitioning creditor that the bills would be paid by installments upon receipt of permission from the

Reserve Bank of India. It was also stated that the company had applied to the Reserve Bank of India for the required approval, but till the date of

the sending of the telex no such permission had been given. It was further stated that the local laws did not permit the bank to credit a foreigner''s

account and as such the money could not be deposited in the bank to the credit of the petitioning creditor without the permission of the Reserve

Bank of India. It was also stated that the bills were due for over 15 months, but that it was beyond the company''s control. It was also proposed

by the company that the petitioning creditor should accept payments by installments and should authorise the bank to accept and remit payment of

the bills in part/installments subject to the Reserve Bank of India''s approval. It was also stated that there would not be any obligation on the part of

the Bank to remit the amount unless the necessary Reserve Bank of India''s approval was received. It was noted that for period the money was so

held by the Bank, no interest would be paid. Therefore, to safeguard the interest of the petitioning creditor, the company was also applying to the

Reserve Bank of India to pay the interest on the amount payable. It was finally stated that a photocopy of the letter would be forwarded to the

petitioning creditor by post.

3. On 23rd June, 1988 a memorandum of understanding was entered into between the, company and the petitioning creditor. The company was

represented by P. Saraf. Director and the petitioning creditor by its General Manager/Director. The terms and conditions of the document dated

23rd June, 1988 read as follows (the petitioning creditor being referred to as "KTS" and the company being referred to as ''AFP''):

(1) that AFP will settle the total outstanding amount of US $ 87,503.37 by progressive monthly installments before 31st December, 1988.

(2) ABP has already made the first installment of Indian Rupees 1,00,000/- on 16th June 1988 and Canara Bank will get the approval from the

Reserve Bank of India to remit the same to K.T.S.

(3) AFP shall, without fail, effect the installments to Canara Bank regardless approval from the Reserve Bank of India has been granted or not, for

account of K.T.S.

(4) K.T.S. will instruct Standard Chartered Bank, Singapore to instruct Canara Bank to accept the installments from A.F.P.

4. No payment was however, made pursuant to the memorandum of understanding by the company to the petitioning creditor.

5. On 24th May 1989 a guarantee was executed by Pradip Saraf, the Director of the company by which the facts set out earlier were confirmed.

There was a rescheduling of the payments of the reduced price of U.S. $ 87,503.37 equivalent to Rs. 14,17,554.50 in ten installments of 1 lac

being payable on 25th May, 1989 and the last installment being payable on 22nd March, 1990. The guarantee contained clauses relating to the

mode of payment which are set out verbatim, as reliance has been placed on the language of these clauses by the company in its defence in these

proceedings. The clauses are clauses 6 & 7 and read as under:

that the undersigned will issue A/C. payee cheque and/or Bank Draft on Bombay Branch in favour of M/s. United Lubricants & Industrial

Products of India, offices held both at Calcutta and Bombay, the third party, known to both that is the said seller and the undersigned so far the

first installment payment on 25.5.89 is concerned. Thereafter for all the rest of the installment payment, the undersigned will issue a cheque

(Account Payee) and/or Bank Draft in favour of the said M/s. United Lubricants & Industrial Products on Calcutta Branch until the last installment

is paid:

That the undersigned do hereby agree to be and shall at all times here after, until repayment of this debt of Rs. 14,17,554.50, remain responsible to

the said seller for and guarantee payment of the said sum Rs. 14,17,554.50 as the price for the sawn timber-Balau sold and delivered to the

undersigned in case of default together with interest @18% per annum (Indian Bank Interest) such interest to be calculated with effect from the

date as fixed as per laws of the land.

6. The guarantee was supported by a verification of Pradip Saraf signed on the same date to the effect that the contentions stated in the document

dated 24th May, 1989 were correct and no part of it was false. The verification also states:

I further affirm that the guarantee as stated before is fulfilled, at, my risk and responsibility.

7. The company thereafter made payment of an amount of Rs. l lac to M/s. United Lubricants and Industrial Products of India. A receipt was

granted by Ms. United Lubricants and Industrial Products to the company in which it has been stated that the amount of Rs. 1 lac had been

received on behalf of the petitioning creditor for remittance to them on receipt of payment for one lot out of three lots. The amount of Rs. 1 lac has

been deposited by United Lubricants with the United Commercial Bank.

8. After this, no further payment was received from the company either by United Lubricants or by the petitioning creditor. The company also did

not take any steps to apply for the approval of the Reserve Bank of India for remittance of the amount payable by the company to the petitioning

creditor from the Reserve Bank of India.

9. On 21st May 1990 the petitioning creditor served notice u/s 434 of the Companies Act, 1956 (referred to as the Act) on the company through

its Advocates. No reply was received to the notice.

10. The winding up petition was presented on 24th October, 1990. The company appeared and took directions for filing of affidavits. The

company filed its affidavit on 27th November, 1990. The petitioning creditor filed its affidavit-in-reply in February, 1991. On 30th September,

1991 the company prayed for leave to file a supplementary affidavit to bring certain subsequent facts on record. Such leave was granted and on

13th November, 1991 a supplementary affidavit-in-opposition was filed by the company which was countered by a supplementary affidavit-in-

reply of the petitioning creditor affirmed on 29th January, 1992.

11. The defence raised by the company is six-fold. The first defence is that the goods supplied by the petitioning creditor were not as per

specification and were defective and that the company was entitled to a discount of 50% on the price for the defective material. If is stated that the

petitioning creditor had admitted the defects and had agreed to grant a discount of 25% on the price. The company has relied upon the telexes

dated 11.6.86; 19.9.86; 1.10.86; 2.10.86 and 4.10.86 in support of this defence.

12. The second defence of the company is that the petitioning creditor had failed to execute several contracts as a result of which the company has

suffered losses and damages amounting to U.S. $ 87,703.00. It is therefore, stated that by reason of the claim of the company against the

petitioning creditor, and upon a taking of accounts, money was in fact payable by the petitioning creditor to the company.

13. The third defence of the company is that the claim of the petitioning creditor is barred by limitation as the goods had admittedly been received

in 1986.

14. The fourth defence of the company is that the entire transaction between the company and the petitioning creditor was in violation of the

Foreign Exchange Regulation Act, 1973 (referred to as the FERA) and that the agreement to make payment to United Lubricants was violative of

section 9 of FERA.

15. The fifth defence is an alternative to the fourth. It is contended that if United Lubricants was not to receive the money on account of the

petitioning creditor, there was a novation of the agreement between the petitioning creditor of the Company within the meaning of section 62 of the

Contract Act and the petitioning creditor could not sue the company for the payments.

16. The sixth and final defence of the company is that the petitioning creditor had filed a suit under Order 37 of the CPC against Pradip Saraf on

the basis of the guarantee stated to have been executed by him for payment of the petitioning creditor"s dues. The interlocutory Judge had directed

the matter to be tried as an ordinary suit subject to Pradip Saraf''s furnishing a security of Rs. 2,50,000/-. Such security had been furnished. It is

stated that one learned Judge of this Court having held in effect that there was a triable issue in respect of the payability of the claim of the

petitioning creditor against the company, this Court should not take a different view in the matter.

17. The first two defences of the company are not acceptable. There is a serious doubt regarding the genuineness of the telexes relied upon by the

company. Some of the telexes do not bear any serial number. In fact, the telex dated 2.10.86 alleged to have been sent by the petitioning creditor

to the company admitting that the timber was defective and conceding a 25% discount on the price is one of such telexes. The petitioning creditor

has produced a copy of a telex also dated 2.10.86 bearing the serial number mentioned in the telecom bill of the petitioning creditor, the contents

of which are very different from the contents of the telex produced by the company. The company has on the other hand not produced its telecom

bill which would have corroborated the authenticity of the telexes relied upon by it.

18. In any event the allegation of defective material, the right to a discount and the entitlement to damages were, according to the company''s own

showing, known to the company in 1986. No steps whatsoever have been taken by the company to realise any part of such loss or assert its right

to any discount from the petitioning creditor. The total inaction on the part of the company belies the probability of its claim. Again, considering that

the company''s alleged claims on account of defective material, discount and damages were known to the company in 1986, the unconditional

acknowledgement of the liability of the company to make payment of the entire amount to the petitioning creditor in the telex dated 7th January,

1988, the memorandum of understanding dated 23rd June, 1988 and the document of guarantee dated 24th May, 1989 would falsify both the first

and the second defences raised by die company.

19. Additionally, it is to be remembered, that the company had not chosen to give any reply to the statutory notice served by the petitioning

creditor''s Advocate on it. There is no explanation as to why such reply was not forthcoming. If the company indeed, had a defence as claimed on

account of defective materials, discount and damages it is to be expected that the company would have raised the same in answer to the statutory

notice. In the absence of such answer the Court is entitled to presume that the company accepted the claim of the petitioning creditor in toto.

20. There has been some argument on the question whether the company''s claim against the petitioning creditor is barred by limitation. It is not

necessary to go into this aspect of the matter as I am of the view that the claim is not worthy of any credence.

21. The third defence of the company is equally without substance. Although the claim of the petitioning creditor arose in 1986 nevertheless by the

Telex dated 7.1.88, the Memorandum of Understanding dated 23.6.88 and the documents of guarantee dated 24.5.89, the claim of the petitioning

creditor has been kept alive by the company by repeatedly acknowledging its liability to the petitioner. The last of such acknowledgements having

been made in 1989 and the winding up petition having been filed in September 1990, there is no question of any part of the petitioning creditor''s

claim being barred by limitation.

22. I am also unable to accept the company''s contention that the transaction between the company and the petitioning creditor was illegal or in

violation of the FERA.

23. It is stated by the company that there was no default in payment of the petitioner''s debts as payment to the petitioning creditor was prohibited

under the FERA. It is stated that it was only when the receipt of United Lubricants was received by the company to the effect that the money had

been received on behalf of the petitioning creditor that the company was advised that the payment was illegal. It is only for that reason that no

further payment was made.

24. It is also urged that it was not the petitioning creditor''s case that the company had not applied to Reserve Bank of India for permission. In my

event it was the duty of Canara Bank in terms of the Memorandum of Understanding to get the necessary approval from the Reserve Bank of

India. If is stated that section 47(3)(b) of the FERA did not save winding up proceedings. It is said that an application for winding up of the

company is really an enforcement of the claim of a petitioning creditor and has been described as an equitable mode of execution. Reliance has

been placed cm the decision of the Supreme Court in Harinagar Sugar Mills Ltd. Vs. M.W. Pradhan, in this connection. It is further submitted that

legal proceedings for recovery of monies u/s 47(3) of the FERA did not include a winding up petition. It is stated that there was nothing to stop the

petitioner from applying for permission to the Reserve Bank of India to receive the payment from the company. It is stated that the Court cannot

presume that if an application were made for permission to the Reserve Bank of India, permission would be granted as a matter of course. It is

stated that the Court cannot presume that if an application were made for permission to the Reserve Bank of India, permission would be granted

as a matter of course. It is stated that under threat of a declaration of insolvency the company would be forced to pay and circumvent the

provisions of the FERA. It is finally submitted under this head of the company''s defence, that even if the court came to the conclusion that the

provisions of FERA did not bar the company from discharging its obligation to the petitioning creditor, the company itself was under such

impression. This could not be held to be mala fide as such a stand on a legal issue cannot be considered to be perverse or unreasonable.

25. As far as the first aspect of the company''s argument is concerned, it is not that the prohibition of payment to a person not resident in India is an

absolute bar u/s 9(1) of the Act. The payment may be made subject to the permission of the Reserve Bank. This is clear from the wording of

section 9(1) of the FERA. Even if the agreement between the petitioning creditor and the company did not explicitly provide for the obtaining of

the permission from the Reserve Bank, section 47(2) of the FERA provides that every contract governed by the laws of India would have an

implied term to the effect that nothing agreed to be done which was prohibited to be done except with the permission of the Reserve Bank, shall

not be done unless such permission is granted. With this statutory implied term in the contract, the agreement between the petitioning creditor and

the company cannot be said to be violative of the FERA.

26. The contention of the company that it was the obligation of Canara Bank to get the approval from the Reserve Bank of India in respect of

payments is not borne out by the language of the memorandum of understanding dated 23rd June, 1988. It appears that the Canara Bank was to

have obtained the approval from the Reserve Bank of India to remit the first installment stated to have been paid by the company to it after getting

the approval from the Reserve Bank of India. The obligation of Canara Bank ended there.

27. The subsequent letters of guarantee etc. do not contain any explicit statement regarding the obligation of the parties to obtain the approval of

Reserve Bank of India. It could not be the obligation of Canara Bank because Canara Bank was no longer the intermediary for receipt of the

payment. The obligation to obtain permission really arises out of the statutorily implied term u/s 47(2) of the FERA. Section 47(2) read with the

form for the application for remittance of foreign exchange in respect of imports made or to be made, (Form A-I) would show that the application

for permission has to be made by the importer which in this case was the Company. Admittedly the company has made no such application at least

after the letters of guarantee had been executed. Even with regard to the earlier application for permission, the onus was on the company to show

that such application had in fact, been made. It would not be logical to rely upon the statement of the petitioning creditor regarding the application

said to have been made by the bank to RBI as clearly the petitioning creditor could have no first hand knowledge of the fact. The matter was

within the special knowledge of the company and it was for the company to have produced the relevant correspondence to show that it had bona

file made all attempts to obtain the permission of Reserve Bank of India. It has not done so. There is no doubt therefore, that the principle

enunciated by S. K. Roychowdhury, J. in the case of Eurometal Ltd. v. Aluminium Cables & Conductors (U.P.) Pvt. Ltd., 53 Comp Cases 744,

is applicable to this case and cannot be distinguished on this ground.

28. In the case of Eurometal Limited v. Aluminium Cables & Conductors (U.P.) Pvt. Lid. (53 Comp Cases 744) the company which was sought

to be wound up had entered into an agreement with a foreign buyer through the agency of a foreign concern. Under that agreement the company

was to supply goods to the foreign buyer. The company was also to pay commission to the foreign concern for negotiating the contract with the

foreign buyer. The company supplied the goods to the foreign buyers and was paid the price, but did not pay any commission to the foreign

concern. The foreign concern filed an application for winding up the company. One of the contentions raised was that the payment of commission

could not be made by reason of the prohibition under the FERA. In dealing with this submission S. K. Roychowdhury, J. said:

This is a right which is conferred upon the creditors by statute and is not a right arising out of a particular contract of loan between the petitioning

creditor and the debtor.

It was the petitioning creditor''s duty to produce a document to show that such a permission has been refused and it can be safely presumed that

the company has not done anything of that sort.....

The company has failed to produce any document whatsoever and, therefore, it should be inferred that the company has deliberately made no

application for payment to enable it to pay to the petitioning creditor and, as such, it must be held that the company is unable to pay its debt and

liable to be wound up.

It was the duty and it was also incumbent under the law, that is the Foreign Exchange Regulation Act and the Rules made thereunder, for the

company to make the necessary application for permission for remitting the said amount to the petitioning creditor.

If the company has failed to apply for the necessary permission and obtain the same in due course, that does not mean that the debt is not persently

payable. It is due to the default of the company that such a situation has arisen and it is an elementary principle that nobody can take advantage of

his own default. Therefore, it cannot be contended now by the company that the debt is not presently payable having not produced any document

before this Court to show that it made an application before the RBI under the FERA for the remittance of the commission payable to the

petitioning creditor, under the said contract between the parties, which is admitted. It is evident that the said plea raised by the company is not only

frivolous, fallacious but lacks in commercial morality and involves a question of international commercial transactions, having impact on the public

interest which the court should always zealously safeguard for upholding the national prestige in the international commercial transaction.

It is also admitted that the notice u/s 434 of the Companies Act, 1956, has been duly served on the company and in spite of such service, the

company has neither taken any step for making payment of the amount after obtaining the necessary permission of the Reserve Bank of India nor

produced any material before this Court that it has ever applied for the Reserve Bank of India''s permission which has been refused. It also

appears that the company has not given any reply to the statutory notice served on the company by the petitioning creditor''s advocate-on-record.

At this stage, the question of permission of the Reserve Bank of India for the payment of the debt due to the petitioning creditor cannot and does

not arise. That will only arise if the company is wound up and the assets of the company are realised by the liquidator in the administration of the

company in winding up.

29. Even without going into the controversy as to whether or not the application was to have been or had been made by the company for approval

from the Reserve Bank of India, the relevant period, in my view, is tire period subsequent to the notice u/s 434. Assuming that the petitioner could

not pay by reason of the embargo placed u/s 9(1)(a) of the FERA and assuming that the company had duly applied for permission which had not

been granted by RBI, nevertheless, there was prohibition on the company securing or compounding the claim of the petitioning creditor u/s 434 of

the Act. The prohibition in section 9(1)(a) is limited to payment. The company had consumed the goods sent by the petitioning creditor to it in

1986. There is, therefore, no scope for restitution. The Court cannot allow a situation where a party can reap the benefit of a contract and not pay

for it. Had the intention of the company been at all bona fide it would have, at least secured the claim of the petitioning creditor which is admittedly

due to it. This the company did not even attempt to do within the period of 21 days subsequent to the notice section 434 of the Act or at all.

30. If therefore United Lubricants were the agent of the petitioning creditor as claimed by the petitioning creditor, the company could have secured

the claim were it minded to act in a commercially honest manner. If, on the other hand, United Lubricants were not the agent of the petitioning

creditor, but an independent concern as claimed by the company, the company could have paid United Lubricants without any question of the

payment being made to or for the credit of the petitioning creditor in violation of section 9(1)(a) of the FERA.

31. The payment to United Lubricants would not be for the credit of the petitioning creditor. ''Credit'' has been defined in the Oxford Dictionary as:

A sum placed at a person''s disposal in the books of a bank, etc., any note, bill etc., on security of which a person may obtain funds.

If United Lubricants were a recipient independent of the petitioning creditor, the payments to United Lubricants could not be said to be at the

disposal of the petitioning creditor.

32. Although the debt is the debt of the petitioning creditor and continued to be so after the letters of guarantee, the payment to United Lubricants

would have given the company a valid and complete discharge. This too the company did not do. The company may therefore be presumed to be

insolvent u/s 434 of the Act.

33. The defence of the company that there had been a novation of the contract by virtue of the document dated 24th May, 1989 as a result of

which only United Lubricants could sue to recover the debt has not been raised by the company in its affidavit-in-opposition. In fact, the company

has stated:

Under the document dated 24th May, 1989 payments to be made to United Lubricants and Industrial Products are to the credit of the petitioner

company and on behalf of the petitioner company and the dues of the petitioner would be totally discharged by payments to the United Lubricants

and Industrial Products. No permission or exemption general or special from the provision of section 9 of the Foreign Exchange Regulations Act,

1973 from the Reserve Bank of India was obtained in connection with the said document dated 24th May, 1989. The said document and/or the

agreement purported to be recorded therein is forbidden by section 9 of the FERA, 1973 and is illegal.

(Emphasis supplied)

34. There was no doubt in the company''s mind therefore, that the debt was due to the petitioning creditor and there was no novation of the

agreement to pay the petitioning creditor its dues. Furthermore the document itself makes it clear that it was the debt of the petitioning creditor

which was to be paid by installments. Clause 5 of the document reads as follows:

At the request of the undersigned, the buyer of the goods, the said seller has agreed to accept to receive the reduced price US $ 87503.37

equivalent to Rs. 14,17,554.50 in ten installments for the sake of promotion of further business between them.

35. The seller referred to in the clause quoted is the petitioning creditor, similarly in clause 7 of the document it is stated:

That the undersigned do hereby agree to be and shall at all times hereafter, until repayment of this debt of Rs. 14,17,554.50, remain responsible to

the said seller for and guarantee payment of the said sum of Rs. 14,17,554.50 as the price for the sawn timber Balau sold and delivered to the,

undersigned.

This defence of the company is therefore, also rejected.

36. The other aspect of this defence namely that winding up proceedings being a proceeding in execution was not saved by section 47(3) (b) of the

FERA proceeds on a misconception of the nature of an application far winding up. Section 47(3) specifically permits legal proceedings being

brought in India to recover any sum the receipt of which is prohibited under the Act whether as a debt, damages, or otherwise. The only restriction

is that my judgment or order for the payment of any sum in such legal proceeding cannot be enforced except with the permission of the Reserve

Bank [See section 47(3)(b)]. A winding up proceeding is a legal proceeding based on the claim for recovery of a debt but the order which is

passed on such a proceeding is not a judgment or an order for payment but an order declaring the company insolvent. The enforcement of this

order would result ultimately in the sale of the company''s assets by the Official Liquidator. It would he only after the company''s assets had been

realised and the sale proceeds distributed in order of priority in terms of sections 529A and 530 of the Companies Act, 1956 that there would be

any question of the petitioning creditor receiving payment of any sum of a ratable distribution with the other creditors of the Company in liquidation.

It would be only that stage that there may be a question of obtaining the permission of the Reserve Bank for remitting the petitioner''s share in the

proceeds of the company''s assets in liquidation. It is in this sense that the Supreme Court approved the description of winding up proceedings as a

form of equitable execution, in the case of Harinagar Sugar Mills Ltd. Vs. M.W. Pradhan,

37. In the application for winding up the prayer is not for enforcing any judgment or order for payment. The prayer is to declare the company

insolvent. The description of a winding up proceedings being an equitable mode of execution does not mean that a winding up petition culminates in

an order for payment of money. It may be that in order to avoid a declaration of insolvency the company may voluntarily agree to pay or secure or

compound the debt of the petitioning creditor. But such a voluntary submission would not be a judgment or order for payment.

38. In the case of Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., the Supreme Court was called upon to consider whether an application

u/s 20 of the Arbitration Act, 1940 (by which a foreign seller sought to have a dispute in respect of its claim on account of breach of contract by a

Indian buyer referred to arbitration) was violative of section 5 of the FERA, 1947 (equivalent to section 9 of the FBRA, 1973). It was contended

by the Indian buyer that the application u/s 20 could not be made as it would involve a violation of section 5 of the FERA, 1947. The Supreme

Court after considering the provision of section 5 held:

The effect of these provisions is to prevent the very thing which is claimed here, namely, that the Foreign Exchange Regulation Act arms persons

against performance of their contracts by setting up the shield of illegality. An implied term is engrafted upon the contract of parties by the second

part of sub-section (2), and by sub-section (3), the responsibility of obtaining the permission of the Reserve Bank before enforcing judgment,

decree or order of Court, is transferred to the decree-holder. The section is perfectly plain, though perhaps it might have been worded better for

which a model existed in England.

39. Therefore, even if the arbitration proceedings would ultimately result in a possible payment in foreign exchange, this did not mean that the

application u/s 20 was debarred. Similarly even if the winding up application may ultimately result in payment to the petitioning creditor in foreign

exchange, this would not mean that the proceeding itself is prohibited.

40. In any event, the judgment or order which is passed on a winding up proceeding filed at-the instance of a creditor is not a judgment or order

which ensures to the benefit of the petitioning creditor alone. The order comes to the benefit of all the creditors of the company. As stated by

Buckley, J. in Re: Crigglestone Coal Company Ltd., (1906) 2 Ch 327, 33:

that the order which the petitioner seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex

debito justitiae is not his individual right, but his representative right.

41. For all these reasons I am of the view that a winding up proceeding does not come within the exception to the general permission as enunciated

in Clause (b) of sub-section 3 of section 47 of FERA, 1973.

42. The final submission of the company is also misconceived. The mere fact that the Interlocutory Court has allowed leave defend to Pradip Saraf

in the suit filed by the company against him, would not debar this Court from finding for the petitioning creditor in the winding up proceeding against

the company. Firstly, the claim of the petitioning creditor is against Pradip Saraf and not the Company. Secondly, the claim in the suit is based on a

guarantee. Various defences had been taken by Pradip Saraf in the application for summary judgment filed by the petitioning creditor. The Court

on a consideration of all the defences felt that there was a triable issue. Although the Court has noted the defence of Pradip Saraf that the

agreement to make payment to the petitioning creditor was violative of the FERA, 1973, there was no discussion by the Learned Judge of this

issue.

43. Even assuming that the issue raised in the suit filed by the petitioning creditor against Pradip Sarat and the issue raised in the winding up

proceedings relating to the applicability of the FERA to the transaction in question were the same, the nature of the consideration of a Court in

deciding whether a triable exists in summary proceedings under Order 37 is very different from the nature of the consideration of a Company

Court in assessing the actual bona fides of the defence. In the first case the Court is merely called upon to see whether the defence raised was not

moon shine"". In the second case the second case the Court is called upon to determine the defence itself.

44. A similar case came up for consideration before the Court of appeal in Re : Welsh Brick Industries Ltd. (1946) 2 All ER 197. In that case the

petitioning creditor had filed a suit against the company itself and had applied for summary judgment. Unconditional Leave to defend was given to

the company by the Registrar who, in England, is competent to hear and determine such summary proceedings. The petitioning creditor then filed

winding up proceedings against the company. It was contended by the company before the Company Court, that unconditional leave having been

granted in the summary proceedings, there was no question of the winding up application being proceeded with. Loral Greene, M.R. said:

I cannot accept the proposition that, merely because unconditional leave to defend is given, that of itself must be taken as establishing that there is a

bona fide dispute or that there is some substantial ground of defence. The fact that such an order is made is no doubt a matter which the winding-

up court will take into consideration and to which the winding up court will in due course pay respect, but I cannot regard it as in any way

precluding a winding-up judge from going into the matter himself on the evidence before him and considering whether or not the dispute is a bona

fide dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action. An order, of course, can be

made under R.S.C., Ord. 14, giving unconditional leave to defend on grounds which fall far short of the establishment of a substantial ground of

defence to the satisfaction of the registrar or the master, as the case may be.

45. Morton L.J. who concurred that the decision of Lord Greene M. R. stated:

....the decision of the Registrar in giving leave to defend does not amount to more than this-that he thought, on the evidence before him, that there

was at least a fair probability that the company had a bona fide defence. To my mind it is quite impossible to regard such a finding by the Registrar

as a bar in itself to a finding of fact by the county-Court judge that there was no bona fide dispute as to this debt at all.

I respectfully adopt the reasoning of the Court of Appeal in the case of Welsh Brick Industries Ltd. and I see no reason to hold to the contrary.

46. The submission that even if the company"s view that the payment under the contract with the petitioning creditor was forbidden under the

FERA is found to be wrong, nevertheless it was a possible view, and was therefore, bona fide, is not acceptable to this Court. Even if the

Company bona fide held the view that no payment could be made because of FERA why did it not secure the claim or even bother to reply to the

statutory notice? No argument whatsoever, has been advanced by the company as to why it did not at least even attempt to secure or compound

the claim of the petitioning creditor even if it thought that no payment could be made. It may be noted that even at the hearing the company did not

offer to secure the claim of the petitioner in any manner at all.

47. In my view the company has displayed a singular lack of bona fides in its conduct and its defence to the winding up proceedings. The

presumption of insolvency raised by virtue of its failure to secure or compound the claim of the petitioning creditor pursuant to the notice u/s 434 of

the Act has not been rebutted. In that view of the matter the winding up petition is admitted subject to scrutiny for the amount of Rs. 13,17,554.50

together with interest at 18% per annum from the due dates of the installments under the document dated 24th May 1989 until the date of this

order and costs assessed at 25 G.Ms. The petitioner will advertise the petition once in the Telegraph and once in the Bartaman. Publication in the

Official Gazette is dispensed with. The matter is returnable six weeks hence.

48. Prayer for stay of this judgment as order is made which is granted for a period of two weeks from today.

The injunction already granted on 1st June, 1992 restraining the petitioning creditor from filing any suit in respect of the subject matter of the claim

in the winding up petition will continue for a period of a fortnight or until further order by any other appropriate forum.

49. Let xerox copy of this judgment he given to the parties upon their undertaking to apply for the certified copy of the judgment and on payment

of usual charges.

The parties are to act on a signed copy of the operative part of this judgment on the usual undertaking.