IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Company Petition No. 106 of 2012 (O&M)
Date of decision: January 27, 2015

**The Bank of New York Mellon, London Branch**
**.. Petitioner**

**vs.**

**JCT Limited**
**.. Respondent**

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL

Argued by: Mr. Arun Kathpalia, Mr. Rohit Khanna,
Mr. Manu Krishnan and Mr. Nikhil Prikshit, Advocates for the petitioner.

Mr. U. K.Chaudhary, Senior Advocate with
Mr. Yashwant Mathur, Mr. Deepak Suri,
Mr. Himanshu Vij, Advocates for
the respondent- JCT Limited.

Mr. Anand Chhibbar, Senior Advocate with
Mr. Vijay Sharma, Ms. Harpriya Khanika and
Mr. Lalit Thakur, Advocate for Consortium of Banks.

Mr. A.S. Narang, Advocate for Workers' Union of the respondent-company.

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Rajesh Bindal J.

1. The present petition has been filed under Sections 433 (e), 434 and 439 of the Companies Act, 1956 (for short, 'the 1956 Act') for winding up of the respondent-company.

2. The petitioner herein is London Branch of a bank-corporation registered under the laws of the State of New York in the United States of America engaged, *inter-alia*, in the business of providing trustee, agency and other related securities services. The respondent-company is having its registered office in District Hoshiarpur (Punjab).

3. Briefly, the pleaded facts are that on 31.3.2006, the respondent-company issued US$ 30 millions 2.5% convertible bonds due on 8.4.2011. Interest @ 2.5% per annum was payable semi-annually on 7th of April and October each year. As per the terms of allotment, unless converted, redeemed, re-purchased or cancelled before the due date, the respondent-company was to redeem each bond at US$ 120.075% of the principal amount. The maturity date was 8.4.2011. On 7.4.2006, the respondent-company executed a Trust Deed with the petitioner as a trustee for holders of the bonds. As on 24.9.2012, the respondent-company was indebted to the bond holders to the tune of US$ 33,283,286.42 and despite notice for winding up, the amount was not cleared, the present winding up petition was filed.

4. Before dealing with the preliminary objection raised by the respondent and also the issue on merits, it would be appropriate to deal with two applications filed by Consortium of Banks and the workers employed with respondent-company for being impleaded as party to the petition.

**Applications Under Order 1 Rule 10 CPC by Consortium of Banks and Workers' Union**

5. In the application filed by Allahabad Bank representing the Consortium of Banks (hereinafter referred to as 'the applicant'), who advanced loans to the respondent-company, for being impleaded as a respondent in the petition, it is seeking permission of this court to object to the admission of the winding up petition. Mr. Anand Chhibbar, learned senior counsel for the applicant submitted that Section 557 of the 1956 Act has to be read with Sections 433, 434 and 439 of the said Act, as winding up proceedings are not between two parties, rather, once the order is passed, it is applicable in *rem*. It is not that only the person who is filing the petition or the respondent-company is affected, rather, the other creditors, the employees and many persons connected with the affairs of the company are also affected. The admission notice is published on statutory form-48 in terms of Rule 96 of the Company (Court) Rules (for short, 'the Rules'). The application was required to be filed as vide order dated 19.9.2013, this court restrained the bank from cancelling the CDR package, in terms of which the bank had agreed to advance more loan. Accordingly, further charge was

to be created on the assets of the company. Debt restructuring was approved on 21.9.2012, whereas the winding up petition was filed on 29.9.2012 and listed before the court on 3.10.2012. The order restraining creation of charge by the company on its assets was passed on 17.10.2012. The applicant has an exposure of ₹ 352.17 crores as loan towards the company. In fact, the order passed by this court on 19.9.2013, vide which valuation of assets of the company was directed, shows that applicant was accepted as a party to the petition. There are other creditors to the extent of 95% of the loans advanced to the respondent-company, who are before the court, objecting to the winding up petition, as their interest will be adversely affected.

6. Learned counsel further submitted that the provisions of the 1956 Act and the Rules should be interpreted in the manner that any person affected or going to be affected with the admission of the petition has a right to be heard even before the petition is admitted, as publication of citation of admission of petition in newspapers and the official gazettee has large scale ramifications. In support of the arguments, reliance has been placed upon National Textile Workers' Union and others v. P. R. Ramakrishnan and others, (1983) 1 SCC 228; In Re: Umang Boards Pvt. Ltd. (M/s), 2011 (3) ILR (Raj.) 245 and Bharat Petroleum Corporation Ltd. v. National Organic Chemical Industries Ltd. and State Bank of India, (2004) 120 Company Cases 333 (Bom). It was further submitted that judgment of this Court in Chemical Enterprises and another v. Kalpanalok Ltd. and others, (1984) 55 Company Cases 552 should be ignored in view of later judgment of Division Bench of Rajasthan High Court in Re: Umang Boards Pvt. Ltd. (M/s) (supra) and the same should not be considered a good law.

7. On the issue of prejudice being caused to the applicant, though learned counsel for the applicant submitted that the applicant being a secured creditor can take action against the company under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the 2002 Act'), but still considering the fact that the company is serving the debt properly and as a banker, the applicant has the right to object to the winding up of such a company. On

account of recession in the market and finding that net worth of the company and the value of assets was more than the liabilities, debt restructuring was allowed and further loan was advanced. The applicant has full confidence in the company. He did not dispute the fact that in case the company is wound up, the secured creditors will have priority to receive their amount against the mortgaged properties as against the unsecured creditors. He further submitted that there are many fatal consequences in case petition against a running unit is admitted. Once a creditor can be heard after admission of the petition, there is no bar in affording him hearing before admission. The result of admission of a petition against the running unit will have adverse impact on the goodwill of the company. The shares of a company may fall and the business is likely to be affected. The same will have effect on the exposure of the applicant to the respondent-company.

8. He further submitted that in any case, the stay granted by this court against the company for creating any charge on the properties of the company deserves to be vacated as the banks have already advanced further loan to the respondent-company as per CDR package.

9. It was further submitted that the applicant had seen the balance sheet of the company and noticing that the petitioner's name is not there in the balance sheet as a creditor, had agreed for debt restructuring.

10. In the application filed by the workers' union on behalf of the workers of the respondent-company for being impleaded as respondents No. 2 and 3 in the petition (hereinafter referred to as 'the applicants'), Mr. A. S. Narang, learned counsel for the applicants submitted that there are more than 6,000 employees working in the establishment, who are regularly being paid their salaries. Their families are dependent on the company. In case, it is wound up, they will loose their livelihood. They will even loose shelter provided by the company to live in. All the workers are making strenuous efforts to bring the company out of debt and in fact it has started generating cash profits, It would not be in the interest of the workmen to even admit the petition as with the publication of citation, their interest will be adversely affected. In support, reliance was placed upon the judgment of Hon'ble the

Supreme Court in National Textile Workers' Union's case (supra).

11. In response to the aforesaid contentions raised by learned counsel for the applicant, learned counsel for the non-applicant/petitioner submitted that it is totally misconceived to contend that a Single Bench judgment of this court in Chemical Enterprises and another's case (supra) is not a good law in view of the Division Bench judgment of Rajasthan High Court in Re: Umang Boards Pvt. Ltd. (M/s)'s case (supra). In terms of law of precedence, a court is bound by its own judgment and the judgment of Hon'ble the Supreme Court. The judgment of other High Courts, even of larger benches, may have persuasive value. The judgment of the same High Court deserves to be followed by the co-ordinate Bench. In case of dis-agreement, the matter is required to be referred to a larger Bench. Unless that is reversed or over-ruled, merely because there is a contrary view of other High Court, the same cannot be ignored. The judgment of Delhi High Court in Bipla Chemical Industries v. Shree Keshariya Investment Ltd., (1977) 47 Company Cases 211 was followed by this court in Chemical Enterprises and another's case (supra).

12. Further contention raised by learned counssel for the non-applicant-petitioner is that in view of the judgments of this Court in Chemical Enterprises and another's case (supra) and Delhi High Court in Bipla Chemical Industries' case (supra), a secured creditor does not have any right of hearing before admission of the petition.

13. Learned counsel further submitted that in National Textile Workers' Union's case (supra), Hon'ble the Supreme Court carved out an exception for granting right of hearing to the workmen before admission of the petition in exceptional circumstances. It was in terms of various interim orders passed therein where their salaries had been withheld and they were starving. The principles laid down therein cannot be extended to the creditors, much less the secured creditors as the applicant is. Otherwise, it has been specifically mentioned in the aforesaid judgment that Section 447 of the 1956 Act along with some other sections come into operation only after the petition is admitted. The judgment of Rajasthan High Court in In Re: Umang Boards Pvt. Ltd. (M/s) (supra), which learned counsel for the

applicant has relied upon, in fact goes against him. In that case, an application filed to object admission of the petition was dismissed by the Company Judge. The order was upheld in appeal despite the fact that judgment of Hon'ble the Supreme Court in National Textile Workers' Union's case (supra) was referred to in detail. The judgment of Bombay High Court in Bharat Petroleum Corporation Ltd.'s case (supra) is *per incuriam,* as it has been decided on a wrong premise and misreading the judgment of Hon'ble Supreme Court in National Textile Workers' Union's case (supra). It was further submitted that the 1956 Act is a complete code in itself. The entire procedure has been laid down with reference to filing of a winding up petition and the process to be followed thereafter at different stages.

14. It was further submitted that Rule 96 of the Rules provides that it is only the company, which is to be heard at the stage of admission of the petition. The role of all other affected persons come thereafter. The advertisement of admission of petition on statutory form No. 48 is issued subsequently, which provides for opportunity of hearing to any person, who wants to support or object to the admission of the petition. The same is with reference to Rule 34 of the Rules. Rule 103 of the Rules provides for filing of affidavit in support of a petition or objecting to the winding up. This process is after the petition has been admitted.

15. In fact, the applicant wants to participate in the process without joining in the petition. In case, it wishes to do so, it is welcome and then it has to forego the securities and join the petition as an unsecured creditor, otherwise the interest of the applicant is safe as the entire loan advanced is secured against the assets. It can very well take action under the 2002 Act. Unless interest of the applicant is affected, he cannot even file affidavit objecting to or supporting the petition after it is admitted, much less at the stage even before admission of the petition. In fact, the applicant is trying to play smart. It is advancing more loan and seeking to create further charge on the assets of the company, as a result of which chances of payment of unsecured amount to the bondholders will be further reduced. Judgment of Hon'ble the Supreme Court in Allahabad Bank v. Canara Bank and another,

(2000) 4 SCC 406 was referred to.

16. While referring to the aforesaid judgment, learned counsel further submitted that there are two options available with the secured creditors, i.e., either to submit to the jurisdiction of the Company Court or to remain outside. Under these two different options, it has different remedies, rights and liabilities. The applicant is required to choose one and not to sail in two boats.

17. Learned counsel further submitted that the applicant in the present case is hand in glove with the respondent-company. The petition was filed in this court on 29.9.2012. This court granted interim stay against the respondent-company for creating further charge on its assets on 17.10.2012. The order was appealed against by the company vide Company Appeal No. 2 of 2013, wherein vide order dated 17.1.2013, operation of the order passed by the learned Company Judge was stayed. The order passed by the Division Bench of this court was challenged by the petitioner before Hon'ble the Supreme Court, where the same was set aside. It clearly shows that the applicant had full knowledge about the pendency of the present petition before this court, hence, it cannot be claimed that any prejudice is going to be caused to it. Even in Debt re-structuring agreement entered into between the applicant and the respondent-company on 18.1.2013, immediately after passing of the stay order by Division Bench on 17.1.2013, pendency of the winding up proceedings before this court has been specifically noticed.

18. Learned counsel further argued that the issue regarding CDR was sought to be raised by the respondent before Hon'ble the Supreme Court. The same was rejected. Even the review was also dismissed. The 1956 Act and the Rules framed thereunder are complete code. They do not provide for impleadment of a party in a winding up petition. All what has been envisaged is filing of objection under Rule 3 of the Rules. Once a manner has been provided for doing a thing in the statute or the Rules, all other procedures are barred. In the application filed by the bank, the prayer is for impleadment as a respondent. The language of the Rules and the order, in which these have been provided in the Rules, show that right to

file objection has been conferred on any of the affected party only after admission of the petition. Prior to that, it is only the company, which is to be heard. Rule 139 of the Rules, in which a reference has been made to Section 457 of the 1956 Act, is applicable only after admission of the petition and it is only thereafter a list of creditors is to be prepared and a meeting is called. Prior to that, meeting of the creditors is not possible. After the aforesaid meeting, as envisaged under the 1956 Act and the Rules, Sections 559 and 560 of the 1956 Act which follow Section 557 of the 1956 Act, provide for complete burial of the company. Though the applicant is seeking to claim that it is exposing the claim of the creditors, but is only one set of them.

19. It was further submitted that the interim order passed by this court on 19.9.2013 regarding valuation of assets of the company cannot be termed to be an order for deemed impleadment of the applicant as before passing of the aforesaid order, the non-applicant had already filed reply to the application and objected to the impleadment of the applicant. The order was passed with reference to settlement of claims with the petitioner. It has specifically been noticed therein and the same is without prejudice, hence, no effect on the rights of the parties.

20. In response to the contentions raised by learned counsel for the applicants, learned counsel for the non-applicant/petitioner submitted that such a plea has already been raised in arguments on behalf of the respondent-company. In fact, both the applicants have been made to file applications before this court by the respondent-company. They are all hand in glove and do not deserve to be heard before admission of the petition. However, after admission, whosoever has a right to be heard can either support or oppose the winding up order.

21. In response to the contentions raised by learned counsel for the non-applicant/petitioner, learned counsel for the applicant-Consortium of Banks submitted that despite there being no provision under the 1956 Act, still Hon'ble the Supreme Court provided for a right of hearing to the workmen before admission of the winding up petition as they were to be adversely affected. On the same analogy, the applicant is seeking

impleadment as the applicant will be prejudically affected. The non-applicant has every right to recover the amount of debt, if due, by filing a civil suit or availing any appropriate remedy in terms of the provisions of the trust deed. The debt has been re-structured in terms of the RBI guide-lines. The object is to let the company function and not to close if it can come out with support. In the case in hand, the attitude of the petitioner shows that it is seeking a pound of flesh, which is not in the interest of any of the parties.

22. Heard learned counsel for the parties on the issue as to whether the applicant representing the secured creditors and the workers' union representing the workmen are entitled to be heard before admission of the winding up petition.

23. In National Textile Workers' Union's case (supra), a Constitution Bench of Hon'ble the Supreme Court by majority opinion of three Hon'ble Judges, opined that workers have a right to be heard before and after admission of winding up petition, as their rights are adversely affected. It was on the principle of *audi alteram partem.* The only issue under consideration before Hon'ble the Supreme Court was relationship of the workmen vis-a-vis the company. In the aforesaid case, application was filed by the workers' union for being impleaded as respondent in the petition. The same was opposed by the petitioner therein on the plea that trade union was neither a creditor nor share holder, hence, no locus standi to be impleaded as respondent in the petition. Finding that any order passed by the Company Court admitting the petition or winding up of the company would adversely affect the workers, they will have a right to be heard before passing of such an order as the same would be violative of the basic principles of fair procedure unless there is express provision in the Act, which forbids the workers from hearing at the time of winding up of the petition. It was opined that a company is not property of the share holders only. Today, it is treated as a living, vital and dynamic, social organism with firm and deep rooted affiliations with the rest of the community in which it functions. Capital introduced by the share holders is one of the factors that contributes to production of national wealth. Another equal factor is labour.

Then there are financial institutions and investors who provide funds required for production. The important role of the consumer and other members of the community is also not less important. Relevant paragraphs thereof are extracted below:

> "It would be contrary to every recognised principle of fair judicial procedure and violative of the rule of audi alteram partem which constitutes one of the basic principles of natural justice, to deny to the workmen the right to be heard before an order is made by the Company Judge prejudicially affecting their interest.
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> The objection as to the right of the workers' unions to be heard in the winding up proceedings is untenable as the applications were made by the Unions on behalf of the workmen represented by them and though made in the name of the Unions, the applications were in reality and substance applications of the workmen who were members of each respective Union.
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> The workers are entitled to appear at the hearing of the winding up petition whether to support or to oppose it so long as no winding up order is made by the court. The workers have a locus to appear and be heard in the winding up petition both before the winding up petition is admitted and an order for advertisement is made as also after the admission and advertisement of the winding up petition until an order is made for winding up the company. If the winding up order is made and the workers are aggrieved by it, they would also be entitled to prefer an appeal and contend in the appeal that no winding up order should have been made by the Company Judge. But when a winding up order is made and it has become final, the workers ordinarily would not have any right to participate in any proceedings in the course of winding up the company though there may be rare cases where in a proceeding in the

course of winding up, the interest of the workers may be involved and in such a case it may be possible to contend that the workers must be heard before an order is made by the court. Even when an application for appointment of a Provisional Liquidator is made by the petitioner in a winding up petition, the workers would have a right to be heard if they apply for being heard. Neither the petitioner nor the court would be under any obligation to give notice of such application to the workers. The circumstance that the workers were not so heard would not have the effect of vitiating the order appointing Provisional Liquidator, for it would be open to the workers to apply to the court for vacating that order and it would be for the court after considering the material produced before it and hearing the parties to decide whether that order should be vacated or not.

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A company is no more regarded as the property of the shareholders, as a legal device adopted by shareholders for carrying on trade or business as proprietors. A company is now considered as a species of social organisation with a life and dynamics of its own and having a firm and deep-rooted affiliation with and duties and responsibility towards the contemporary society. Therefore, maximisation of social welfare should be the legitimate goal of a company. The socio-economic objectives, set out in the Preamble, Articles 23, 24 and Part IV- especially Articles 43-A of the Constitution, clearly mandate that the management of the enterprise should not be left entirely in the hands of the suppliers of capital but the workers, who supply labour, being equally, if not more, interested in the enterprise, should also be entitled to participate in it. The workers should have voice or a right to be heard in the determination of the question whether the enterprise should continue to run or be shut down under an order of the court."

In Bharat Petroleum Corporation Ltd.'s case (supra),

application filed by consortium of bank for being heard before the petition is admitted was allowed while referring to Section 557 of the 1956 Act and opining that it had wide application considering the plain language which use the words “relating to winding up of company”. The same does not prescribe a stage. The judgment of Delhi High Court in Bipla Chemical Industries' case (supra) was distinguished.

24. In Re: Umang Boards Pvt. Ltd. (M/s)'s case (supra), in appeal before a Division Bench of Rajasthan High Court, the order impugned was passed by the learned Company Judge dismissing the application filed before the Company Judge opposing admission of the petition. The application seeking opportunity of hearing before admission of the petition in the aforesaid judgment was filed on the strength of agreement to purchase shares entered into by the applicant with JME Employees Credit & Thrift Society Ltd. An application filed by the applicant therein with the State Government for transfer of shares was declined. The cheque issued by the workers' union for refund of the amount paid under the agreement was not accepted by the applicant. It was further not disputed therein that arbitration proceedings pertaining to the said agreement were pending before the court. It was under these circumstances and finding that the applicant being not a creditor or contributory is not entitled to be heard at the stage of admission of the petition. However, the judgment of Bombay High Court in Bharat Petroleum Corporation Ltd.'s case (supra), where the creditor was given a right to be heard before admission was accepted.

25. In Bipla Chemical Industries' case (supra), Delhi High Court rejected the application filed by the creditors to oppose winding up petition at admission stage opining that their interest was not affected or prejudiced merely by an order of admission. They will have full opportunity to be heard after the petition is admitted. The applicants may not be all of the creditors before the court to form an opinion whether petition should be admitted or not.

26. In Chemical Enterprises and another's case (supra), this court, while referring to Form-9, opined that at the hearing of the petition advertised would mean the date/dates on which the petition comes up for

hearing before the court after it is advertised according to the Rules. Reliance was placed upon a judgment of Hon'ble the Supreme Court in National Conduits (P) Ltd. v. S. S. Arora, (1967) 37 Company Cases 786 (SC) and Delhi High Court in Bipla Chemical Industries' case (supra), wherein it was opined that creditors do not have any right of hearing before admission of a winding up petition.

27. The primary ground on which the Consortium of Banks has sought hearing before admission of the petition is, while placing reliance upon Section 557 of the 1956 Act, a judgment of Hon'ble the Supreme Court in National Textile Workers Union's case (supra) and Rajasthan High Court in Re: Umang Boards Pvt. Ltd. (M/s)'s case (supra). The issue under consideration before Hon'ble the Supreme Court in National Textile Workers Union's case (supra) was regarding right of hearing to the workmen before and after admission of the petition. Considering the special status of the workmen in an industrial unit, Hon'ble the Supreme Court while taking into consideration the principles of *audi alteram partem*, opined that the workers should be offered opportunity even before admission of the petition as they may have some proposal for revival of the company or otherwise. In that case, Hon'ble the Supreme Court opined that the object of winding up is to realise assets of the company and pay the amount so realised in terms of the priority as fixed in the 1956 Act. There are many provisions in the 1956 Act, which speak of winding up of company being carried on with due regard to the interest of creditors and the contributories or after consultation with them. The provisions of Sections 454, 456, 478, 517, 542, 543, 549, 556, 557 and 560 of the 1956 Act were referred to while opining that these provisions apply at a stage after the winding up order is made by the court or in a case of voluntary winding up. At that stage, what remains to be done is only to wind up the company, pay the creditors and if there is any surplus, distribute the same among the share-holders. It was opined that the aforesaid provisions do not deal with a situation prior to making of the winding up order, when the question is whether the company should be ordered to be wound up or not.

28. The procedure to be followed in the case of winding up petition is provided in Part-III of the Rules. Rule 95 of the Rules provides that a petition for winding up shall be in Form No. 45, 46 or 47, as the case may be. On filing, it shall be posted before the Judge in Chamber for admission and for fixing the date of hearing and for direction as to the advertisement to be published or as he may think fit, direct notice to be given to the company before directing for advertisement of the petition (Rule 96). Rule 99 of the Rules provides for advertisement of the petition in the manner provided for under Rule 24 of the Rules and on Form No. 48. Rule 24 of the Rules provides that a clear 14 days' notice has to be there of the date of hearing from the date of publication. The publication has to be in two newspapers, one in English and one in regional language and also in the official gazettee. The contents of the notice are to be published on Form -48 to give an opportunity to the creditors, contributories or other persons desirous of supporting or opposing the petition to be heard on the date so fixed. Section 557 of the 1956 Act does not have any application at any stage before the petition is advertised as no creditor otherwise will have knowledge of filing of a winding up petition against a company. Initially the notice is issued only to the company, that too, at the discretion of the court with a view to find out as to whether prima facie case is made out for admission of the petition. As per the stand of the applicant-Consortium of Banks, they are the secured creditors. Even if the company is ultimately wound up, they have priority for payment of their debt and as such will not be prejudiced at this stage before admission of the petition. After it is admitted, all the affected persons will have a right to either support or object to the winding up.

29. Further considering the earlier judgment of this Court in Chemical Enterprises and another's case (supra), which is still holding the field, it would not be appropriate for this court to take a view different than that merely because Bombay High Court has taken a different view.

30. For the reasons mentioned above, in my opinion, the application filed by Consortium of Banks for being impleaded as respondent in the petition deserves to be rejected as it does not have any

right of hearing before admission of the petition. Ordered accordingly.

31. As far as the application filed by the applicants-workers' union of the company is concerned, in view of the judgment of Hon'ble the Supreme Court in National Textile Workers' Union's case (supra), they have a right to be heard before winding up petition is admitted and an order for its advertisement is passed. They have been conferred this right even after the petition is admitted. The reason on account of which learned counsel for the petitioner sought to distinguish the judgment in the case in hand is not tenable in law. The closure of a manufacturing unit certainly affects the livelihood of workers. In the present case, it is claimed that there are more than 6,000 workers/ employees working in the company, many of whom have been provided residential quarters as well, hence, the application filed by the workers for offering them opportunity of hearing is accepted.

32. One of the preliminary objection raised by counsel for the respondent-company was regarding the power of attorney annexed with the petition to be inadmissible as the same was not stamped in terms of the provisions of the Indian Stamp Act. The issue was considered and vide order dated 19.1.2015, passed by this court, the preliminary objection was rejected while opining as under:

> "Heard learned counsel for the parties on the issue of power of attorney being not stamped and perused the judgments referred to by them.
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> Hon'ble the Supreme Court in Malasian Airlines Systems, BHD's case (supra) considered the issue regarding impounding of power of attorney executed outside India and presented in India for use in proceedings before Hon'ble the Supreme Court. The objection was raised by the respondent therein that power of attorney being not in order and the stamp duty having not been paid, as a consequence thereof the affidavit filed in support of the petition being not competent, the same deserves to be dismissed. In the aforesaid case, the document was impounded under Section 33 of the Stamp Act by the Court and the petitioner therein was directed to deposit

stamp duty along with penalty, as provided for under Section 40(1)(b) of the Stamp Act. The process for deposit of the stamp duty and the penalty was completed through Registrar (Judicial). After payment of the duty, the power of attorney was admitted and the affidavit filed in support of the application before Hon'ble the Supreme Court was found to be in order. The objection regarding production of un-stamped power of attorney after three months from the date of execution outside India was also considered. It was opined by Hon'ble the Supreme Court that in case where un-stamped document (other than bill of exchange) is produced in evidence within 3 months of execution, the stamp duty can be collected without impounding and without penalty. If a document is sought to be used in evidence beyond three months, the document can be impounded under Section 33 of the Stamp Act and the stamp duty and penalty can be levied even after expiry of three months. The relevant parts thereof are extracted below:

> "2. An order was passed on the last occasion on 3.11.2000, impounding the power of attorney dated 15.12.1997 and levying maximum penalty along with stamp duty and directing deposit of a sum of Rs. 110 in the treasury. Directions were also issued to the treasury to give the receipted challan on the same day. That order reads as follows:
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> > "This application has been filed by the petitioner under Section 11 of the Indian Arbitration and Conciliation Act, 1996.
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> > At the time of hearing of this application learned counsel for the respondent has raised an objection that the general power of attorney dated 15.12.1997 issued by the petitioner Company of Malaysia in favour of Mr. Noor Amiruddin Bin Mohd. Nordin, Senior Vice-President/ General

Manager, South-Asian Region executed at Kuala Lumpur has not been properly stamped according to the Indian Stamp Act, 1899 and that, therefore, it is not admissible in India. The present petition under Section 11 is signed by the said power-of-attorney holder.

Learned counsel appearing for the petitioner has stated that, assuming the said plea is tenable, the petitioner has no objection to make good the required stamp duty and penalty.

Under Section 3(c) of the Indian Stamp Act, 1899, stamp duty is payable on every instrument (other than a bill of exchange or promissory note) mentioned in the Schedule, which, not having been previously executed by any person, is executed out of India on or after that day, relates to any property or to any matter or thing done or to be done in India and is received in India. As the document, though executed outside India, is sought to be used in India, for filing the application under Section 11 of the Arbitration and Conciliation Act, 1996, the power of attorney is liable to stamp duty under the Indian Stamp Act.

Under Article 48 of Schedule I of the Stamp Act, omitting clause (d) or (e) of Article 48 which refers to more than one person being authorised under the power of attorney and also omitting clause (f) which deals with the power to sell immovable property, the maximum fee otherwise payable for a power of attorney is Rs. 10, according to counsel on both sides.

I, therefore, impound the document under Section 33 of the Act, direct the petitioner to

deposit stamp duty worth Rs. 10 plus the maximum penalty of ten times as provided in Section 40(1)(b). The total stamp duty and penalty liable to be deposited will be Rs. 10 x 11= Rs. 110. The Registrar (Judicial) is directed to put his stamp on the challan to be produced by the petitioner's counsel. Thereafter, the petitioner will deposit Rs. 110 in the treasury and produce the receipted challan back with the seal or endorsement of the treasury. Thereafter the Registrar (Judicial) will make an endorsement that the document was impounded by the Court and that the stamp duty and penalty has been paid. Then the document will be placed before the Court.

For the purpose, the original power of attorney shall be produced before the Registrar (Judicial) for completing the above formalities.

The Treasury Officer is directed to give the receipted challan on the same date on which it is presented, without raising any further objection.

Call the matter on 17.11.2000 in chambers at 1.30 p.m. If the stamp duty is paid aforesaid, then this court will be able to make an endorsement as per Section 42(1) of the Stamp Act admitting the instrument in evidence."

3. The penalty and stamp duty have since been paid and the original document dated 15.12.1997 is produced in this court and also contains the endorsement of the Registrar of this Court to the following effect:

"The document was impounded by this Hon'ble Court under Section 33 of the Indian Stamp Act, 1899. As per the order of this Hon'ble Court dated 3.11.2000 the petitioner has paid stamp duty of Rs.

10 and penalty of Rs. 100, total sum of Rs. 110 with the treasury vide Challan No. 46 dated 10.11.2000."

4. In the meantime, IA No. 4 of 2000 was filed by the respondent to recall the order dated 3.11.2000, contending that the power of attorney dated 15.12.1997 was produced beyond 3 months from the date of execution outside India and that therefore under Section 18 of the Indian Stamp Act, read with clause (b) of Section 32 of the Indian Stamp Act, it is not permissible to follow the course adopted by this court in its earlier order abovementioned, inasmuch as more than 3 months have elapsed from the date of execution of the document.

5. In my view, the point raised in the IA is not tenable. In a case where the unstamped document (other than bill of exchange) is produced as evidence, within three months of execution, the stamp duty can be collected without impounding and without penalty. If the document is sought to be used as evidence beyond three months, the abovesaid bar of three months shall not apply and the document can be impounded under Section 33 and stamp duty and penalty are levied, even after expiry of three months.

6. According to the decision of the Full Bench of the High Court of Allahabad in *Mohd. Amir Ahmad Khan v. Dy. Commr., AIR 1956 All. 453* as affirmed by this court in *Govt. of U. P. v. Raja Mohd. Amir Ahmad Khan, AIR 1967 SC 787* and also according to the decision of the Delhi High Court in *J. S. Bhalla v. G. J. Bhawnani, 23 (1983) DLT 125* the procedure permitting submission of a document within 3 months of its execution as in Section 18 is for collection of the stamp duty payable on the document. If it is produced as evidence within three

> months of execution, the stamp duty can be collected under Section 18, read with Section 32, without impounding the document under Section 33. But in case where 3 months have already expired from the date of execution of the document and later on the document is produced before the court as evidence, it is permissible for the court to impound the document and collect the stamp duty and penalty and in such a situation, the time-limit of 3 months provided in Section 18 and clause (b) of Section 32 is not attracted. Therefore, the point raised by the respondent in the abovesaid IA cannot be accepted."

In United Bank of India's case (supra), the issue before Hon'ble the Supreme Court was as to whether the plaint was signed and verified by a competent person. It was opined that a person may be expressly authorised to sign the pleadings on behalf of a company, for example by the Board of Directors by passing a resolution to that effect or by a power of attorney executed in his favour. In the absence thereof, in case where the pleadings have been signed by any of its officer, a corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The court can come to a conclusion regarding implied ratification on the basis of evidence on record and taking into consideration all the circumstances of the case during conduct of the trial. It would be travesty of justice if a party is non-suited only for a technical reason which does not go to the root of the case. The suit in that case did not suffer from any jurisdictional infirmity and the only defect alleged was curable.

The issue also came up for consideration before Delhi High Court in Mahesh Nathani's case (supra), where the objection pertaining to inadmissibility of power of attorney on the ground that it was not validly stamped in India was rejected.

In the aforesaid case, though the petition was filed on the basis of an un-stamped power of attorney dated 16.7.1997, however, after the objection was raised, a fresh power of attorney dated 18.10.2004 was filed in court which was executed on proper stamp paper and was also attested by Counsulate General of India, New York. The fresh power of attorney clearly mentioned execution of earlier power of attorney. The action of the attorney holder, who instituted the company petition initially, was specifically approved and ratified in the fresh power of attorney. It was further opined therein that in case the earlier power of attorney was not duly stamped as per Indian law, it was merely an irregularity which could be cured. The judgment of Hon'ble the Supreme Court in United Bank of India's case (supra) was referred to while holding that ratification can be proved even at the appellate stage.

In Hindustan Steel Ltd.'s case (supra), Hon'ble the Supreme Court opined that the Stamp Act is a fiscal measure and enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The provisions have been conceived in the interest of revenue. Once that object is secured in accordance with law, the party's claim on the basis of that instrument will not be defeated on the ground that the document was initially defective. Complete procedure has been provided for in the Stamp Act for payment of duty and penalty on a document, which is initially deficient on that account and on fulfilment of those conditions, the document becomes admissible in evidence.

In Hariom Agrawal's case (supra), Hon'ble the Supreme Court opined that photo copy of an instrument cannot be validated by impounding. For the purpose, original has to be available. In the present case, original has been produced in court.

In Associated Journals Ltd.'s case (supra), Hon'ble the Supreme Court upheld the order passed by the Company Court allowing the party concerned to correct the error in verification of the affidavit filed in support of the petition by filing a fresh affidavit. It was observed therein that the rules or procedure cannot be a tool to circumvent justice. These are laid down to help for speedy dispensation of justice. These are meant to advance the cause of justice and not to frustrate it.

In Malhotra Steel Syndicate's case (supra), Hon'ble the Supreme Court opined that even if there is some slight defect or irregularity in filing of the affidavit, the party should have been given an opportunity to rectify the same.

There is no quarrel with the proposition laid down by Rajasthan High Court in Pukhraj Surana's case (supra), as the document not duly stamped is not admissible in evidence. However, once the defect is cured, the same is admissible as even provided for in Section 42 of the Stamp Act.

The judgments of this court in Mool Chand Wahi's (supra) and Gujarat High Court in Welding Rods (P.) Ltd.'s case (supra) are not relevant for the reason that these deal with only defect in the affidavit filed in support of the petition. In the case in hand, the issue regarding defect is sought to be raised on the plea that power of attorney executed in favour of the person executing the affidavit is un-stamped. When that defect itself is curable and cured, the affidavit filed in support of the petition becomes valid.

In the case in hand, the power of attorney initially produced along with the petition was a photo copy not duly stamped. It was executed outside India. Objection to the admissibility of the same was raised by learned counsel for the respondent when final arguments in the petition were being heard. In reply to the petition, there is no specific objection regarding the power of attorney being not stamped, hence,

inadmissible. It is not only at the stage of filing of the reply to the petition but even in appeal against the interim order dated 9.1.2013, against which Company Appeal No. 2 of 2013 was filed, no such issue was raised, when according to learned counsel for the respondent, this sole ground was enough to non-suit the petitioner. Thereafter, the matter went to Hon'ble the Supreme Court. Even there, no such plea was raised by the respondent. It is being so noticed for the reason that the stand taken by the petitioner is that had this objection been raised earlier, it would have produced the original power of attorney and paid the duty and penalty immediately and cured the defect, as it was merely an irregularity and not illegality. The original power of attorney was produced in court, which was taken on record. The objection raised by learned counsel for the respondent at the time of hearing is not sustainable. Execution of power of attorney is not in dispute or that it is not a genuine document. The only question was its inadmissibility on account of non-production of original and non-payment of stamp duty thereon.

Even a perusal of the various provisions of the Stamp Act do not, in any way, suggest that production of a document not duly stamped is fatal for its admissibility in evidence as the procedure for curing the defect has been provided for. A document can be impounded and on payment of duty and penalty thereon, the same becomes admissible in evidence. In Hindustan Steel Ltd.'s case (supra), Hon'ble the Supreme Court opined that the Stamp Act is merely a fiscal statute to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. Learned counsel for the petitioner had categorically stated that the petitioner is ready and willing to pay the stamp duty and the penalty.

In view of the aforesaid discussion, I order impounding of the original power of attorney produced in court under Section 33 of the Stamp Act and direct the petitioner to deposit stamp duty plus the maximum penalty as provided in Section 40(1)(b) of the Stamp Act. The power of attorney on record be sent to Registrar Judicial, who is directed to put his stamp on the challan to be produced by the petitioner's counsel. Thereafter, the petitioner will deposit the amount in the treasury and produce the receipted challan back with the seal and endorsement of the treasury before the Registrar Judicial. Thereafter the Registrar Judicial will make an endorsement that the document was impounded by the court and that the stamp duty and penalty has been paid.

The Treasury Officer is directed to give the receipted challan on the date of presentation without raising any further objection.

List the matter on 27.1.2015 for further orders."

33. As the stamp duty and the penalty have been paid as directed by this court and endorsement has been made by the Registrar Judicial of this court on 23.1.2015, I certify that the said endorsement falls within sub-section (1) of Section 42 of the Indian Stamp Act. The power of attorney is taken on record, hence, the issue regarding maintainability of the petition on the ground of power of attorney being not stamped is taken care of by the petitioner.

**Preliminary Objection raised by the respondent in the main petition**

34. Mr. U. K. Chaudhary, learned senior counsel appearing for the respondent-company raised a preliminary objection regarding maintainability of the present petition. For the purpose, he relied upon a judgment of the Karnataka High Court in Company Petition No. 203 of 2010- The Bank of New York Mellon v. Cranes Software International Limited, decided on 4.3.2014. He submitted that in the aforesaid judgment, the petitioner herein was the petitioner. An identically worded Trust Deed was under consideration where the court opined that petition for winding up

was not maintainable. As per clause 25.1 of the Trust Deed, the same is to be governed and construed in accordance with English law. The petitioner to be entitled to file the present petition has to show that it is a creditor as per English law and has a right to file winding up petition in terms thereof. While referring to clause 25.2 of the Trust Deed, it was submitted that exclusive jurisdiction regarding the dispute has been given to the courts of England and Wales. In case the petitioner wants to avail of the remedy under the 1956 Act, it has to first get the debt determined in terms of the English law as per the Trust Deed, then only a petition could be maintainable. Clause 24 of the Trust Deed provides for certain pre-conditions even for enforcement of the terms of the Trust Deed. The Trust Deed itself was executed in London. The petition for winding up can be filed only by a creditor. The petitioner-bank herein is not a creditor. It is merely a trustee. The date on which the offering circular was issued, i.e., 31.3.2006 for issuance of US$ 30 millions 2.5% convertible bonds by the respondent-company, the Trust Deed had not even been executed. The bond holders have option for conversion of the bonds into shares. The bonds, which were not opted to be converted into shares, are only to be redeemed. In the balance sheet of the respondent-company, the petitioner has not been shown to be a creditor. What has been shown is that certain amount is outstanding on account of FCCB/ GDRs/ ARs, part of which had been converted into shares as well. He further submitted that as on today, out of total bonds worth US$ 30 millons, about US$ 14 millons are pending and rest had been converted into shares at the option of the bond holders, some before the due date for redemption whereas some after that.

35. It was further submitted that even as per the Insolvency Act, 1986 (for short, 'the 1986 Act'), as applicable in England, a trustee has no right to file a winding up petition. In fact, as per the Trust Deed, the trustee is merely an agent of the respondent-company paid for its services, which is to collect payment and distribute amongst the bond holders towards principal amount and/or interest. It is not a representative of the bond holders. In support of the arguments, regarding governing law, reliance was further placed upon judgment of Hon'ble the Supreme Court in British India

Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries and others, JT 1990(1) SC 528 and Bombay High Court in Rhodia Ltd. and others v. Neon Laboratories Ltd., AIR 2002 Bom. 502.

36. Another objection raised to the maintainability of the petition is that the petitioner was not authorised to issue notice and file petition even as a trustee as there was no authorisation in its favour. The notice shows that it has been issued on behalf of the petitioner and the bond holders, however, no authorisation as such from the bond holders was annexed. With the rejoinder, authorisation on behalf of two of the bond holders conveyed by them to the petitioner in London was annexed, which was of the same date as that of the statutory notice.

**Arguments of the petitioner**

37. In response to the contentions raised by learned senior counsel for the respondent regarding maintainability of the present petition, Mr. Arun Kathpalia, learned counsel for the petitioner submitted that the issue of jurisdiction being raised by the respondent is beyond pleadings. The question of jurisdiction is a mixed question of law and fact. The same cannot be argued in abstract, for this facts are required to be gone into. If the litigation comes to the court, it pre-supposes a dispute. A winding up petition can be filed in case a company is unable to pay its admitted debt. In the case in hand, the fact that the amount due on account of bonds have not been re-paid by the company even on its expiry and there being specific note to that effect in the balance sheet of the company, clearly establishes that there is no dispute about the facts. Once there is no dispute, no interpretation of the Trust Deed is required to be got from the courts in England and Wales in terms of English law. The respondent having submitted to the jurisdiction of this court cannot be permitted to raise this objection at this stage as the present petition is pending for the last two years. He further submitted that even if there is a clause in the Trust Deed, which ousts the jurisdiction of the Company Court, the same shall be void and hit by Section 9 of the 1956 Act. The clause providing for governing laws in the Trust Deed entered into between the parties does not oust the jurisdiction of the Company Court under the 1956 Act. Learned counsel

further submitted that the contention of the respondent that the petitioner is not a creditor is not a jurisdictional issue. Section 439(2) of the 1956 Act is a deeming provision, which takes in its fold many aspects of a creditor and the petitioner falls in that. It is a deemed creditor as it is to take care of interest of the bond holders being a trustee. In support of the plea, reliance was placed upon judgments of Hon'ble the Supreme Court in State of T. N. v. Arooran Sugars Ltd., (1997) 1 SCC 326 and Aneeta Hada v. Godfather Travels and Tours Private Ltd., (2012) 5 SCC 661. This Court alone has the jurisdiction under the 1956 Act in case there is a debt, which is not disputed, and on demand, there is default in payment thereof.

38. Raising a larger issue, learned counsel further submitted that the issue relates to business dealings by Indian corporates with foreign investors/foreign institutional investors. The money is raised from foreign market at very low rate of interest as in the present case, it was merely 2.5% per annum, as compared to very high rate of interest on the loans advanced by Indian banks or otherwise. If even in the cases where there is admitted default in payment of the amount due on maturity of the bonds, no action can be taken against the borrowing company, the same will shatter the confidence of the foreign investors. The entire issue is required to be examined in that light. Our country is a growing economy where need is to build that confidence.

39. Elaborating his arguments further, learned counsel for the petitioner, while referring to various clauses of offering circular dated 31.3.2006 and the Trust Deed, submitted that event of default has been clearly defined, the same is, inter-alia, non-payment of either the interest or the principal amount. Constitution of the Trust Deed was clearly provided for in offering document. The trustee represents all the bond holders. In fact, the bond holders cannot approach this court individually unless the trustee fails in discharge of its duties, namely, does not take action within 60 days of the resolution. The powers of the trustee are unlimited and its decision is final between the trustee and the bond holders. As per the Trust Deed, the amount due had to be paid to the trustee or to any one in terms of its order. The petitioner-trustee is the creditor in that scheme of things. The remedies

provided under the Trust Deed are over and above any other remedy available in law and the jurisdiction, as conferred on the courts in England as per English law, is not exclusive. Rather, in addition the trustee/bond holders had a right to avail of any other appropriate remedy available to them in law. The remedies are cumulative. It is an admitted case that last date for redemption of Foreign Currency Convertible Bonds (for short, 'FCCBs') was 8.4.2011. On failure of the respondent-company to adhere to the terms, notice dated 3.5.2011 was got issued by the petitioner, which was responded to by the respondent-company vide letter dated 24.6.2011 specifically admitting that there is default in payment of the amount on account of financial crisis. He further submitted that even in the balance sheet of the respondent-company for the year 2010-11, the default has been clearly admitted.

40. While referring to the pleadings of the respondent-company in Company Application No. 256 of 2013, it was submitted that the respondent-company clearly admitted therein that the amount had to be paid to the petitioner, however, inability was expressed on account of financial crisis.

41. While distinguishing the judgment of Karnataka High Court in The Bank of New York Mellon's case (supra), it was submitted that in the aforesaid case, there was default in payment of interest only. The petition was filed at that stage. The clauses of Trust Deed under consideration before Karnataka High Court in The Bank of New York Mellon's case (supra) were materially different than the clauses in the Trust Deed in question. In that case, the term of bonds had not expired and the court opined that it has jurisdiction but the same was not exercised. The clause regarding jurisdiction contained the term “exclusive”. The court found that whether there was 'event of default' was yet to be determined and the same could be determined only by English courts having exclusive jurisdiction, hence, the company petition was not entertained. The facts in the matter before Bombay High Court in Appeal (L) No. 29 of 2014—Videocon Industries Ltd. v. Intesa Sanpaolo S.P.A., decided on 18/19.7.2014, have been wrongly referred to in The Bank of New York Mellon's case (supra) by Karnataka

High Court while mentioning that it was a case where the petition was filed on the basis of a decree of foreign court, whereas it was not. Appeals against the aforesaid judgments are stated to be pending. In the present case, no dispute is to be adjudicated upon as the liability for refund of the amount on account of FCCBs is clearly admitted.

42. Learned counsel further submitted that in reply filed by the respondent, specific plea with reference to clause 25 of the Trust Deed regarding exclusion of jurisdiction was not raised. In any case, it was submitted that once the respondent has submitted to the jurisdiction of this court, it cannot be permitted to raise the issue as the Company Court has exclusive jurisdiction to deal with a petition for winding up.

43. It was further contended that a petition under Section 433 of the 1956 Act for winding up of a company is an action in *rem*. When the economy of the country was opened up, corporates are borrowing money from foreign institutional and individual investors at a very low rate of interest. If the amount is not returned on due dates and their action is not sustained on hyper-technical pleas, this will put a dent on creditworthiness of not only the corporates of the country but even the country as such, which is inviting foreign investment. In the case in hand, there is no dispute that the amount is payable, which had not been paid. The governing law as per the Trust Deed is relevant only if there is a dispute pertaining to the terms agreed between the parties, which is none in the present case and as such no adjudication is required. While referring to Clause 24 of the Trust Deed, it was submitted that even if it has not been provided therein that the trustee or the bond holders can file a petition for winding up, the same being a statutory right under the 1956 Act, cannot be taken away. The petitioner can enforce the same at any point of time. Even in the absence of clause like 24, the petitioner can file a petition for winding up. There is no estoppel against the statute. Agreements do not confer or take away jurisdiction of the courts. The provisions of the 1956 Act do not make any distinction between an Indian or foreign creditor. As on today 100% of the bond holders are supporting the present petition. The amount was payable on maturity on 8.4.2011, more than three years have gone by thereafter, but the

same has still not been paid. Initially, the respondent-company had been admitting that debt is payable but on account of financial difficulty, it was unable to pay the same. Now technical pleas are being raised regarding jurisdiction and locus of the petitioner to file the petition. The object is merely to delay the process so that cheap funds are retained by the company. In support of the plea, reference was made to the judgments of Delhi High Court in Company Petition No. 558 of 2012—Citi Bank, N.A. v. Moser Baer India Ltd., decided on 17.7.2013 and of Bombay High Court in Company Petition No. 971 of 2009—BNY Corporate Trustee Services Ltd. v. Wockhardt Limited, decided on 11.3.2011 and Appeal (L) No. 344 of 2013-- Zenith Infortech Ltd. v. The Bank of New York Mellon London Branch, decided on 2.9.2013; Delhi High Court in Company Petition No. 128 of 2005-- Shin Satellite Public Co. Ltd. v. STV Enterprises Ltd., decided on 16.6.2008 and Company Petition No. 240 of 1998—Aturia Pompe S.P.A. v. Aturia Continental Ltd., decided in July, 2005; and of Hon'ble the Supreme Court in Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others, (2011) 5 SCC 532.

44. Further, learned counsel for the petitioner argued that the plea raised in the reply that interest of petitioner has been taken care of on account of Corporate Debt Restructuring is totally misconceived, as the petitioner was never a party to that. It was merely with the secured creditors who advanced additional loan by taking further security. The only remedy available with the petitioner is to file a winding up petition, as with the advancement of more loans and furnishing of security by the company the chance of repayment to the petitioner, which is trustee of the unsecured bond holders, will be further depleted.

45. Learned counsel, while referring to stay order dated 3.10.2012 and order dated 17.10.2012, whereby this court directed that no charge on the assets of the respondent-company shall be created, submitted that CA No. 762 of 2012 was filed by the respondent-company seeking permission to create further charge on the properties of the company for the purpose of Corporate Debt Restructuring. Vide order dated 9.1.2013, this court dismissed the application and made the orders dated 3.10.2012 and

17.10.2012 absolute. The order dated 9.1.2013 was stayed by a Division bench of this court vide order dated 17.1.2013 in Company Appeal No. 2 of 2013. In Special Leave Petition filed by the petitioner against the aforesaid order, Hon'ble the Supreme Court, vide order dated 1.2.2013, stayed the operation of order dated 17.1.2013. Even review sought by the respondent-company of the aforesaid order passed by Hon'ble the Supreme Court was also dismissed on 3.4.2013.

46. While summing up his arguments, learned counsel for the petitioner submitted that debt in the present case is admitted and so is the inability. Section 434 of the 1956 Act is a deeming provision, which should be given its logical effect. Right to sue is statutory, hence, even the agreement between the parties will not take away the same.

47. While touching the merits of the case, learned counsel for the petitioner referred to the balance sheet of the respondent-company for the year 2010-11, where in Director's report, it was mentioned that the company could not redeem FCCBs due on 8.4.2011 for paucity of cash funds, however, it was taking steps to restructure or extend the maturity thereof. Similar statements were made in Corporate Governance Report under the heading “Outstanding GDRs/ADRs/Warrants or any Convertible instruments.....” and in Schedule -IX under the heading “Significant Accounting Policies and Notes to the Accounts for the year ended 31st March, 2011”. In Schedule 'D' attached to the balance sheet under the heading “Unsecured Loans”, the amount due on account of FCCBs has been shown.

48. In the affidavit dated 24.5.2013 filed by Chief Financial Officer of the respondent-company, it was admitted that the total amount due on account of non-payment is about ₹ 50 crores and the bondholders are being represented by the petitioner.

**Replication on behalf of the respondent**

49. In response to the arguments of learned counsel for the petitioner, Mr. U. K. Chaudhary, learned senior counsel appearing for the respondent-company, submitted that merely if specific reference has not been made to Clause 25.1 of the Trust Deed in the reply filed, the same will

not debar the respondent-company to raise that issue as it goes to the root of the case. For the purpose reference was made to a judgment of this Court in Santa Singh Gopal Singh and others v. Rajinder Singh Bur Singh and others, AIR 1965 Punjab 415. It was further submitted that the issue regarding maintainability of the petition, in the sense that the petitioner has no locus to file the same in terms of various clauses of the Trust Deed, has not been answered. The issue as to whether the petitioner is a creditor in terms of various provisions of the Trust Deed has to be determined in view of English law as per Clause 25.1 of the Trust Deed, as it involves interpretation thereof. Clause 24 of the Trust Deed provides that the petitioner is merely a collecting agent. It is not a person, who had advanced loan to the respondent-company and as such was a creditor. It has different status, as defined in the Trust Deed, such as trustee, Transfer Agent, Paying Agent, Conversion Agent and the Registrar appointed under the Agency Agreement. The petitioner has not been shown to be a creditor in the books of accounts of the respondent-company. It was further submitted that even if for argument's sake it is admitted that the petitioner can be said to be a creditor, still whether it has a right to file a winding up petition is to be decided in terms of various clauses in the Trust Deed, which would require interpretation thereof, as the intention of the parties has to be deciphered therefrom. The issue regarding proper law was not raised in any of the judgments cited by learned counsel for the petitioner, hence, these are not relevant. Even the judgments of Delhi High Court in Shin Satellite Public Co. Ltd.'s case and Aturia Pompe S.P.A.'s case (supra), cited by learned counsel for the petitioner, are not relevant as these were not the cases of a petition filed by a trustee. The petitioners therein were the creditors. So is the judgment of Hon'ble the Supreme Court in Booz Allen and Hamilton Inc.'s case (supra), which was a case under the Arbitration and Conciliation Act, 1996.

50. Learned counsel for the respondent further submitted that even if the petitioner chooses to initiate any legal action in the courts in India, it will have to base its claim on English law. Insolvency Act, 1986 and other statutes, as applicable in U.K., do not confer any right on a trustee to file a

winding up petition as the same is available only to a creditor. It is not a case where the bond holders had assigned their right in favour of the petitioner as no such deed or agreement has been produced. There is no guarantee furnished by the respondent-company in favour of the petitioner as were the facts in Videocon Industries Ltd.'s case (supra), hence, even that judgment is not relevant.

51. It was further submitted that no doubt, this court has the jurisdiction to entertain a winding up petition against a company having registered office within its territorial jurisdiction, however, for maintaining a winding up petition, the petitioner has to prove that it is a creditor. As to whether the petitioner is a creditor or not is an issue to be gone into and decided in terms of various provisions of the Trust Deed which, as per the agreed terms, has to be as per English law.

52. While referring to the pleadings, learned counsel for the respondent submitted that the petitioner itself is not clear about its status as in the petition, somewhere it is claimed that it is a creditor; somewhere as trustee, whereas at some places on behalf of the bond holders. In fact, the services of the petitioner were hired by the respondent on payment of certain agreed charges. To that extent, it can be a creditor but not otherwise. From the pleadings, it was further referred to that initially when the petition was filed, the total amount due from the respondent-company was US$ 33 millions, however, as of now, the same has decreased to US$ 14 millions. 51% of the bond holders had got their FCCBs converted into shares. It means that majority of the bond holders have faith in financial health of the respondent-company and are not in favour of its winding up, as the same will harm their interest. It is the minority bond holders, who are seeking that relief. It also shows that the petitioner has no authority or control over them. Some of them had got the bonds converted even after issuance of winding up notice by the petitioner. When the bond holders can deal with the respondent-company directly, the petitioner does not come in picture claiming it to be a creditor, as is sought to be in the case put up. The creditor cannot be for and on behalf of some other persons. Even notice for winding up can be issued by a creditor or the assignee, but the petitioner is

none of them. Though it is sought to be pleaded that in case the winding up petition is not allowed, the petitioner will suffer irreparable loss, but it is none as it is neither a bond holder nor a creditor.

53. As per Section 439(2) of the 1956 Act, a trustee of bond holders is a person in whose favour security is created. Such a trustee is required to be registered with Securities and Exchange Board of India as per Securities and Exchange Board of India Regulations, 1993 (for short, 'the 1993' Regulations). The deeming provisions in Section 439(2) are restricted in application to only 439(1)(b) of the 1956 Act. The same cannot be imported in Section 434 of the 1956 Act for entitling the petitioner, who is not a creditor, to issue a notice for winding up, as such even the notice is defective. It has always been the case of the respondent-company that the amount is due to the bond holders and not the petitioner.

54. Another contention raised by Mr. Chaudhary, learned senior counsel appearing for the respondent is that FCCBs in the present case cannot be termed to be debentures or bonds as the same have not been issued under the 1956 Act. The case set up by the petitioner is that it is a deemed creditor under Section 439(2) of the 1956 Act. It refers to debenture, which has been defined in Sections 2(12) of the 1956 Act. Sections 117, 117A and 117B of the 1956 Act provide as to how debentures can be issued to Indian residents. The same can be issued only by issuing a prospectus or letter of offer. A trustee is to be appointed, which is governed by the 1993 Regulations. In the case in hand, neither the bonds have been offered and issued to Indian public nor the petitioner is a trustee under the 1993 Regulations, hence, it cannot take the benefit of deeming provision under Section 439(2) of the 1956 Act to claim itself to be a creditor. The debentures in the present case have been issued to the investors outside India. No doubt, there is a cause of action to the bond holders to initiate proceedings against the respondent-company as there is event of default, but the issue as to whether the petitioner has the locus has to be gone into. The same is governed by the provisions of the Trust Deed, which have to be interpreted in terms of English law. It can be either by this Court or by English Court.

55. While referring to the judgment of this Court in Canara Bank v. Arihant Industries Ltd., (2002) 110 Company Cases 70 (P&H), it was submitted that it is not as a matter of right to be exercised by the petitioner-creditor that on account of default in payment of amount, even if it is admitted, the company is to be wound up. Still considering the totality of circumstances, the Company Court may still refuse to admit a petition and ultimately order for its winding up. In the aforesaid judgment, even the creditor was secured. A winding up petition filed by an unsecured creditor, in fact, is against his own interest as in case of winding up, he comes in last for payment of dues in priorities as is envisaged under the 1956 Act. The power to admit a petition for winding up is discretionary and it is to be exercised with circumspection, especially in the cases of a going concern.

56. It was further submitted that it is wrong to suggest that for the purpose of admission of a winding up petition, only the amount and the default are to be seen. Even if both these facts are admitted, still it is the discretion of the court as to whether winding up petition is to be admitted or not. There are many other factors to be considered like the interest of other creditors, number of employees working, contribution to the State, whether it is commercially insolvent and to let it continue is not in public interest where even other creditors have lost faith. The assets of the company are more than its liability. The valuation thereof was got done in terms of the order passed by this court on 19.9.2013, wherein it was found that total realisable value of the assets is ₹ 929 crores. Even the distress sale value is about ₹ 749 crores. The liabilities are ₹ 605 crores. In fact, after the debt restructuring by the banker and advancement of more loans, the company has been able to turn around. Its liabilities have been reduced. It has started generating cash profit. Referring to production capacity, actual production and exports, it was submitted that the company should not be directed to be wound up merely on a petition filed by one of the unsecured creditor. Facts in totality have to be seen. All other secured creditors have confidence in the company and are objecting to the winding up. The petition is merely an arm twisting exercise to unduly press the respondent-company to pay the amount. Had the petitioner agreed to CDR package in terms of which some

non-core assets were to be sold and the amount paid to the creditors, the bond holders would also have got certain money, however, by objecting to the same, the respondent-company has not been able to effectively pursue the CDR package.

57. It was further submitted that when a creditor files a petition, he has to show that in his books of account, there is a debt due from the respondent. Copy of account has to be produced with the petition, but in the present case, there is nothing to show that. As against this, the respondent has produced with the reply statement of account showing that bondholders are the creditors and not the petitioner, hence, the petition filed by the petitioner is not maintainable. In support reliance was placed upon Rohtak and Hissar Districts Electric Supply Co. Pvt. Ltd. v. Anausi Textiles Mills Ltd., (2001) 106 Company Cases 697 (All.).

58. Further, learned counsel for the respondent, while referring to the judgments in Tata Iron and Steel Co. v. Micro Forge (India) Ltd., (2001) 104 Company Cases 533 (Guj.); Pradeshiya Industrial and Investment Corporation of Uttar Pradesh v. North India Petro Chemical Ltd. and another, (1994) 79 Company Cases 835 (SC); *In re* P. & J. Macrae Ltd., (1961) 1 WLR 229; Essar Steel Ltd. v. Gramercy Emerging Market Fund, (2003) 116 Company Cases 248 (Guj.); Allahabad Bank v. Kothari Petrochemicals Ltd., (2005) 128 Company Cases 402 (Mad.); Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd., (1972) 42 Company Cases 125 (SC); Deutsche Trustee Company Ltd. v. Mascon Global Ltd., (2013) 181 Company Cases 223 (Mad.); New India Corporation v. Nandanvan Manufacturers and Traders (P.) Ltd., (1983) 54 Company Cases 32 (Kar.) and Shantilal Khushalds and Bros. Pvt. Ltd. v. Smt. Jayabala Suresh Shah and another, (1997) 90 Company Cases 399, submitted that even after admitting a petition, still no winding up order was passed in various cases by the courts.

**Reply by the petitioner**

59. As far as merits of the controversy is concerned, in response to the contentions raised by learned counsel for the respondent, learned

counsel for the petitioner submitted that Section 439(2) of the 1956 Act was already existing in the Act when Sections 117A to 117C of the 1956 Act were added. A subsequently added section will not control the meaning of the section already existing. It can be harmoniously read to mean that Section 117B of the 1956 Act deals only with one kind of debentures, which could be secured and unsecured. The argument that for the purpose of maintainability of a winding up petition in this court, English law is to be seen, the same would mean that Indian courts are sought to be made subject to English law. The contention is totally misconceived. All judgments cited by learned counsel for the respondent on the issue of governing law are irrelevant as the cases do not pertain to FCCBs or like clause 25.1 in the Trust Deed. When there is no dispute that the amount is due to the bond holders, the governing law is irrelevant. If there is a dispute, then even under the local laws enquiry is not possible in winding up jurisdiction.

60. Regarding the contention that the notice got issued by the petitioner being invalid, learned counsel for the petitioner submitted that in reply to the notice, the status of the petition as a trustee has not been disputed. Clause 2.4(B) of the Trust Deed clearly provides that payment is to be made either to the Trustee or on its order. The other clauses of the Trust Deed also provide the same. Section 439(2) of the 1956 Act treats the trustee a deemed creditor. Same meaning has to be given to the word "creditor" in Section 434 of the 1956 Act, otherwise the very object of the said Act will be defeated. If the contention of the respondent is accepted, same will make the provisions of the 1956 Act unworkable.

61. Regarding admissions made in the pleadings, which were sought to be explained by the respondent while claiming them to be typographical error, learned counsel for the petitioner submitted that typographical error can be of a word or a line made inadvertently, but it cannot be treated to be an error if it is repeated many times in pleadings. If the same was noticed by the respondent, it could be got corrected only by filing an application. No application for amendment was filed. The admissions otherwise also cannot be permitted to be withdrawn. Learned counsel referred to paragraphs No. 5 and 9 in CA No. 256 of 2013 and

paragraph (e) in CA No. 762 of 2013, where the respondent termed the petitioner as one of the creditors.

62. Regarding the bonds being debentures, learned counsel while referring to the definition of "debenture" as contained in Section 2 (12) of the 1956 Act, submitted that the same includes bonds. It could be secured and unsecured as well. Section 117B of the 1956 Act talks about the duration of secured and unsecured debenture. The definition otherwise is also inclusive and not exhaustive. It is a debt instrument. The application of the 1956 Act is not limited to issuance of bonds/debentures under the said Act only. The borrowings in the case in hand being external commercial borrowings from outside India, the same are governed by various guide-lines issued by the Government, as the amount has also to be repatriated in foreign currency. Even a foreign company or a creditor, who may not be a bond holder can also file a petition for winding up in case of failure of a company to discharge its debt. Reference was made to Commissioner of Income Tax v. Cochin Refineries Ltd., (1983) 142 ITR 441 (Ker.) and Narendera Kumar Maheshwari v. Union of India and others, 1990 (Supp) SCC 440, where term "debenture" has been dealt with extensively. The issuance of FCCBs cannot be said to be *de hors* the 1956 Act as it contained a clause for its optional conversion into equity, which is governed by the 1956 Act.

63. Once the liability in the present case is admitted, as the bonds had become due for redemption in April, 2011, no payment having been made thereafter to the bondholders who did not opt for its conversion into equity, the inescapable conclusion in case the locus of the petitioner to file the petition is accepted, is that the company is unable to pay its debt, hence, the petition deserves to be admitted.

**Discussions regarding maintainability**

64. It is a case in which the company issued an offering circular on 31.3.2006 for issue of US$ 30,000,000 2.5% convertible bonds subject to an additional over allotment of US$ 4,450,000. The interest was payable on the bonds semi-annually on 7th day of April and October every year. Unless previously redeemed, converted, purchased or cancelled, the bonds

were optionally convertible into equity at any time on or after 7.5.2006 till 8.3.2011 at the rates defined. The bonds could be redeemed in whole or in part at the option of the company at any time on or after 7.4.2009 and before 8.4.2011. The redemption on due date was to be at 120.075% of the face value. It was further provided in the offering circular that the bonds will be issued under the Trust Deed, to be dated as on or about 7.4.2006 between the petitioner and the respondent-company. Other relevant conditions in the offering circular contained in clauses 11, 15.3 and 16 are extracted below:

> **"11. EVENTS OF DEFAULT**
>
> If any of the following events (each an **"Event of Default")** occurs the Trustee at its discretion may (but shall not be obliged to), and if so requested in writing by the holders of at least 25% in principal amount of the Bonds then outstanding, shall (subject always to the Trustee having been indemnified or provided with Security to its satisfaction), give notice to the Issuer that the Bonds are, and they shall immediately become, due and payable:
>
> (A) **Non-Payment:** The Issuer fails to pay the principal premium or interest of any of the Bonds when due; or
>
> (B) **Breach Of Other Obligations:** The Issuer defaults in performance or observance of or compliance with any of its other obligations set out in the Bonds or the Trust Deed which default is incapable of remedy or, if it is capable of remedy, is not remedied within 30 days after written notice of such default shall have been given to the Issuer by the Trustee (acting at the written direction of Bondholders holding not less than 25% of the principal amount of the Bonds then outstanding); or
>
> (C) **Cross Default:**
>
> (1) any other present or future indebtedness for borrowed money of the Issuer or any of its Subsidiaries of at least US$1,000,000 in aggregate amount outstanding (or its equivalent at the relevant time in any other currency) becomes (or becomes capable of being

declared)due and payable prior to its stated maturity by reason of an Event of Default or a potential Event of Default; or

(2) any such indebtedness for borrowed money is not paid when due, as the case may be, within any applicable grace period originally provided for; or

(3) the Issuer or any of its Subsidiaries fails to pay when due for within any applicable grace period originally provided or any amount in excess of US$1,000,000 in aggregate payable by it under any present or future guarantee or indemnity in respect of indebtedness for borrowed money (or its equivalent at the relevant time in any other currency); or

(D) **Enforcement Proceedings:** A distress, execution or other legal process is levied, enforced or sued upon or against any material part of the property, assets or revenues of the Issuer or any of its Subsidiaries by any person or entity and is not discharged or stayed within 60 days of having been so levied, enforced or sued out; or

(E) **Security Enforced:** An encumbrancer takes possession or a receiver, manager or other similar person is appointed over, or an attachment order is issued in respect of the whole of any material part of the undertaking, property, assets or revenues of the Issuer or any of its Subsidiaries and in any such case such possession, appointment or attachment is not stayed or terminated or the debt on account of which such possession was taken or appointment or attachment was made is not discharged or satisfied within 30 days of such possession, appointment or the issue of such order; or

(F) **Insolvency:** The Issuer or any of its Subsidiaries is declared by a court of competent jurisdiction to be insolvent, bankrupt or unable to pay its debts, or stops, suspends or threatens to stop or suspend payment of all or a material part of

its debts as they mature or applies for or consents to or suffers the appointment of an administrator, liquidator or receiver or other similar person in respect of the Issuer or any of its Subsidiaries or over the whole or any material part of the undertaking, property, assets or revenues of the Issuer or any of its Subsidiaries pursuant to any insolvency law or takes any proceedings under any law for a readjustment or deferment of its obligations or any part of them or makes or enters into a general assignment or an arrangement or composition with or for the benefit of its creditors except, in any such case, for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by an Extraordinary Resolution of the Bondholders; or

(G) **Winding-Up**: An order of a court of competent jurisdiction is made or an effective resolution passed for the winding-up or dissolution of the Issuer or any of its Subsidiaries or the Issuer or any of its Subsidiaries ceases to carry on all or any material part of its business or operations (other than in connection with any consolidation, amalgamation or merger of the Issuer with, or the sale of all or substantially all the assets of the Issuer to, any other corporation where all relevant Trust Deeds and supplemental Trust Deeds are executed pursuant to, and to give full effect to, the rights of a Bondholder pursuant to Condition 7.1) except, in any such case, for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by an Extraordinary Resolution of the Bondholders; or

(H) **Expropriation:** Any governmental authority or agency compulsorily purchases or expropriates all or any material part of the assets of the Issuer or any of its Subsidiaries without fair compensation; or

(I) **Analogous Events:** Any event occurs which under the laws of India has an analogous effect to any of the events referred to in paragraphs (D) through (H) above.

For the purposes of (C) above, any indebtedness which is in a currency other than US dollars shall be translated into US dollars at the spot rate for the sale of US dollars against the purchase of the relevant currency quoted by any leading bank selected by the Trustee on any day when the Trustee requests a quotation for such purposes.

In this Condition, "**indebtedness for borrowed money**" means any present or future indebtedness (whether being principal, premium, interest or other amounts) for or in respect of (i) money borrowed, (ii) liabilities under or in respect of any acceptance or acceptance credit or (iii) any notes, bonds, debentures, debenture stock, loan stock or other securities, issued or distributed whether by way of public offer, private placing, acquisition consideration or otherwise and whether issued for cash or in whole or in part for a consideration other than cash.

Upon such notice being given to the Issuer, the Bonds will immediately become due and payable at their Early Redemption Amount.

Under current regulations of the RBI applicable to convertible bonds, the Issuer would require the prior approval of the RBI before providing notice for or effecting such a redemption prior to the Maturity Date and such approval may or may not be forthcoming.

**15.3 Entitlement of the Trustee**

In connection with the exercise of its functions (including but not limited to those in relation to any proposed modification, authorisation or waiver) the Trustee shall have regard to the interests of the Bondholders as a class and shall not have regard to the consequences of such exercise for

individual Bondholders and no Bondholder shall be entitled to claim from the Issuer, the Trustee or any other person any indemnification or payment in respect of any tax consequences of any such individual Bondholders.

xx xx xx

**16. ENFORCEMENT**

At any time after the Bonds become due and payable, the Trustee may, at its discretion and without further notice, institute such proceedings against the Issuer as it may think fit to enforce the terms of the Trust Deed and the Bonds, but it need not take any such proceedings unless (i) it shall have been so directed by an Extraordinary Resolution or so requested in writing by Bondholders holding at least twenty five per cent, of the principal amount of the Bonds outstanding and (ii) it shall have been indemnified and/or provided with security to its satisfaction. No Bondholders may proceed directly against the Issuer unless the Trustee, having become bound to proceed, fails to do so within a reasonable time and such failure is continuing for a period of 60 days and no direction inconsistent with such written request or Extraordinary Resolutions has been given to the Trustee during such 60 day period by the holders of a majority in principal amount of the outstanding Bonds."

65. The relevant clauses from the Trust Deed dated 7.4.2006 executed by the petitioner as a trustee and the respondent-company, as contained in Clauses 2.2, 2.4, 8.1, 9.15, 10.1, 11.6, 11.11, 11.13, 11.25, 19, 24, 25.1 and 25.2, are extracted below:

**2.2 Covenant to pay**

The Company will, on one Business Day in London prior to any date when the Bonds or any of them become due to be redeemed in accordance with the Conditions, unconditionally pay or procure to be paid to or to the order of the Trustee in London in U.S. Dollars in immediately available funds the

principal amount of the Bonds becoming due for redemption or repayment on that date (to be received by 10.00 a.m., London time) together with any applicable premium and will (subject to the Conditions) until such payment (both before and after any judgment or other order of a court of competent jurisdiction) unconditionally so pay or procure to pay to or to the order of the Trustee interest in U.S. Dollars on the principal amount of the Bonds outstanding as set out in the Conditions provided that (a) every payment of any sum due in respect of the Bonds made to or to the account of the Principal Agent as provided in the Agency Agreement shall, to that extent, satisfy such obligation except to the extent that there is failure in its subsequent payment to the relevant Bondholders under the Conditions and (b) a payment made after the due date or pursuant to Condition 11 will be deemed to have been made on the third Business Day after the full amount due (including interest accrued to that third Business Day) has been received by the Principal Agent or the Trustee and notice to that effect has been given to the Bondholders if required under Clause 9.10 (Notice of late payment) except (if payment is made to the Principal Agent) to the extent that there is failure in the subsequent payment to the relevant Bondholders under the Conditions. The Trustee will hold the benefit of the covenants in this Clause 2.2 on trust for itself and the Bondholders.

xx xx xx

2.4 **Payment after a default**

At any time after an Event of Default or a Potential Event of Default has occurred the Trustee may (but shall not be required to) and shall if directed by an Extraordinary Resolution of the holders of the Bonds or, if so requested in writing by the holders of not less than 25 per cent., in principal amount of the Bonds then outstanding (subject in each case to the Trustee being indemnified and/or secured to its satisfaction):

(A) by notice in writing to the Company and the Agents, require the Agents, until notified by the Trustee to the contrary, so far as permitted by applicable law:

(1) to act as agents of the Trustee under this Trust Deed and the Bonds mutatis mutandis on the terms of the Agency Agreement (save for necessary consequential amendments and except that the Trustee's liability under any provisions of the Agency Agreement for the indemnification, remuneration and all other expenses of the Agents will be limited to the amounts for the time being held by the Trustee in respect of the Bonds on the terms of this Trust Deed after application in accordance with Clause 8 (Application of Monies received by the Trustee) below in satisfaction of payment of sums other than those referred to in this Clause 2.4(A)(1) and thereafter to hold all Certificates and all monies, documents and records held by them in respect of Bonds to the order of the Trustee; and/or

(2) to deliver all Certificates and all monies, documents and records held by them in respect of the Bonds to the Trustee or as the Trustee directs in such notice, provided that this clause 2.4(A)(2) shall not apply to any documents or records which the relevant Agent is obliged not to release by any laws or regulations to which it is subject; and

(B) by notice in writing to the Company require it to make all subsequent payments in respect of the Bonds to or to the order of the Trustee and not to the Principal Agent.

8.1 **Declaration of Trust**

All monies received by the Trustee in respect of the Bonds or amounts payable under this Trust Deed will, despite any

appropriation of all or part of them by the Company, be held by the Trustee on trust to apply them (subject to Clause 8.2 (Accumulation)):

(A) first, in payment or satisfaction of all costs, charges, expenses and liabilities incurred by the Trustee and the Agents (including remuneration payable to the Trustee and the Agents) in carrying out their functions under this Trust Deed and the Agency Agreement *pari passu* and rateably;

(B) secondly, in payment of any other amounts (including principal, premium and interest) owing in respect of the Bonds *pari passu* and rateably; and

(C) thirdly, in payment of any balance (if any) to the Company for itself.

If the Trustee holds any monies in respect of Bonds in respect of which claims have become prescribed under Condition 12, such funds shall be returned to the Company.

xx xx xx

9.15 **Trust Deed**

comply with and perform and observe all the provisions of this Trust Deed which are expressed to be binding on it. The Conditions shall be binding on the Company and the Bondholders. The Trustee shall be entitled to enforce the obligations of the Company under the Bonds and the Conditions as if the same were set out and contained in this Trust Deed which shall be read and construed as one document with the Bonds. The provisions contained in Schedule 3 (Provisions for meetings of Bondholders) shall have effect in the same manner as if herein set forth;

xx xx xx

10.1 **Normal remuneration**

So long as any Bond is outstanding the Company will pay the Trustee as remuneration for its services as Trustee such sum on

such dates in each case as they may from time to time agree in writing, which sums, for the avoidance of doubt, shall be paid free and clear of deduction, withholding, set-off or counter claim on account of taxation. Such remuneration will accrue from day to day from the date of this Trust Deed and shall be payable in priority to payments to the Bondholders. However, if any payment to a Bondholder of monies due in respect of any Bond or delivery of Shares on conversion of a Bond is improperly withheld or refused, such remuneration will again accrue as from the date of such withholding or refusal until payment or delivery to such Bondholder is duly made.

xx xx xx

11.6 **Discretion**

Save as expressly provided in this Trust Deed, the Trustee will have absolute and uncontrolled discretion as to the exercise or non-exercise of its functions and will not be responsible for any loss, liability, cost, claim, action, demand, expense or inconvenience which may result from their exercise or non-exercise. Whenever in this Trust Deed, the Agency Agreement or by law, the Trustee shall have discretion or permissive power it may decline to exercise the same in the absence of approval by the Bondholders and need not exercise the same unless it has been indemnified and/or provided with security to its satisfaction.

xx xx xx

11.11. **Determinations conclusive**

As between itself and the Bondholders, the Trustee may determine all questions and doubts arising in relation to any of the provisions of this Trust Deed. Such determinations, whether made upon such a question actually raised or implied in the acts or proceedings of the Trustee, will be conclusive and shall bind the Trustee and the Bondholders.

xx xx xx

11.13 **Events of default**

The Trustee may determine in its absolute discretion whether or not an Event of Default or Potential Event of Default is in its opinion capable of remedy and/or materially prejudicial to the interests of the Bondholders. Any such determination will be conclusive and binding on the Company and the Bondholders.

xx xx xx

11.25 **Interests of Bondholders**

In connection with the exercise of its powers, trusts, authorities or discretions (including, but not limited to, those in relation to any proposed modifications, waiver or authorisation of any breach or proposed breach of any of the Conditions or any of the provisions of this Trust Deed), the Trustee shall have regard to the general interests of the Bondholders as a class and shall not have regard to any interest arising from circumstances particular to individual Bondholders (whatever their number) and, in particular but without limitation, shall not have regard to the consequences of such exercise for individual Bondholders (whatever their number) resulting from their being for any purpose domiciled or resident in, or otherwise connected with, or subject to the jurisdiction of, any particular territory or otherwise to the tax consequences thereof and the Trustee shall not be entitled to require from the Company, nor shall any Bondholder be entitled to claim from the Company or the Trustee, any indemnification or payment in respect of any tax consequence of any such exercise upon individual Bondholders except to the extent provided for in Condition 10 and/or in any undertakings given in addition thereto or in substitution therefor pursuant to this Trust Deed.

xx xx xx

**19. POWERS AND REMEDIES CUMULATIVE**

Except as otherwise provided in this Trust Deed, no right or remedy herein conferred upon or reserved to the Trustee or to

the Bondholders is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

xx xx xx

**24. ENFORCEMENT**

At any time after the Bonds have become due and repayable, the Trustee may, at its discretion and without further notice, take such proceedings against the Company as it may think fit to enforce repayment of the Bonds together with premium (if any) and to enforce the provisions of this Trust Deed, but will not be bound to take any such proceedings unless (a) it shall have been so requested in writing by the holders of not less than 25 per cent., in principal amount of the Bonds then outstanding or so directed by an Extraordinary Resolution and (b) it shall have been indemnified and/or secured to its satisfaction. No holder of the Bonds will be entitled to proceed directly against the Company, unless the Trustee, having become bound to do so, fails to do so and such failure shall have continued for a period of 60 days and no direction inconsistent with such written request or Extraordinary Resolution has been given to the Trustee during such 60-day period by the holders of a majority in principal amount of the outstanding Bonds.

xx xx xx

25.1` **Governing law**

This Trust Deed shall be governed by and construed in accordance with English law.

25.2 **Jurisdiction**

> The courts of England and Wales are to have jurisdiction to settle any disputes which may arise out of or in connection with this Trust Deed or the Bonds and accordingly any legal action or proceedings arising out of or in connection with this Trust Deed or the Bonds (**"Proceedings")** may be brought in such courts. The Company irrevocably submits to the jurisdiction of such courts and waives any objections to Proceedings in such courts on the ground of venue or on the ground that the Proceedings have been brought in an inconvenient forum. This submission is for the benefit of the Trustee and each of the Bondholders and shall not limit the right of any of them to take Proceedings in any other court of competent jurisdiction nor shall the taking of Proceedings in any one of more jurisdictions preclude the taking of Proceedings in any other jurisdiction (whether concurrently or not)."

66. As far as the judgment of Karnataka High Court in The Bank of New York Mellon's case (supra) is concerned, firstly the aforesaid judgment is subject-matter of appeal. Further, in the aforesaid case, the Trust Deed was dated 17.3.2006. The due date for redemption of FCCBs was 18.3.2011. The company petition was filed alleging default in payment of interest due on 18.9.2009. The interest upto March, 2009 was paid. On account of that, the trustee therein called upon the company to pay the total amount of FCCBs. The contention sought to be raised by the company therein was that the petitioner therein was not a creditor and not entitled to file the petition as in terms of the provisions of the Trust Deed, only recovery proceedings could be initiated. While referring to the terms of the Trust Deed, it was argued therein that the bonds and GDRs were to governed and construed in accordance with English law. The terms of the Trust Deed therein provided that courts in England shall have "exclusive jurisdiction" to settle any dispute in connection with the Trust Deed or the bonds and the courts in England are the most appropriate and convenient courts to settle that. No doubt, a clause in the Trust Deed therein provided

that the trustee or the bond holders could initiate proceedings relating to the dispute in any other court having jurisdiction, however, the plea was rejected holding that as per the terms of the Trust Deed, exclusive jurisdiction was conferred on English courts. Further, while specifically noticing that the court would have jurisdiction over the respondent-company being registered in its jurisdiction, but final determination had to be got from the forum of choice, exclusively and expressly reserved in the Trust Deed as to whether an "event of default" had occurred or not. It is only after the finding is arrived at with reference to provisions of the Trust Deed in terms of English law, only on the basis of those findings, a winding up petition could be entertained. The reservation of option of approaching any other court than the English courts was only under the circumstances where no adjudication on facts was required. The case in hand is entirely different as in the present case, the fact that the amount payable on expiry of due date of FCCBs had become due on 8.4.2011 and further that there is an event of default and the company could not pay the amount on account of financial crisis, are admitted, hence, no facts are required to be adjudicated upon.

67. The facts in Aturia Pompe S.P.A's case (supra) before Delhi High Court were that petitioner-Aturia Pompe was a foreign company incorporated in Italy engaged in the business of manufacture, sale and supply of various types of motors and pumps. It had exclusive knowhow for the products manufactured by it and had also the right to use the trade mark of Aturia/Rotos. The respondent-Aturia Continental approached Aturia Pompe for obtaining technology and transfer of technical knowhow for different types of pumps and motors. As a result thereof, a collaboration agreement was entered into between the parties on 18.6.1992, in terms of which Aturia Continental was to pay a lump sum of US $ 3,20,000. On account of failure of Aturia Continental to adhere to the terms of the technical knowhow agreement and closure of the factory, the collaboration/ technical knowhow agreement was terminated. As Aturia Pompe had supplied the technical knowhow, US $ 3,20,000 became payable, out of which first instalment of US $ 74,666.67 was paid and two instalments of

US$ 2,13,334 were still payable. On account of failure to pay the aforesaid amount, winding up petition was filed, where the plea raised was that as per the collaboration agreement, resolution of disputes was by way of arbitration and that too in accordance with laws of Switzerland, hence, the Company Court should not exercise jurisdiction. While negating the plea raised by Aturia Continental, it was held by Delhi High Court that the said plea was not with reference to any dispute in terms of the agreement between the parties, which was required to be resolved as per the agreement. The closure of the factory was pleaded on account of change in economic policy of the government. The inability was pleaded on account of bad financial position. Under these circumstances, the Court opined that in that case the matter could be referred to arbitration only if there was a bonafide dispute which could not be adjudicated upon in summary proceedings by the Company Court. The applicability of law of Switzerland will arise when such a dispute is to be resorted to by means of arbitration. Even if there was any such arbitration clause, the company petition for winding up was held to be maintainable as while entertaining the company petition, the court has to apply the provisions of the 1956 Act. Aturia Continental having its registered office in Delhi, winding up petition could only be filed in Delhi High Court. Relevant paragraph thereof is extracted below:

> "16. In view of this discussion, the argument of the learned counsel for the respondent that it is a matter which should have been remitted for arbitration does not cut any ice. No doubt, Article 6.12 of the Agreement provides for resolution of disputes by means of arbitration and the arbitration has to proceed in accordance with the laws of Switzerland. However, only when it is found that the defense of the respondent company raises bona fide disputes which cannot be adjudicated in these proceedings which are of summery nature and require evidence that the petitioner could be relegated to the arbitration. Further, the question of applicability of laws of Switzerland would arise only when there are such disputes which are to be resorted to by means of arbitration. It is settled proposition of

law that notwithstanding the arbitration clause, company petition seeking winding up of a company is maintainable. The judgment of the Supreme Court on the point is Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., MANU/SC/0401/ 1999: (1999) 3 SCR 861. While entertaining such a petition the Court has to, naturally, apply the provisions of the Companies Act. Therefore, there is no conflict of laws as tried to be projected by the learned counsel for the respondent and the judgment of the Supreme Court in Modi Entertainment Network (supra) shall not be applicable. That was a case where the suit was filed in an Indian Court (i.e. Bombay High Court) claiming damages, although the contract contained a non-exclusive jurisdiction clause of English court in accordance with English law. It was in this context the Apex Court held that the civil suit in Bombay High Court was not maintainable and remedy was to go to English Court, as dispute between the parties was also governed by English law. Present case is not one for recovery but for winding up of the respondent company. It is trite law that company proceedings are not in the nature of recovery suits. Present petition is one which is for winding up of the respondent company. As respondent company is having its registered office in Delhi, winding up petition can be filed only with this Court, which is the mandate of Section 10 of the Companies Act."

68. In Videocon Industries Ltd.'s case (supra), the Company Court admitted Company Petition No. 528 of 2012 vide judgment dated 5.12.2013, which was upheld in Appeal (L) No. 29 of 2014 vide judgment dated 18/19.7.2014. In the aforesaid case, respondent-Intesa Sanpaolo S.P.A. was a bank incorporated under the laws of Italy. The petitioner-Videocon approached the aforesaid bank for financial assistance. As a condition to secure financial assistance, Videocon offered and issued a guarantee letter styled as *'Patronage Letter'* in favour of the bank. In terms of the loan agreement as guaranteed, Intesa advanced financial assistance. On default,

Intesa instituted proceedings in the court at Turin, Italy as per the terms of agreement. The same was decreed. Intesa filed a suit in the court in India for enforcement of the decree obtained in the court at Turin. Thereafter, Intesa issued a notice for winding up of Videocon. In response thereto, neither execution of *'Patronage Letter'* was denied nor disputed. Even the default was also admitted. As a result, the petition for winding up was filed. In defence of the winding up petition, Videocon raised the plea that once the suit had been filed by Intesa for enforcement of a foreign decree, the company petition was not maintainable. However, the Court negated the aforesaid plea finding that a petition for winding up is maintainable in a court in whose territorial jurisdiction the registered office of a company is situated. As the loan was guaranteed in the form of *'Patronage Letter'* given by Videocon, the same being the foundation for filing a petition, the civil suit filed at Turin and a decree passed therein will not debar entertainment of the winding up petition on the basis of original cause of action, i.e., guarantee in the form of *'Patronage Letter'*. Since the court had found that it was a case where the loan advanced by the bank to Videocon was guaranteed by way of *'Patronage Letter'* and the bank will be the creditor, the petition was held to be maintainable.

69. In Citi Bank's case (supra), petitioner-Citi Bank was appointed as a trustee for bond holders. As respondent-Moser Baer India Ltd. defaulted in redemption of bonds on the due date, petition for winding up was filed. The plea raised by Citi Bank was that the debt has been admitted by Moser Baer and its ability to pay. Even the CDR Scheme, sought to be pleaded by Moser Baer, was not taking care of the interest of unsecured bond holders. The stand of Moser Baer was that implementation of CDR Scheme is in process. Unless, the company is allowed some time for revival, it will not be in a position to start repaying its debt. The winding up proceedings would upset the entire process. Publication of citation of admission of petition will carry a stigma on the company rendering all attempts to revive the same futile and further the power of the court to order winding up is discretionary. The entire issue in the aforesaid judgment was considered in the light of the fact whether the plea raised by Moser Baer that

the company should not be wound up as there is a CDR Scheme being implemented was declined as such a plea could be considered after admission when all concerned with the company are to be heard. The earlier judgment of Delhi High Court in Company Petition No. 960 of 2009— Sublime Agro Ltd. v. Indage Vintners Limited, decided on 19.3.2010 was relied upon.

70. In Shin Satellite Public Co. Ltd.'s case (supra), winding up petition was filed by Shin Satellite as in terms of an agreement signed by STV Enterprises Ltd. with Shin Satelite to partly utilise and avail the services of non-Preempitible unprotected extended C-Band Regional Beam Transponder of Thaicom-3 satellite of Shin Satellite for the purpose of digital broadcast applications etc. for a period of 5 years commencing from 15.11.2001. As per the said agreement, the service fees of US $ 49,219 per quarter was payable in advance. STV Enterprises failed to adhere to the terms. Shin Satellite issued a notice dated 16.9.2002 to STV Enterprises claiming that there was an outstanding amount of US $ 99,683. The same was admitted by STV Enterprises. In subsequent communication, STV Enterprises admitted outstanding balance of US $ 4,32,570.97 as on 31.12.2003. Notice for winding up of STV Enterprises was issued where the matter was compromised and disposed of for payment in terms of agreed schedule. As STV Enterprises did not adhere to the schedule, application for revival of the company petition was filed. The Company Court found that STV Enterprises was admittedly indebted to Shin Satellite for an amount of US $ 50,000, which was not paid despite opportunity. The plea raised by STV Enterprises about maintainability of the winding up petition was regarding governing law in relation to the contract being the law of Republic of Singapore. The court having found that the debt of US $ 50,000 being admittedly due, jurisdiction of the Company Court for winding up was not ousted.

71. With reference to the judgments of Bombay High Court in Zenith Infortech Ltd. and BNY Corporate Trustee Services Ltd.'s cases (supra), the plea raised by learned counsel for the respondent-company was that import of Clause 25.1 of the Trust Deed, which was identically worded

in the aforesaid cases, and the fact that the trustee was not a creditor was neither raised nor considered, hence, these judgments cannot be said to be precedent to be relied upon. In Zenith Infortech Ltd.'s case (supra), a Division Bench of Bombay High Court dealt with a similar issue where the petitioner-bank herein was the petitioner who filed a winding up petition on account of non-payment of the amount of FCCBs after these became due. The petition was admitted. In appeal, the order of Company Judge was upheld. It was opined therein that a petition for winding up filed by the trustee on behalf of the bond holders was maintainable. Non-reference of a clause like Clause 25 in the present trust deed will not make any difference for the reason that even in terms thereof, the trustee and the bond holders have a right to take proceedings in any court of competent jurisdiction. Similar was the issue under consideration in BNY Corporate Trustee Services Ltd.'s case (supra).

72. The judgment of Hon'ble the Supreme Court in British India Steam Navigation Co. Ltd.'s case (supra) is distinguishable as it was a case of dispute between two parties regarding short supply of material where they had agreed to confer exclusive jurisdiction on English Courts or at the option of the Carrier at the port of destination according to English law. Certain disputed facts were required to be gone into. Whereas in the case in hand, Clause 25.2 of the Trust Deed clearly provides that in addition to the courts in England, proceedings can be initiated in any other court of competent jurisdiction. It cannot be disputed that a petition for winding up can be filed in a court in whose territorial jurisdiction registered office of the company is situated.

73. To similar effect is the judgment of Bombay High Court in Rhodia Ltd. and others' case (supra).

74. As a preliminary objection, the respondent-company while referring to clauses 25.1 and 25.2 of the Trust Deed, sought to argue that jurisdiction with reference to the Trust Deed was exclusively with the courts in England and Wales and the Trust Deed is to be governed and construed in accordance with English law. Unless the petitioner first gets it determined under the English law that it is a creditor, it does not have any

right to file the present winding up petition, as in terms of Section 439(2) of the 1956 Act, such a petition can be filed only by a creditor.

75. Clause 25.1 of the Trust Deed provides that the Trust Deed shall be governed and construed in accordance with English law. Meaning thereby, if there is any dispute with reference to any of the terms contained in the Trust Deed, the same has to be interpreted in accordance with English law. Clause 25.2 provides that courts of England and Wales shall have the jurisdiction to settle any dispute in connection with the Trust Deed or the bonds and the respondent-company irrevocably submits to the jurisdiction of such court.

76. A perusal of Clause 25.1 of the Trust Deed shows that the same is to be governed and construed in accordance with English law. Clause 25.2 of the Trust Deed deals about the jurisdiction. It provides that Courts in England and Wales shall have jurisdiction to settle any dispute arising out or in connection with the Trust Deed or the bonds. The company waives off its objections to those proceedings on the ground of venue or inconvenient forum. It has been further provided in the aforesaid clause that the same is for the benefit of the trustee and the bondholders and further it shall not limit the rights either of the trustee or the bondholders to take proceedings in any court of competent jurisdiction, even it may be concurrent.

77. The aforesaid clause is not to be read in isolation, rather, various clauses of the Trust Deed have to be read collectively to find out the real spirit. Clause 2.2 provides that the company on the day prior to any date when the bonds became due to be redeemed or procure to be paid to or to the order of the trustee in London in US dollars will pay redemption amount. The trustee is to hold the benefit of the covenants in this clause in trust for itself and the bondholders. The apparent object of the aforesaid clause and the execution of the Trust Deed for payment to a trustee was that the company is not required to deal with number of bondholders individually and it is the trustee which takes care of their interest for collection of interest and the principal amount from the company and further disbursement thereof to the bondholders. Clause 2.4 of the Trust Deed provides that at any time after an event of default or a potential event

of default has occurred, the trustee may by notice in writing to the company require to make all subsequent payments in respect of the bonds to or to the order of the trustee. Clause 11.25 of the Trust Deed provides that the trustee shall have regard to the general interests of the bondholders as a class. Clause 19 of the Trust Deed provides that in addition to the rights and remedies conferred in the Trust Deed, every other right and remedy permissible shall be cumulative and in addition to right and remedy as provided for in the Trust Deed.

78. Clause 24 of the Trust Deed provides for enforcement. The bonds became due for redemption on 8.4.2011. This clause provides that at any time after the bonds become due and repayable, the trustee may, at its discretion and without any further notice take such proceedings against the company as it may think fit to enforce repayment of the bonds together with the premium (if any). It can further enforce the provisions of the Trust Deed. However, such proceedings could not be initiated unless there is a request of not less than 25% of the bondholders in writing. This clause specifically provides that no bondholder will be entitled to proceed against the company directly unless the trustee fails to take appropriate action and such failure continues for a period of 60 days and during this period. The case in hand is not such. Meaning thereby, the right to proceed against the company, in case of an event of default, has been specifically conferred on the trustee and not the individual bondholder.

79. Even the issue raised by learned counsel for the respondent that consent of the bond holders having not been produced, the present petition filed by the trustee is not maintainable, is to be noticed and rejected. It is the admitted case of the respondent-company itself that even after issuance of winding up, some of the bonds were got converted into shares. The liability, which was initially to the tune of more than US$ 33 millions was reduced to US$ 14 millions, meaning thereby they were in touch with the bond holders. Nothing has been produced on record by the respondent to show that any of the bond holders, which are about 49% at present of the total, is objecting to the filing of present petition. The issue was sought to be raised only on the ground that some consent letter was received just a day prior to the filing of

the petition and some even after that. This leads to the conclusion that even if there was no consent at the initial stage, the remaining bond holders have ratified the action of the petitioner in filing the present petition.

80. The terms and conditions of FCCBs show that interest thereof was due for payment on 7th of April and October every year and the same were due for redemption at a specified premium on 8.4.2011. An event of default, as defined in the Trust Deed, is described in clause 11 of the offering circular which *inter-alia* provides non-payment of the principal amount, premium or interest on the bonds when due. It was the admitted case of the parties that though some of the bonds were got converted into shares before the due date for redemption and some after the due date, but presently the bonds worth US$ 14 millions are due for redemption. The petitioner got a notice dated 3.5.2011 issued to the company specifying that there is event of default and the company was directed to make payment in respect of the bonds to the trustee. The aforesaid notice was replied to by the company vide letter dated 24.6.2011 specifically admitting that event of default on the bonds occurred due to failure to make payment of the redemption amount on the due date for the reason that since 2008 recession had hit the company badly, which resulted in major losses and deterioration of the balance sheet.

81. On 24.8.2012, a notice for winding up of the company was got issued by the trustee specifying the event of default and admitted inability of the respondent-company to pay the debt. In reply, the event of default was admitted, though it is sought to be claimed qua the bond holders and not the petitioner.

The contention of learned counsel for the petitioner that the petitioner does not have any right to initiate winding up proceedings is totally misconceived. Even section 439(2) of the 1956 Act provides that a secured creditor, holder of any debenture, whether or not any trustee or trustees have been appointed, and trustee for holders of debentures shall be deemed to be a creditor within the meaning of clause (b) of sub-section (1), which provides that winding up petition can be filed by any creditor or creditors of the company. The petitioner in the present case is a trustee of

the bond holders, hence, entitled to maintain the petition.

82. The contention that the aforesaid deeming provision, as provided for under Section 439 of the 1956 Act, is limited only to the entitlement to file a petition and not for issuance of a notice under Section 434 of the 1956 Act is totally misconceived and deserves to be rejected. Once a trustee has been given right to file a petition and has been treated as a deemed creditor and a creditor has been given a right to issue notice or get the notice issued to a company, then the trustee is entitled to get the notice issued. If the contention of learned counsel for the respondent is accepted, the same will make the provisions of the 1956 Act unworkable. This is the only possible harmonious construction.

83. The contention raised by learned counsel for the respondent that debentures in question had not been issued under the 1956 Act as it required a trust deed to be registered in terms of the provisions contained in Section 117A to 117C of the 1956 Act and the same being not there, the petitioner cannot be treated as a trustee under the 1956 Act is also meritless. It is not in dispute that the bond holders had advanced money to the company. The event of default is admitted. The bonds having been issued in the present case outside the country in foreign currency were in terms of certain guide-lines issued by SEBI and RBI, as repatriation of the amount on maturity was to be in foreign currency, but the fact still remains that debt is admittedly due and the company had signed the trust deed with the petitioner for taking care of interest of the bond-holders. Under these circumstances the respondent cannot be permitted to raise hyper technical plea to avoid its liability under the 1956 Act.

84. The contention of learned counsel for the respondent that the bonds in the present case having not been issued under the 1956 Act cannot be termed to be debenture, hence, the provisions of the 1956 Act will not be applicable is also misconceived as a petition for winding up can be filed even for any other debt due from the company and the term “bond” and “debenture” will not make any difference.

85. In view of my aforesaid discussions, I am of the firm opinion that the petition filed by the petitioner, being a trustee of the bond-holders for winding up of the respondent-company is maintainable, the petitioner being a deemed creditor.

**On merits**

86. As far as the issue as to whether in the facts and circumstances of the case, the petition against the respondent-company should be admitted or not is concerned, the plea raised by the petitioner is that once the debt is admitted and there is default in payment thereof, the only inescapable conclusion is that the company is unable to pay its debt and deserves to be wound up, the first step in the process being admission of the petition. The event of default having been admitted in the present case, the petition deserves to be admitted, whereas the respondent-company has raised the issue that even if there is admission of debt, it is still the discretion of the court, which is to be exercised considering many factors, namely, whether the company is functional, number of employees working, contribution to the State etc.

87. As per the information available in the annual report of the company for the year 2012-13, the date of commencement of commercial production of the company was 19.12.1946. It is engaged in manufacturing of cotton textiles, synthetics fabrics and nylon filament yarn. As per the balance sheet of the company for the period ending in September, 2013 (18 months), the company suffered operating loss of ₹ 6399.27 lacs. For six months period from October, 2013 till March, 2014, the company earned operating profit of 302.05 lacs. For the quarter ending 30.6.2014, the same was ₹ 821 lacs (un-audited) and for the quarter ending 30.9.2014, the same was ₹ 816 lacs (un-audited).

88. The valuation of the assets of the company was got done by this court vide order dated 9.9.2013, in terms of which the valuer had submitted his report. As per that report, the total realisable value of the assets was ₹ 929 crores. Even the distress sale value of the assets of the company located at Phagwara, Hoshiarpur and Shri Ganganagar was about ₹ 749 crores. The liabilities were ₹ 605 crores in March, 2014 reduced from ₹ 697 crores in

September, 2013. The same stood at ₹ 630.71 crores on 30.9.2014.

89. It is the case set up by the respondent as well as in the application filed by the workers' union-applicants for seeking opportunity of hearing before admission of the petition that there are more than 6,000 employees working in the respondent-company at different units. Majority of whom are workmen. Number of workmen have been given residential quarters by the company. It has not been alleged that the company is making default in payment of either the salaries or any other statutory dues. As is evident from the balance sheet, the respondent-company is coming out of red as it has started generating operating profits. It was even the case set up by the respondent-company that on account of recession in the market, it had incurred huge losses but it is on the path of revival. It is not in dispute that publication of citation of admission of petition inviting objections has large ramifications. It is proceeding towards winding of the company, namely, selling of the assets of the company and paying of the workers and the creditors and balance, if any, to the contributors. Publication of citation of admission of a running unit sometimes results in its slow death. Where a unit is working and giving direct source of livelihood to more than 6,000 employees, giving indirect to many more and its assets are more than its liability, in my opinion, even if the debt is admitted, it would not be in larger public interest to admit a petition and initiate the process for winding up as the same will adversely affect its business and creditworthiness, which will not be in the benefit of either of the party. No doubt, the petitioner is interested in return of the money advanced by the bond holders, but still in proceedings for winding up, totality of circumstances have to be seen. For non-payment of the amount due to one of the creditors, livelihood of thousands of workers cannot be put at stake once the bonafide of the respondent-company to revive the same and pay of the debts cannot be doubted. All what was claimed by the petitioner was that by arranging more loans and furnishing securities, interest of the petitioner will be further affected, but the fact remains that even as on today, the total assets of the company are more than its liabilities. It suffered losses on account of recession and also apparently on account of non-availability of liquid funds

as was claimed that in terms of the exercise being done for Corporate Debt Restructuring Scheme, some of the non-core assets were to be sold to pay of the creditors. Such an opportunity deserves to be afforded to the respondent-company. It will not be in the fitness of things to give unceremonial burial to the respondent-company, once it is in business for the last more than 68 years. It is further relevant to add here that 50% of even the bond holders have got their bonds converted into equity. It shows that even they have faith in the management and financials of the company.

90. Hon'ble the Supreme Court in M/s IBA Health (India) Private Limited v. M/s Info-Drive Systems SDN. BHD., (2010) 10 SCC 553, while making observations regarding public policy to be kept in mind by the Company Court, observed that publication of an admission notice may damage creditworthiness or financial standing of the company, which may also have other economic and social ramifications. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of the public at large. Relevant paragraph 34 thereof is extracted below:

> "34. A creditor's winding-up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the newspaper of the filing of winding-up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of the public at large."

91. In Canara Bank's case (supra), this court opined that despite the debt being admitted, still considering the fact that the company was employing about 3,000 workmen and officers and paying their salaries

regularly; honouring its tax liability; as there were number of shareholders and dealers, who were having indirect financial nexus with the company and it was established that the company was progressing towards revival, the petition was not admitted. It was opined that admission would be a loss to one and all, though debt of the petitioning-creditor may be paid of.

92. In Sublime Agro Ltd.'s case (supra), Bombay High Court considered the issue regarding safeguarding the interest of unsecured creditors vis-a-vis secured creditors with reference to CDR scheme. It was opined that interest of unsecured creditors was part of the scheme, which was voluntary and not binding on unsecured creditors. In the process of implementation of CDR, more loans may be advanced to the company resulting in creation of more charge on its assets, leaving the unsecured creditors and the workers high and dry. In that case, number of petitions were admitted against the company involving a debt of more than 41 crores. After admission of the petition, other creditors had also filed their claims. The current and fixed assets of the company as per books of account were found to the tune of ₹ 276 crores, whereas its liability towards secured and unsecured creditors was ₹ 400 crores. Under these circumstances, the petition was allowed. The Official Liquidator was directed to take charge of the assets of the company. The facts in the present case are altogether different as the assets are more than the liabilities and other creditors are opposing even the admission.

93. Considering the aforesaid factual matrix, in my opinion, it would not be in the fitness of things to admit the petition for winding up against the respondent-company. However, it is expected that the respondent-company will make all out efforts to generate funds either out of cash profits or by sale of non-core assets to pay of the petitioner or get the debt restructured to maintain its creditworthiness. 25% of the amount due to the balance bond holders be arranged to be paid within a period of six months and balance thereafter, unless re-scheduled. The respondent-company is restrained from creating any further charge on its assets, which may prejudice the right of the petitioner, being un-secured creditor.

94. The petition stands disposed of accordingly.

(Rajesh Bindal)
Judge

January 27, 2015

(Refer to Reporter)