(2007) 02 CAL CK 0035

Calcutta High Court

Case No: C.P. No. 64 of 1999

In Re: Raghunath Exports Ltd. APPELLANT

Vs

RESPONDENT

Date of Decision: Feb. 22, 2007

Acts Referred:

- Companies Act, 1956 - Section 434, 434(1), 443, 446

Citation: (2008) 83 SCL 68

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Raj Ratan Sen, for the Appellant;Ratnanko Banerjee and Ritabrata Mitra, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Sanjib Banerjee, J.
A much-answered question falls for consideration once again.

2. The Company resists an Order of admission sought on a creditor''s winding up petition not only on the basis of the dispute it claims it has raised but also on the propriety of the Company Court in inquiring into the merits of the dispute as a suit founded on such dispute has been instituted by the Company. It is irrelevant, according to the Company, whether the suit was instituted before or after receipt of the statutory notice; that a suit is pending and that the same is not demurrable is enough to ward off winding up proceedings against the Company touching upon such matters.

3. The petitioner was the carrier of goods shipped by the Company. The goods were to be partly carried by sea and partly by road. They were to be discharged by the vessel at Felixstowe in the United Kingdom and carried by road to Speke in containers. According to the petitioner, upon the cargo being discharged at

Felixstowe, it was discovered that one of the containers was damaged and four others were found to contain more than the rated payload and three of the containers weighed more than the weight permissible in the country of discharge. The petitioner contends that following negotiations between the Chinese principal of the petitioner and the Company, the Company accepted that it would bear the additional charge for devanning at Felixstowe for further carriage by road to Speke upon maintaining the permissible limits.

4. A writing of 18-11-1997 executed by the Company has been relied upon. The writing refers to 7 X 40 containers and appears to be unconditional in the following assertion:

We accept responsibility and all/any costs which are incurred in any way in connection with stripping/delivery of cargo - any Government fine for overnight vehicle - as well as hold Choyang Line blameless in respect of any damage to cargo and the like - make their own arrangements in conjunction directly with receiver to deliver any cargo devanned from containers.

Choyang Line referred to in the message is the principal of the petitioner.

5. Though the mode of urgent communication by telegraph or teleprinter is now obsolete, it is evident from the message that the old habit of dropping verbs from sentences and vowels from words continue in the shipping business. According to the petitioner, the opening words of the message, "We accept responsibility and all/any costs which are incurred..." read with the further representation "as well as hold Choyang Line blameless in respect of any damage to cargo" implied both an acceptance of liability of unprescribed limit, and waiver of any claim on account of damage to the cargo. The petitioner claims that the expression "and the like" following the word "cargo" completely absolved the petitioner of any liability on account of any damage whatsoever and any damage to any container would be covered, within its fold.

6. Shortly upon the cargo being delivered, a bill for ₹ 11,207.30 was raised in a writing issued by the petitioner to the Company on 24-12-1997. The brief break-up of the charges as conveyed by the petitioner to the Company was spelt out thus:

Weighing Expenses	:	GBP	527.80
CNTR Stripping CHGS. (PART D/V X 6 +I FULL D/V)	:	GBP	811.50
CNTR Demurrage	:	GBP	351.00
Repairs to CYLU 4142544	:	GBP	1077.00
LO/LO 6 @ GBP 60 (LESS PREPAID DIH 7 @ GBP 270)	:	GBP	1530.00
Shed Rent for Stripped CARGO	:	GBP	4970.00

TOTAL	:	GBP	11207.30
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7. The writing also indicated that on that day the pound commanded a rate of Rs. 64.54.

8. The petitioner has asserted that no dispute of any nature was raised by the Company within any reasonable period after receipt of the said writing of 24-12-1997 and that the company had assured the petitioner (though no writing to such effect has been relied upon) that the payment would be made. A statutory notice of 17-7-1998 was issued on behalf of the petitioner claiming the principal sum of Rs. 7,34,526.40 upon applying the exchange rate as prevailing on 24-12-1997. Interest was also sought.

9. It is only after receipt of such notice that the Company appears to have disputed its liability. Though the Company''s response of 29-7-1998 has been referred to in the petition, no copy thereof was annexed thereto and the Company also did not deem it fit to append a copy of such reply in the affidavit it has used in these proceedings. The petitioner sought leave to rely on the Company''s letter after serving a copy thereof on the company.

10. In the reply it was asserted on behalf of the company that inasmuch as freight for the shipment to Speke had been prepaid and would appear from the bills of lading of 11-9-1997, it was the petitioner''s responsibility to deliver the goods in undamaged condition at Speke. The Company denied that any of the containers was overweight. The Company''s grievance was contained the following two paragraphs before it proceeded to deny the petitioner''s claim:

In such circumstances our client had to agree to unpacking of the containers alleged to be overweight for delivery to destination in as much Tea is a delicate and easily perishable commodity and its taste undergoes rapid deterioration with storage. Taking advantage of such a situation your client has started claiming an astronomical amount as alleged additional costs and expenses for devanning of the goods and other related matter completely oblivious of its obligation for free haulage of the goods to consignee''s warehouse at Speke - charges in respect whereof has already been paid at Calcutta.

In the premises aforesaid our client is entitled to claim damages from your client and its principal for their failure to deliver in time the said seven containers to the warehouse of the consignee at Speke, United Kingdom. Our client denies and disputes its liability to pay any amount to your client for alleged additional costs and expenses incurred by it in delivering the said containers on the alleged ground of their being over-weight. Further as your client is aware some of the said containers were delivered in damaged condition besides three of the containers not alleged to be overweight were also not delivered within time for which our client is also entitled to recover damages.

11. The defence in the Company''s affidavit is on similar lines. It has been suggested that the petitioner coerced the Company to agree to the additional charges though

the petitioner was not entitled to the same. The Company claims that the petitioner was liable for damage caused to one container as the same was a result of the petitioner''s negligence and failure to take reasonable care. In the reply to the statutory notice, the execution and contents of the document dated 18-11-1997 were not denied but in its affidavit the Company has "denied that the said purported undertaking of the company was given voluntarily". The Company has also insisted that the petitioner was liable to pay damages to the Company for delaying the said shipment and for damaging part of the cargo and for causing business loss to the Company.

12. The Company has relied on the plaint relating to the suit filed by the Company against the petitioner (C.S. No. 653 of 1999). The substance of the claim in that suit is contained in paragraph 8 of the plaint:

The said goods contained in said containers were not delivered in time to the consignee and one of the containers was entirely damaged resulting in substantial loss in value of the Tea packets contained therein. The consignee who had Ordered for delivery of the said quantity of tea also suffered serious business loss for non-delivery of the said cargo in time and also for being saddled with damaged tea which could not be utilised. The said consignee as a result therefore considerably reduced its business activity with the plaintiff as a result of which the plaintiff suffered serious business loss. The said consignee in 1977-98 (presumably, 1997-98) purchased 6,95,850 Kilograms of tea from the plaintiff but since the delayed delivery of the said cargo and that too in partially damaged condition in or about October 1997 (presumably, October, 1998) has purchased till date only about 36,986 Kilograms of tea from the plaintiff.

13. Upon such averment, the petitioner assessed its loss at Rs. 23,71,511 of which Rs. 20 lakh was claimed on account of loss of business and Rs. 3,71,511 on account of loss of value of tea for the damaged container.

14. The suit appears to have been filed in March 1999 though the present company petition was instituted in January 1999 and notice thereof was issued by the petitioner to the company prior to the institution of the suit.

15. In the affidavit-in-reply, the petitioner has alleged that no steps have been taken by the Company to proceed with the suit. The petitioner has also pointed out that the Company had deliberately delayed the hearing of the present proceedings by taking repeated extensions of time to file its affidavit-in-opposition. It has been said that after several extensions and after suffering an Order of admission of the petition and requiring the same to be recalled, the Company filed its affidavit in June 2005. The records contain an Order of 21-11-2001, the first paragraph whereof is as follows:

In spite of directions given by Court on more than one occasion, no affidavit was filed by the Company. Today when the matter was called on for hearing Company

was not represented in Court. The Company was obviously not interested to oppose this application and had no defence to the petition.

16. That was the prelude to the Order of admission. Such Order was subsequently recalled and directions were given for filing affidavits which went unheeded till, by the Order dated 6-6-2005 the Company was permitted to file its affidavit by 24-6-2005 subject to payment of costs of 50 GMs.

17. The Company urges that disputes have been raised and as a suit had been instituted by the Company it would not be proper for the matters likely to be in issue in such suit to be prejudged. The Company has relied on the judgments - SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., , In Re: Bayoil SA 1999 (1) All ER 374 and Montgomery v. Wanda Modes Ltd. 2002 (1) BCLC 289.

18. Primarily relying on the Division Bench judgment in the matter of SRC Steel (P.) Ltd. (supra), the Company urges that unless the Company''s suit in support of its counter claim was demurrable, the Company Court would not pronounce judgment on the merits of the issues involved and likely to be involved in such suit and Courts have generally either stayed creditor''s winding up proceedings or have adjourned them till the time the suit was decided.

19. In the case of SRC Steel (P.) Ltd. (supra), the Company hardly raised any direct dispute to the balance claimed by the petitioner on account of price of goods sold and delivered. The Company''s case was that it had suffered damage because of a breach of contract made by the petitioning creditor in that case, that the petitioner had supplied far less than had been orally agreed and as a consequence thereof the Company suffered loss. In answering the statutory notice in that case, the Company referred to a suit that it had instituted two months prior to the date of the statutory notice. The plaintiff''s claim in such suit was thereafter put forward to substantiate the Company''s defence in the affidavit used in the Company proceedings. The petitioner filed its written statement in the suit and delivered a counter-claim therein, seeking a decree for the same amount which it claimed in the company petition. The learned Single Judge was of the view that the Company''s defence was bogus as it was not supported by any document. The winding up petition was admitted, which the Company appealed.

20. Upon such facts, the Appellate Court recorded the following principles before proceeding to discuss the circumstances in which a creditor''s winding up petition may be admitted:

(a) ...there is no bar either in the Companies Act or in the general body of our Civil Code 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. (Paragraph 17)

(b) ...although winding up is not a normal alternative for the realisation of debts yet it is a form of equitable execution. (Paragraph 18)

(c) It is well-settled law that a winding up petition is a perfectly proper remedy for enforcing payment of a just claim. (Paragraph 19)

(d) ...the petitioning creditor can file a winding up petition and at the same time present the counter claim the Company Court has both the power and the duty not to proceed with the winding up application until the suit has been disposed of. Similarly, the Company Court could, in appropriate cases, proceed with the winding up petition in preference with the suit and in that case, should it so think fit, restrain the parties from proceeding with the same claim or claims in the Suit Court. In short, the Company Court can stay its own proceedings which are pending before it, or, in the alternative, restrain the parties who are appearing before it from proceeding elsewhere. (Paragraph 21)

21. On the basis of the above position at law, the Appellate Court posed the question which, in part, is also the question that arises in the present proceedings. Lest the clarity of the question and the lucid expression of the thought involved in answering such question be diluted in them being reworded or paraphrased, it would be best to reproduce the same:

24. The law being this, the question before us today would be, do we stay the winding up petition, or do we restrain the parties from proceeding with the suit? In our opinion, the answer to this question, at least in our case, would be, as would also be in most of the other cases, answered by first answering the question, whether the winding up petition itself is a properly presented and a properly constituted one or not. If the Company Court is satisfied that the winding up petition should proceed, then and in that event, such satisfaction positively must arise upon the primary and pre-conditional finding of the Company Court that the nature of the debt put forward by the petitioning creditor is indisputable. Once that finding is reached it would be within the power and also the duty of the Company Court to restrain parties before it, in the very large majority of ordinary cases, from proceeding with any adjudication of that very claim, which has been found by the Company Court to be indisputable, in the Suit Court or practically before any other forum. The problem of whether to go up with the winding up application or with the suit, thus gets solved at the same time when the Company Court solves its primary and basic problem as to whether it should or should not entertain and receive the winding up application.

25. Even in the later stages of the proceeding, after it has assumed representative capacity after advertisement, the position is quite clear and there can be but only one course open. If the Company ultimately happens to get wound up and an Order to that effect is passed all suits involving the Company would automatically come within the purview of the Company Court and it might or might not grant leave u/s

446 of the Companies Act. If it has already opined about the genuine and indisputable nature of a debt owed by the Company, needless to mention, it will, almost as a matter of course, refuse to give leave to any party to proceed with a suit involving that very same indisputable claim.

26. If, on the other hand, the Company Court comes to the conclusion that the debt is not really of an indisputable nature, then again the problem, whether the winding up petition should go on or the suit should go on, does not arise. This is because in the case of a bona fide disputed debt the winding up petition itself would not be admitted and the problem of any party being restrained from proceeding with a suit would not present itself.

27. Accordingly, in our case if the winding up petition is not to be admitted both the claim of the Company and the counter-claim of the petitioning creditor will naturally be adjudicated upon by the Suit Court. On the other hand, if we come to the conclusion that the winding up petition should be admitted, some sort of Order would have to be passed by us to see to it that the Suit Court is not embarrassed by the suit being made ready or coming up for hearing before it, when the Company Court is already in seisin of the equitable execution of a debt found to be due as a result of consideration of both the claim and the counter-claim of the Company upon the petitioning creditor.

28. The all important question, therefore, is whether the debt which is the subject-matter of the winding up notice is a bona fide disputed one or not.

22. Irrespective of a suit being instituted by the Company to justify its defence or set up a counter-claim to be little the petitioner''s claim, the bona fides of the dispute raised or the counter-claim and, consequently, the merits thereof to the extent permitted by the very nature of the Company proceedings, have to be assessed.

23. The Division Bench thereafter proceeded to notice various authorities for assessing and determining the bona fides of the dispute or the counter-claim and upon opining that the case before it was a borderline case, quoted the third of the five tests formulated in Kiranmoyee''s case 1945 (49) CWN 246 and extracted in the case of Mechalec AIR 1977 SC 577. This third test requires to be stated in the original words:

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim. The plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment of Court or furnishing security.(p. 580)

24. As the judgment in Mechalec''s case (supra) was rendered in a situation of a summary decree in a suit, Their Lordships in the SRC Steels''(P.) Ltd.''s case (supra) made a distinction between the Suit Court passing a summary decree and the Company Court receiving a winding up petition. Such distinction appears at paragraphs 34 and 35 of the report:

34. Regarding furnishing of security, however, there is an extremely important distinction between the Suit Court passing a summary decree and the Company Court receiving the winding up petition. In passing a summary decree or refusing to pass it, the Court has express power under Order 37, and also usually express power given in other provisions for the passing of as summary decree, so as to allow the defendant to defend on terms. Even if such express conditions are absent, the practice of the Suit Court in passing summary decree has now become too established to be questioned, and that practice is that in some of the appropriate cases, the Court calls upon the defendant to secure the claim of the plaintiff, sometimes even wholly, before it grants leave to defend. This is a way of the Suit Court for testing the bona fides of the defendant and its intention to put up a genuine defence which will naturally delay the suit for a long time.

35. The Company Court''s position is different. A Division Bench of our Court has opined thus in the case of Dun lop India Ltd 1994 (1) CHN 409. The decision in that case is that the Company Court has no jurisdiction to call for security; it can either admit the winding up petition or not admit it. It has to come to a conclusion whether the debt is bona fide disputed or whether it is not bona fide disputed. Fine distinctions of more or less bona fide dispute or so, on the basis of which the Court calls for either full security or a large percentage of it, are not to be made by the Company Court. Security is an appropriate remedy which a plaintiff might obtain but which is not available to the petitioning creditor.

25. The distinction as to furnishing of security has been referred to in the chronology of the discussion of SRC Steel (P.) Ltd. (supra) judgment, but this aspect can wait for the moment.

26. The original question posed in paragraph 24 in the SRC Steel (P.) Ltd.''s case (supra) was expanded to include the following queries at paragraphs 41 and 44:

41. In our respectful opinion this is the final test. Does the Company have some reasonable ground? Is the Company''s defence or counter-claim, in any reasonable view of the matter, arguable?

. . .

44. The basic question accordingly is the Company''s suit a bogus suit or is there some reasonable ground, however thin, but still reasonable, on the basis of which the suit can be opined to be not really a bogus one?

27. Their Lordships concluded that the defence of the Company could not be Ruled to be not bona fide at the receiving stage of the winding up petition and held that the third test of S.R. Das, J. in the Kiranmoyee''s case 1945 (49) CWN 246 applied. Their Lordships found in favour of the Company on the assessment recorded in the following words:

47. On the basis of the above arguments, we have thought out the matter in the following way. Although this thought process is short, it has proved to be of crucial importance to us in our own minds. We had also spoken this out aloud so that we had the advantage of hearing learned Counsel on this aspect also. Our thought process is this. It is not possible for lawyers and Judges to predict, on the basis of documents and pleadings available to them, what exactly the oral evidence is going to be, when the dramatis personae in flesh and blood walk into the witness box one by one and answer question in examination and cross-examination.

48. It might be that one Lohriwalla for the Company will go into the box on behalf of the plaintiff and one Gupta will go into the box on behalf of the defendant/petitioning creditor. We might imagine Lohriwalla being cross-examined on the lack of documents. We might imagine Gupta sticking to his guns and saying that there was no commitment for any supply beyond the supplies actually made. But one is not entitled to make out the result of examination and cross-examination from out of his head. That result will only be as shall be taken down in shorthand script in one Court examination. That some oral discussion was there, it is impossible to deny. Supplies could not have started without some sort of understanding. Supplies could not have ended without some sort of communication. What these are, we do not yet know. We cannot say, on this basis, that the suit is bound to fail because the witnesses are bound to say this, this and this on behalf of the Company and that, that and that on behalf of the petitioning creditor. It would be a theoretical way of dismissing the suit. That is not reasonable.

28. Two other aspects that arise in such matters were also highlighted on behalf of the Company in the present case. The first is, where a Company had a genuine cross-claim which it had been unable to litigate, in an amount exceeding the amount of the petitioner''s debt, the Court should in the absence of special circumstances dismiss or stay the winding up petition in exercise of its discretion. The second is, that a Company may consciously hold back from pursuing a claim but be goaded into action only upon the petitioner threatening it with winding up proceedings if it did not pay the debt owed, claimed in the other direction. The two other decisions cited on behalf of the Company and referred to above are in furtherance of such propositions.

29. In Bayoi, S.A.''s case (supra), Swiss Company chartered a tanker from a Liberian Company. The owner claimed freight and diversion expenses and the charterer counter-claimed for damages on account of breach of the charter party. The disputes were submitted to arbitration and an interim final award was made in the

owner''s favour in respect of freight and the costs of obtaining the award. A statutory demand, akin to the notice required u/s 434 of our Companies Act, was made by the owner. The charterer did not dispute the debt and in the Company proceedings that ensued, sought the discretion of the Company Judge which was at large, on the ground that it had a genuine and serious counter-claim which it had been unable to litigate, in an amount exceeding the amount of the petitioner''s claim.

30. On such facts, Ward LJ concurred with Nourse LJ and discharged the winding up Order on the following reasoning:

First, Section 125 of the Insolvency Act, 1986 dealing with ''Powers of Court on hearing of petition'' gives the Court a wide discretion. Section 125(1) provides:

On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim Order, or any other Order that it thinks fit....

Like every wide discretion, this one conferred by the Act must be exercised judicially. It is not unusual, indeed it is salutary and proper, for the Court, especially this Court, on occasions to give guidance to the Judges as to how judicially they will ordinarily be expected to proceed. Consistency of approach leading to certainty in the litigation process is a virtue. Such guidance must not and cannot fetter the discretion. That was the concern of Edmund Davies LJ in the passage already cited by Nourse LJ from his judgment in Re LHF Wools Ltd. [1969] 3 All ER 882 at 891, [1970] Ch. 27 at 42, where he said:

...I am a little nervous, accordingly, about any decision which appears to lay down almost as a statement or proposition of law that discretion has to be exercised in any particular direction.

The guidance which may be given serves therefore to establish the principle by which the discretion is generally to be exercised, recognising, however, that the Rule is always subject to the exception that, in Order not to fetter the discretion, special circumstances, which the Judge should explain if his exercise of discretion is to be upheld on appeal, will always justify a departure from the Rule.

Secondly, I am satisfied that, when subjecting Re Portman Provincial Cinemas Ltd. & Re LHF Wools Ltd. to close analysis, such as Nourse LJ has subjected them to, there is authority of this Court, from which we should not depart, that the practice is not to allow the winding up where there is a genuine cross-claim except in special circumstances.

Thirdly, were the matter before me de novo, I would arrive at the same conclusion. The practice in the disputed debt case is well established. I appreciate that in that case the petition is dismissed because the petitioner cannot properly claim to be a creditor. That said, there seems to me to be little practical difference between the

disputed debt and a cross-claim which does not constitute a set-off properly so called. In this regard I am fortified by the opinion of Lord Edmund Davies in Malayan Plant (P.) Ltd. v. Moscow Narodny Bank Ltd. [1980] 2 MLJ 53 at 55, where he said:

There is no distinction in principle between a cross-claim of substance (such as in the Wools'' case) and a serious dispute regarding the indebtedness imputed against a Company, which has long been held to constitute a proper ground upon which to reject a winding up petition.

Fourthly, a winding-up Order is a draconian Order. If wrongly made, the Company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim or the cross-claim, that seems to me to require that the Court should proceed cautiously.

31. The Court of appeal compared the situation in winding up proceedings to that in the matter of granting of stay of execution and recognised the practice that a Company should not be wound up where there is a serious and genuine cross-claim save in special circumstances.

32. Section 125 of the Insolvency Act, 1986 in England is on similar lines as Section 443 of the Companies Act, 1956 which provides that on hearing a winding up petition the Court may dismiss it, with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim Order that it thinks fit, or make an Order for winding up the Company with or without costs, or any other Order that it thinks fit.

33. In the case of Wanda Modes Ltd. the Company Judge recognised that in addition to the case where the Company has been unable to litigate its counter claim as was the basis of the Bayoil decision, there could be a situation where the Company, despite there being no embargo on it to litigate its cross-claim, may choose not to do so and yet resist the winding up sought against it. Relying on the fundamental element of the principle stated in Bayoil case in the following words of Nourse LJ:

I emphasise that it (Company''s cross-claim) must be one which the Company has been unable to litigate....

It was held that the wider principle enunciated in Bayoil S.A.''s case (supra) was that a cross-claim could be a ground for dismissing a winding up petition based on an undisputed debt. The petitioner''s ground that the Company delayed before bringing proceedings against him to claim damages in respect of its cross-claim, was repelled, thus:

(33) In the circumstances I do not consider that I am bound by what Nourse LJ said to reject WML''s argument on the ground that it could have litigated its cross-claim against Mr. Montgomery but had not done so. As a matter of principle I would not myself think it right to decide against WML on that ground. I do not think that there is anything objectionable in a Company which believes that it has a claim against

another party holding back from pursuing it, but then, if the other party starts to threaten it with winding-up proceedings if it does not pay a debt owed in the other discretion, deciding that it must pursue its cross-claim after all. A decision in favour of Mr. Montgomery on this issue would have the undesirable effect of penalising a company for refraining from litigating an issue when it first could have done, and encouraging parties to litigate their possible claims sooner rather than later.

34. While the principles laid down in the two English cases cited on behalf of the Company are salutary, the tests to be applied are more appropriately found in SRC Steel (P.) Ltd.''s case (supra), which lays down that the merits of a counter-claim, even in a confession and avoidance situation, can be probed into in the Company Court deciding the matter before it. That such decision may render the Company''s suit or its counter-claim meaningless would not, ipso facto, be a deterrent in undertaking such exercise.

35. Further, the Bayoil S.A.''s case (supra) had special facts. The claim of both the owner and the charterer were before arbitrators and the arbitrators did not reject the charterer''s claim while making an interim final award on account of freight in favour of the owner. The principle laid down in Bayoil S.A.''s case (supra) accommodates the possibility of the exact opposite result if the facts so require. It is not an inflexible principle that upon a Company citing a suit having been instituted against the petitioner the Company Court has to wash its hands off the matter.

36. Again, merely because the company has desisted from initiating an action and has delayed the initiation mere of till the petitioner threatened winding up proceedings, is not, by itself, ground enough to refuse an Order in favour of the petitioning creditor, or an Order of admission. The Company Court has the authority to assess whether the seed of the Company''s counter-claim was sown before or whether it was merely a ploy to stall or frustrate the Company proceedings. In this exercise the Company Court is called upon to assess whether a somewhat less than a demurrable plaint but a somewhat more than an unmeritorious claim has been set up. The Company Court goes about to assess whether the suit is bogus and if it finds the Company''s suit and the counter-claim contained therein to be bogus - and bogus is not as hard a test as demurrable - it may proceed to read judgment in favour of the petitioner, irrespective of the consequence thereof in the Company''s suit. That the Company''s suit can be stayed or that the Company can be restrained from proceeding with it any further, are possibilities recognised in the SRC Steel (P.) Ltd.''s case (supra).

37. In the Wanda Modes Ltd.''s case (supra), the petitioner came to own a property which was let out to the Company. The tenancy agreement required the landlord to keep the exterior and the roof in good and tenantable repair and condition. The premises fell into disrepair and the landlord failed to carry out repairs. The Company tenant carried out the works and expended some 61,000 for the purpose. Upon the petitioner coming to be the owner and the Company''s landlord,

he sought a rent review and was awarded costs of ₹ 6,517.36 by the County Court. The Company failed to pay the amount and in the winding up proceedings that followed, the Company opposed it on the ground that it had cross-claimed for damages which exceeded the amount of the petitioner''s debt. Prior to the petitioner being awarded costs by the County Court in that case, the Company had commenced an action against the petitioner''s predecessor-in-title for damages and the petitioner was added as the second defendant to those proceedings subsequent to the award for costs being made in the petitioner''s action against the Company. The petitioner urged that the Company''s cross-claim was not genuine and motivated by the anticipated winding-up petition as the petitioner had been impleaded as the second defendant in the Company''s suit after the award for costs was made in favour of the petitioner.

38. While enunciating the principle that a Company''s decision to not rush to Court in support of its claim till it was made aware of impending winding up proceedings by a petitioner, should not be discouraged and the Company''s action be construed as not genuine, the basis of the counter-claim weighed with the Court. The Company claimed to have spent money that the landlord should have and which, upon the petitioner claiming to be the landlord, became the petitioner''s liability. There were arguable questions as to whether the Company was entitled to recover the expenses from the landlord or whether the petitioner as subsequent landlord was liable on account of his predecessor-in-title.

39. Nothing as serious as such questions come up while considering the basis for the Company''s counter-claim in the present proceedings. The Company was unequivocal in issuing the writing of 18-11-1997; it authorised the petitioner to incur the expenses and undertook to be liable therefore and, it consciously gave up all claim in respect of any damage to cargo or the like. The Company''s suit in this case would not be demurrable, in the sense that if the petitioners were not to resist it, the Company may well proceed to obtain judgment thereon. But in the event the petitioner resisted the suit, on the strength of the writing of 18-11-1997 issued to it by the Company, the claim is bound to fail. It would not thus be prudent to keep the petitioner waiting till kingdom come or till the Company''s suit is disposed of, whichever is earlier.

40. Having thus found the counter-claim of the Company and its suit in furtherance thereof to be, for want of a more generous word, bogus, it is now for the other part of the exercise to be undertaken.

41. On the nature of the Order that can be passed in a creditor''s application for winding up of the Company, the petitioner has relied on the decisions reported at Conart Engineers Ltd. Vs. Laffans Petrochemicals Ltd, , In Re: Bharat Vegetable Products Ltd., and an unreported judgment of the same Division Bench that rendered judgment in the SRC Steel (P.) Ltd.''s case (supra) in ACO No of 2004, Dhariwal Steel (P.) Ltd. v. Bengal Rolling Shutters & Engg. Works CP No. 219 of 2003.

42. In the first case a learned Single Judge of the Gujarat High Court has summarised the Orders which may be passed in the following words:

(1) After considering the material on record, if the Court comes to the conclusion that the defence raised by the company is not only bona fide, but the defence is reeking of mala fides or the company''s conduct leading to the dispute (in respect of which the Company''s defence is found to be not bona fide) was dishonest, the Court would admit the petition and pass an Order for advertisement;

(2) Where the Court comes to the conclusion that the defence is not bona fide (as distinguished from the conclusion that the defence is mala fide), the court may give the company an opportunity to pay the debt to the petitioner within the stipulated time-limit. If the debt is not paid, the Court would ordinarily admit the petition, unless a strong case is made out for not admitting the petition. The Court may in its discretion even pass a conditional Order of admission without an Order for advertisement while giving the finding that the company''s defence is not bona fide;

(3) Where the Court gives only a prima facie or tentative finding that the Company''s defence is not bona fide, before admitting and advertising the petition the Court must also give a prima facie or tentative finding that the company is commercially insolvent, that is, the company is unable to pay its debts as going concern;

(4) Where the Court gives a finding that the defence raised by the company is a bona fide one, non-payment of such debt cannot amount to neglect to pay the debt as contemplated by Section 434(1)(a). Hence, the Court would dismiss the petition without prejudice to the petitioner''s right to file or to continue with a suit against the company for recovery of its debt. In such a case, the Company Court may give only a prima facie, i.e., tentative finding because the controversy is to be finally decided in the civil suit;

(5) If the case falls in the grey area, that is the Company''s defence is neither found to be substantial nor a moonshine and therefore, the Court is not in a position to give a finding one way or the other whether the defence is bona fide or not - even tentatively, the Court may require the company to deposit the claim amount or a part thereof in the Court and require the petitioner to prove its claim before the civil Court to which the amount deposited will be transferred or the Court may require the Company to give security for the amount claimed.

In the light of the aforesaid principles, this Court proceeds to examine the factual controversy between the parties. p. 402)

43. In a creditor''s winding up petition, the petitioner does not seek a money decree but the Court, in exercise of a discretion undeniably sanctioned by the Companies Act, may make such Order or impose such condition as recognised by Section 443. In the procedure that is followed for decades by this Court, and is explained in detail in the Bharat Vegetable Products Ltd.''s case {supra), there is a receiving stage and a

final stage. A prima facie view is taken at the receiving stage when a petitioner, upon being tentatively adjudged to be a creditor, is entitled to his petition being admitted ex debito justitiae. This does not imply that merely because the petitioner is found, at the receiving stage, to be a creditor, his proceeding to have the company wound up at the final stage is a formality. Even a petitioner who is acknowledged by a company to be a creditor for an ascertained sum, may be resisted by the company from obtaining an Order of winding up. That the debt is undisputed or indisputable is not the only consideration at the final stage.

44. In the practice that we follow in this Court, there is room for a conditional Order of admission to be passed. Though the adjudication of indebtedness and the quantum thereof is tentative at the admission stage, it is mere firm and less tentative as to the indebtedness and quantum of debt than what a prima facie view would connote. In principle there is no bar to the company demonstrating at the final stage that the prima facie view earlier taken ought to be varied on the strength of further material that the company may produce. The company is afforded a chance on the post-advertisement stage to use a second affidavit to the same petition for winding up. However, inasmuch as there is only an Order of admission which is passed at the first stage, the exercise of discretion as to whether the company should be wound up notwithstanding its palpable indebtedness, is left for the second stage.

45. The admission of a winding up petition is completed in two phases; the first is the Order of admission itself to facilitate the passage of the winding up petition to the next stage; and, the second is the publication of advertisements to make it a representative action. It is in between the two that a conditional Order operates. In exercise of the Court''s discretion, the Court may admit the petition and yet delay the publication of advertisement and thereby afford the company to pay off what the Court finds as being due to the petitioner before publication is effected. Ordinary, the Court does not direct payment or direct security to be furnished unless invited by the company but provides that in the event the sum found to be due is not paid or the security not furnished within the time stipulated, advertisements would follow. The company may comply with the condition and in so doing accepts the Court''s prima facie assessment of the company''s indebtedness and the quantum thereof. Equally, the Company may not accept the condition, suffer the advertisement and resist the winding up petition at the final stage. Whether the company resists the Order of winding up upon producing further material in support of its defence to the claim or by citing other considerations that would weigh with Court despite the company''s indisputable indebtedness beyond the floor limit set in Section 434 of the Act, is for the Company to choose.

46. The Gujarat case and, in particular, the fifth test recognised therein cannot be accepted in view of the binding effect of Division Bench judgments of this Court on the Company Judge. The fifth test referred to in Gujarat case was the basis of a

judgment rendered by the Ofu Lynx Ltd. Vs. Simon Carves India Ltd., but that has been overRuled by a Division Bench decision in Dunlop India Ltd. v. Anamika Udyog 1994 (1) CHN 409 referred to in the SRC Steel Ltd.''s case (supra). Relying on the five tests, in the old Calcutta judgment and accepted by the Supreme Court in the case of Mechalec (supra) it was held that in case the defendant in a suit under Order 37 of the CPC is unable to disclose facts spelling out a defence, even then the Court might allow the trial of the suit, thinking in its mercy and surely in its discretion, that there yet might arise a contingency whereby the claim of the plaintiff might not wholly succeed and the Court might Order furnishing of security. The test as to furnishing security, according to Dunlop India Ltd.''s case (supra) does not require the strength of a defence at all. It has been held if the affidavit shows that there is a defence, however thin, which is arguable and is reasonable to go to trial, then unconditional leave to defend must follow. An Order for payment of security can be made, as was laid down in that case, only when the defendant shows no issue whereby he might be able to resist the claim at the trial. But still the Court entertains some doubt, and thus feels some mercy, and desists from passing a decree there and then but passes instead of an Order for security. The Ofu Lynx dictum of testing the strength of the defence even when the Company Court finds that there is an issue to go to trial, was found to be unacceptable. This was the Ofu Lynx test that was over Ruled: "If in particular cases the Court is in some doubt as to whether the disputes were bona fide or not and is not in a position to come to a definite conclusion that the disputes are mala fide and manufactured only to create a defence to the winding up petition, the Court may stay the winding up proceeding and relegate the parties to an action on terms to security or otherwise".

47. This is the same test, in different words, which has been laid down as the fifth criterion in the Gujarat case and, therefore, cannot be accepted. But the related question is whether upon the Ofu Lynx test being found inappropriate the Company Court is precluded from directing security to be furnished. Paragraphs 34 and 35 of the SRC Steel (P.) Ltd.''s case (supra) would denude the Company Court of its authority direct security. But then, and in all humility, as the Division Bench recognised in the immediate lines following the observation that the Company Court has no jurisdiction to call for a security, such question as to Ordering any security did not arise in that case. Further, and again with humility, the conclusion in paragraph 35 that security is not a remedy available to the petitioning creditor was based on a reading of the Dunlop India Ltd. ''s case (supra) which, with respect, does not lay down that the Company Court cannot direct security. The appeal that fell for consideration in the Dunlop India Ltd''s case (supra) arose from a receiving Order in a winding up petition where the petition had been directed to be advertised unless security was furnished by the company. Paragraphs 19 and 23 of the Appellate Court judgment expressly recognised the Company Court''s authority to direct security:

19. If anything, the Company Court should be even slower to Order security in ''bad'' cases, because it is not a debt collecting Court.

. . .

23. We venture to say, again with respect, that in a company matter security is to be granted or Ordered not for calling upon the company to show its bona fides or solvency. On the other hand, security is to be Ordered when the Company is unable to disclose a defence that might be ultimately successful and yet the Court is not willing, having some contingency in its mind, immediately to pass a receiving Order in case of non-payment of the full debt claimed....

48. Fortunately, it is not necessary to refer to the doctrine of precedents or to the authorities that lay down that the binding effect of an earlier judgment, is confined to the matters which were in issue and the judgments, even of superior fora, are not to be read as enactments insofar as they contain observations on matters other than those in issue. That an Order for security may be made in a creditor''s winding up petition has been recognised by the Division Bench in the unreported judgment cited on behalf of the petitioner, passed a month or so after the SRC Steel (P.) Ltd.''s case (supra) judgment. The following words in the unreported decision can be said to recognise the Company Court''s jurisdiction to direct security:

However, if we apply the decisions as to when a summary decree is to be passed, we find that Mr. Sen''s clients (the petitioners) are certainly entitled to succeed. The case of the company is moonshine and unacceptable. It tried to wipe off its admitted debt by alleged sales of goods which are totally fictitious. Even in these circumstances, the Court in its mercy and its discretion might permit full security to be furnished and thereupon relegate the petitioning creditor to a suit, treating the security as security in the suit.... (At page 14 of the authenticated copy of the dictated Order).

The discussion as to the Company Court''s jurisdiction to offer the Company a chance to secure the claim is in the light of the Order that is proposed.

49. In its affidavit-in-reply, the petitioner alleged that the Company had not taken any step to prosecute its suit. The parties did not indicate, in course of submission, whether the petitioner had filed its written statement to contest such suit. It is also unclear as to whether the writ of summons has been served or, if not served yet, whether it can be served any further. If the suit can proceed no further for want of diligence on the plaintiff company''s part, that is the end of the matter. But if the suit does proceed, since no written statement has yet been filed, the defendant may choose not to file a written statement and suffer the consequences or may file a written statement where it may itself negate the reasons recorded in this Order for holding, albeit prima facie, that the company''s claim in the suit was bogus.

50. The petitioner''s claim is so free from doubt that it would be harsh to provide for security and relegate the petitioner''s claim to suit. Similarly, as the Company''s suit is not demurrable, it would not be proper to restrain the Company from proceeding with the suit, if it is otherwise entitled, though the authority of the Company Court for making such Order is found in the SRC Steel (P.) Ltd.''s case (supra). The Company is afforded a chance to secure the entirety of the petitioner''s claim on the ground that it is unclear today as to the stand the petitioner may take, if at all, in the Company''s suit. There is another reason for which the Company may proceed, if otherwise permissible, with its suit and it cannot be restrained at this stage from so doing. The urge to rush and restrain the company from pursuing its action fanned by the finding that its claim is bogus, is tempered by the consciousness of the bounds of authority at the receiving stage of a creditor''s winding up petition. It would ordinarily be only at the final stage of the proceedings, upon the Company having exhausted its further chance to discrediting the petitioner''s claim, that the Company Court may restrain the Company from proceeding with its suit. That a prima facie view is taken at the receiving stage, would imply this.

51. The company petition is, thus admitted for the petitioner''s principal claim of Rs. 7,34,526.40 (being the Indian equivalent at the rate prevailing on 24-12-1997 as claimed in the statutory notice) together with interest at the rate of nine per cent per annum from 24-12-1997. The petition will be advertised once in" The Statesman" and once in "Sanmarg". Publication in the Official Gazette is dispensed with. The advertisements should indicate that the matter would be returnable on the next available Court day four weeks after the date of publication.

52. In the event the Company furnishes security by way of bank fixed deposit receipts in the name of the Registrar, Original Side, for the entire sum, inclusive of interest, and together with a margin of two per cent on such sum to provide for the Registrar''s commission and expenses, if any, within a period of three weeks from date, the petition need not be advertised. In case such security is furnished, the entire proceeds there-from, less the two per cent margin money and the interest accrued on such two per cent will be made over by the Registrar to the petitioner in the event no decree is passed in favour of the company in C.S. No. 653 of 1999. In such case the Company will be entitled to refund of the margin money and the interest thereon after deduction of the Registrar''s commission and other charges, if any. In the event the suit is decreed in favour of the Company, the Company would be entitled to recover such amount from the fixed deposit less the Registrar''s commission and expenses, if any, as the value of the decree would permit it.