

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMPANY PETITION NO.625 OF 2013

SICOM Ltd.)....Petitioner
V/s.
Entertainment World Developers Ltd.)....Respondent

WITH

COMPANY PETITION NO.487 OF 2014

SICOM Ltd.)....Petitioner
V/s.
Treasure World Developers Pvt. Ltd.)....Respondent

Mr.Rohan Rajadhyaksha a/w Mr.Dhirajkumar Totala and Ms.Oendri Neogi i/by AZB & Partners for petitioners.
Mr.Rohan Cama a/w Mr.Mihir Mody and Mr.Dhawal A.Patil i/by M/s.K.Ashar & Co. for respondents.

**CORAM : K.R.SHRIRAM,J
DATE : 13.11.2017**

P.C.:-

COMPANY PETITION NO.625 OF 2013

- 1 The petition was admitted by an order dated 23.6.2016.
- 2 Petitioner filed this petition seeking to wind up respondent-company-Entertainment World Developers Ltd. (the said company) on the ground that it was unable to pay debts.
- 3 It is the case of petitioner in the petition that company was indebted in the sum of Rs.52.80 crores and Rs.23.33 crores (aggregating to Rs.76.13 crores) as on 12.12.2012. Mr. Rajadhyaksha

appearing for petitioners states that by the time petition was taken up for admission, the aggregate amount had increased to Rs.94.37 crores. Subsequent to the order of admission dated 23.6.2016, Mr. Rajadhyaksha states that the property that was mortgaged and given as security to petitioner has been disposed and petitioner has recovered Rs.25.60 crores on 25.10.2016. Mr. Rajadhyaksha states that appropriate credit of Rs.25.60 crores has been given.

4 The facts giving rise to this petition and the defence raised by the company have been dealt with extensively by this court while considering the petition for admission. It would be useful to reproduce paragraph nos.2 to 36 and the same read as under :-

“2 The brief facts giving rise to the present controversy are that, the Petitioner had sanctioned financial assistance to one Nanded Treasure Bazaar Private Limited (hereinafter referred to as “Borrower No.1”) and Treasure World Developers Private Limited (hereinafter referred to as “Borrower No.2”) from time to time and as per the terms and conditions of the respective loan documents. As far as this Petition is concerned, the Respondent Company is sued in its capacity as a Guarantor to the loans given by the Petitioner to the said Borrower Nos.1 and 2.

THE TERM LOAN OF RS.35 CRORES SANCTIONED AND DISBURSED TO BORROWER NO.1:-

3 *On 30th July, 2009, the Petitioner sanctioned a Term Loan for Rs. 35 Crores to Borrower No.1. This loan was disbursed on 28th August, 2009. It is the case of the Petitioner*

that this Term Loan was availed of by Borrower No.1 for partly repaying the outstandings under another Term Loan that they had availed of from the Housing and Urban Development Corporation (HUDCO) and part to finance the capital expenditure for Borrower No.1's property at Nanded, Maharashtra. This Term Loan of Rs. 35 Crores was inter alia secured by an Indenture of Mortgage dated 27th August, 2009 (Exhibit-D to the Petition) as well as two separate Deeds of Guarantee executed by one Mr. Manish Kalani as well as the Respondent Company on the same date. The relevant clauses read as under:-

"1. If at any time default shall be made by the Company in the repayment of the said Term Loan of Rs.35,00,00,000/- (Rupees Thirty Five Crores Only) lent and advanced to be lent and advanced by SICOM to the Company or any part thereof or interest thereon or any other moneys for the time being due and owing by the Company to SICOM under the said Mortgage, the Guarantor will without demur pay to SICOM on demand at Mumbai the said loan together with interest thereon and all other moneys which shall then become due to SICOM as aforesaid and all costs, charges and expenses whatsoever which SICOM may incur by reason of any default on the part of the Company its successor or successors and assigns and will indemnify and keep indemnified, saved harmless and defended SICOM at all times hereinafter against any loss or damage which SICOM may suffer by reason of any default by the Company in repayment to SICOM of the said loan or any part thereof and/or payment of interest thereon or any other moneys for the time being due and payable by the Company to SICOM under the said Mortgage and all costs, charges and expenses whatsoever which SICOM may incur by reason of any default on the part of the Company its successor or successors and assigns.

5. The Guarantee herein contained is irrevocable, absolute and independent of any rights and remedies, which SICOM may have against the Company and shall be enforceable against the Guarantor notwithstanding that the securities or any of them specified under the said Mortgage shall at the time when the proceedings are taken against the Guarantor or any of them hereunder be outstanding or unrealised.

6. The Guarantor hereby agrees and declares that its

liability under these presents shall be irrevocable joint and several with the liability of the Company for repayment of the said loan together with interest, costs, charges and expenses.

9. The Guarantee herein contained shall be enforceable against the Guarantor notwithstanding that no action of any kind has been taken by SICOM against the Company and an intimation in writing sent to the Company and/or the Guarantor by SICOM that a default or breach has occurred, shall be treated as final and conclusive proof as to the facts stated herein.

10. The Guarantee herein contained is a continuing one for all amounts lent and advanced and/or to be lent and advanced by SICOM to the Company under the said Mortgage as also for all interest, costs, charges and expenses and all other moneys which may from time to time become due and payable and remain unpaid for the time being to SICOM under the said Mortgage and shall remain in force until the said loan shall be paid off in full with interest and all costs, charges and expenses and all other moneys as aforesaid.

16. The Guarantor further declares that as between SICOM and the Guarantor, the Guarantor will be treated as principal debtor jointly with the Company and accordingly the Guarantor shall not be entitled to and the Guarantor hereby waives all the costs conferred on the Guarantor by Sections 133, 134, 135, 139 and 141 of the Indian Contract Act. ”

(emphasis supplied)

4 Thereafter, on 27th April, 2010, the Petitioner sanctioned another Term Loan of Rs. 12 Crores to Borrower No.1. This loan was disbursed in two tranches of Rs. 5 Crores each on 6th May, 2010, and one tranche of Rs. 2 Crores on 17th May, 2010. This loan of Rs. 12 Crores was also secured inter alia by a Deed of Mortgage dated 4th May, 2010 as well as a personal Guarantee of one Mr. Manish Kalani. It is not in dispute before me that as far as this loan of Rs.12 Crores is concerned, the Respondent Company has not executed any corporate Guarantee to secure the same.

5 Be that as it may, in relation to the Term Loan of Rs.35 Crores, Borrower No.1 continued to pay the EMI's on a regular basis for the first few installments (from January 2010 to December 2011) and thereafter committed default in making

payment of the EMI's. Accordingly, the Petitioner issued a demand notice on 17th April, 2012 calling upon Borrower No.1 to pay the over due amount of Rs.2.45 Crores on or before 3rd May, 2012. Borrower No.1 even failed to pay this over due amount, and therefore, the Petitioner issued a recall notice dated 30th May, 2012 recalling the entire outstanding of Rs.47.54 Crores (as on 29th March, 2012) under the Term Loan of Rs.35 Crores as well as the Term Loan of Rs.12 Crores. As far as the Term Loan of Rs. 35 Crores is concerned, the recall notice itself states that the principle amount outstanding is Rs. 33.28 Crores and interest over due is Rs. 2.03 Crores totaling to Rs. 35.31 Crores. The reason why I have mentioned this over here is because the Respondent Company was not a Guarantor in relation to the Term Loan granted of Rs. 12 Crores to Borrower No.1.

6 In view of the fact that the Respondent Company failed to make payment, the Petitioner by its notice dated 16th July,2012 invoked the Guarantees executed by the Respondent Company as well as one Mr. Manish Kalani. The said notice, though giving a break up of the amounts due under the Term Loan of Rs. 35 Crores as well as the Term Loan of Rs. 12 Crores, claimed the entire sum due from both the Guarantors. I must mention here that Mr. Rajadhyaksha, the learned counsel appearing on behalf of the Petitioner has fairly stated that as far as the Respondent Company is concerned, they are liable as Guarantors only for the dues that are payable under the Term Loan of Rs. 35 Crores, which on the date of the notices came to approximately Rs.36.35 Crores.

7 In view of the fact that the Respondent Company as well as Borrower No.1 failed to pay the outstanding amounts, the Petitioner initiated recovery proceedings against Borrower No.1 as well as the Respondent Company in the Mumbai Debts Recovery Tribunal by filing Original Application No.206 of 2013. In this Original Application, the claim made against the Respondent Company is only with reference to the Term Loan of Rs. 35 Crores. This Original Application is pending before the DRT.

8 In addition thereto, on account of the failure of the

Respondent Company to pay the outstanding amount under the Term Loan of 35 Crores, on 31st January, 2013, the Petitioner issued a statutory notice to the Respondent Company calling upon it to pay its outstanding dues. The Respondent Company replied to the same by their letter dated 2nd February, 2013 and refuted the claim of the Petitioner on the grounds more particularly set out therein. As mentioned earlier, according to the Petitioner, as on 31st July, 2015, an amount of Rs. 58.24 Crores is outstanding as due and payable by the Respondent Company against the Term Loan of Rs. 35 Crores.

TERM LOAN OF RS.25 CRORES SANCTIONED TO BORROWER NO.2.

9 On 21st June, 2010, the Petitioner sanctioned an inter corporate deposit by way of a Short Term Loan for Rs. 25 Crores to Borrower No.2. This loan was inter alia secured by an indenture of mortgage dated 25th June, 2010. To secure this loan of Rs. 25 Crores, the Respondent Company executed a Deed of Guarantee dated 26th June, 2010 in favour of the Petitioner (Exhibit-K to the Petition). The terms and conditions of this Guarantee are almost identical to the Deed of Guarantee executed by the Respondent Company in relation to the loan sanctioned by the Petitioner to Borrower No.1 (for the Term Loan of Rs. 35 Crores).

10 On 25th August, 2010, the terms and conditions of the Rs. 25 Crore loan were further modified, first on 24th June, 2010 and thereafter again on 25th August, 2010 inter alia to change the nature of the facility from an inter-corporate deposit to a Medium Term Loan for a period of three years. Further, this loan was made repayable in a single installment at the end of 180 days from the date of disbursement under every rotation. It was specifically stated in this modification letter that all other terms and conditions of the sanction letter dated 21st June, 2010 and modification letter dated 24th June, 2010 were to remain unchanged.

11 Thereafter, this Term Loan of Rs. 25 Crores was further modified by a further modification letter dated 16th November, 2011. It was specifically stated even in this letter that all the terms and conditions of the sanction in respect of

the Rs. 25 Crore loan shall continue to be valid and in force. This modification letter dated 16th November, 2011 has been duly executed and signed by Borrower No.1 as well as the Respondent Company in its capacity as a Guarantor. Pursuant to this letter dated 16th November, 2011, the Petitioner eventually disbursed Rs.20 Crores (as against the sanctioned limit of Rs. 25 Crores) in two tranches of Rs. 10 Crores each (on December 27, 2011 and December 29, 2011 respectively).

12 *Since Borrower No.2 defaulted in making payment of the Petitioner's dues, the Petitioner issued a demand notice on 17th April, 2012, calling upon Borrower No.2 to pay an over due amount of Rs.54.82 Lakhs on or before 3rd May, 2012. Since this requisition was not complied with, the Petitioner thereafter issued a recall notice dated 31st May, 2012 to Borrower No.2 recalling the entire outstanding amount of Rs.20.82 Crores (as on 29th May, 2012). In view of the fact that Borrower No.2 did not pay the outstanding dues, the Petitioner by its notice dated 16th July, 2012, invoked the Guarantee given by the Respondent Company (dated 26th June, 2010) and called upon the Respondent to pay the outstanding amount to the Petitioner.*

13 *It is the case of the Petitioner that since the Respondent Company failed to make payment under the Guarantee that was executed by them, the Petitioner on 24th January, 2013, issued a statutory notice under Sections 433 and 434 of the Companies Act, 1956 to the Respondent calling upon them to pay the outstanding amount. As far as this loan is concerned, it is the case of the Petitioner that as on 31st July, 2015, an amount of Rs. 36.13 Crores is outstanding and which is due and payable by the Respondent Company to the Petitioner. It is in these circumstances that the present Company Petition has been filed.*

14 *In this factual background, Mr. Rajadhyaksha, the learned counsel appearing on behalf of the Petitioner, submitted that the dues of the Petitioner and as claimed in their further affidavit dated 2nd February, 2016, are really undisputed. He submitted that there is no dispute with reference to the fact that both these loans (Term Loan of Rs.35 Crores and Term Loan of*

Rs. 25 Crores), have been availed off by Borrower Nos.1 and 2. It is not in dispute that to secure these loans, the Respondent Company executed two Deeds of Guarantee dated 27th August, 2009 and 26th June, 2010 respectively. He submitted that the terms of these Guarantees clearly stipulate that if the borrowers default in repayment of the loans sanctioned to them, the Respondent Company will without demur, pay to SICOM on demand at Mumbai, the said loans together with interest thereon. He submitted that these Guarantees are also irrevocable, continuing, and which entitled the Petitioner to treat the Respondent Company as a principal debtor. He was at pains to point out that the Guarantees further provide that the Guarantees will be enforceable against the Guarantor notwithstanding that no action of any kind can be taken by the Petitioner against the borrower and intimation in writing is sent to the Borrower and/or the Respondent Company that a default has occurred which shall be treated as final and conclusive proof as to the facts stated therein. He further stated that these Guarantees clearly stipulate that the Respondent Company waives all the rights conferred on the Guarantor by Sections 133, 134, 135, 139 and 141 of the Indian Contract Act, 1872. It was his submission that there is no dispute with reference to the execution of these Guarantees and/or terms and conditions stipulated therein. He submitted that these Guarantees have been invoked by the Petitioner, and the Respondent Company has failed to make payment as required under the said Guarantees. He therefore submitted that this is a fit case where the Company Petition ought to be admitted and directions be issued regarding its advertisement etc.

15 On the other hand, and despite several defenses being raised in the Affidavit in reply, Mr. Rohan Cama, the learned counsel appearing on behalf of the Respondent Company, canvassed only the following defenses:-

(a) The entire claim of the Petitioner is fully secured by a mortgage of an immoveable property, the value of which is far more than the claim of the Petitioner;

(b) The Petitioner is guilty of suppression, and therefore, is not entitled to any equitable orders from this Court in company jurisdiction. To elaborate this point further, Mr. Cama submitted the following instances of suppression:-

(i) *Despite the fact that the Respondent Company has not executed any Guarantee for the Term Loan of Rs.12 Crores sanctioned to Borrower No.1, this fact has been suppressed in the Petition and a claim with reference to this loan has also been made against the Respondent Company despite them not being Guarantors in relation to this loan;*

(ii) *the Petition proceeds on the basis that the Term Loan sanctioned to Borrower No.2 was for Rs. 25 Crores whereas in fact only a sum of Rs. 20 Crores was disbursed to Borrower No.2;*

(iii) *a sum of Rs. 9 Crores was paid by Borrower No.2 on/about March, 2013 which fact is suppressed in the Petition and no credit for the same is given to the Respondent Company;*

(iv) *even though the Petitioner has filed proceedings in the DRT for recovery of their dues in respect of both these loans, the same is suppressed in the Company Petition.*

(c) *Since a substantial portion of the debt is disputed by the Respondent Company, this Court, in the peculiar facts of this case, ought not to enter upon any adjudicatory process which is in the exclusive domain of the DRT, by virtue of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;*

(d) *The Deeds of Guarantee are not adequately stamped under the provisions of the Maharashtra Stamp Act, 1958 and are therefore inadmissible in evidence; and*

(e) *The Respondent Company is a profit making company and is a running concern, and therefore, it ought not be wound up.*

16 I must mention here that Mr. Cama fairly stated that the issue of stamping has not been pleaded in the Affidavit in reply filed on behalf of the Respondent Company and hence he is not pressing this point. He, on instructions, states that this point shall be raised by his clients in the proceedings pending in the DRT. Be that as it may, for all the aforesaid reasons Mr. Cama submitted that the debt of the Petitioner is bonafide disputed

and therefore this Petition be dismissed and the Petitioner be left to prosecute the recovery proceedings already initiated by the Petitioner in the DRT.

17 I have heard the learned counsel at length and perused the papers and proceedings in the Company Petition and the Annexures thereto. The first contention raised by Mr. Cama was that the Petitioner is adequately secured by virtue of the fact that the Petitioner had in its favour a mortgage of an immoveable property of a piece and parcel of land admeasuring about 10,947 square meters and thereabouts situated on Nanded Latur Road within the limits of Village Vasarni Taluka, and District Nanded, together with buildings, structures and superstructures thereon (hereinafter referred to as the "mortgaged property"). He submitted that the possession of this mortgaged property has been taken over by the Petitioner by exercising rights under Section 29 of the State Financial Corporation Act, 1951 and they have an unfettered right to sell the same. He submitted that pursuant to the order of this Court dated 1st September, 2014 read with order dated 25th September, 2014, a valuation of the mortgaged property was done and the same was valued at approximately Rs. 74 Crores. He submitted that in this view of the matter, the Petitioner was fully secured as contemplated under Section 434 (1) (a) of the Companies Act, 1956, and therefore, this Company Petition was not maintainable because the deeming fiction as set out in the said Section was not attracted.

18 I am unable to agree with this submission for more than one reason. Firstly, this property wasn't mortgaged by the Respondent Company. It was mortgaged by Borrower No.1. Section 434 stipulates that the Company shall be deemed to be unable to pay its debts if inter alia, a creditor to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor. It is undisputed that the Petitioner qua the Respondent Company is an unsecured creditor. The

Respondent Company has not given any security by way of mortgage or otherwise to secure the dues of the Petitioner. Section 434 contemplates that the Company who is called upon to pay pursuant to the notice issued thereunder has to either pay or secure the dues to the satisfaction of the person giving the notice. Therefore, at least, prima facie, I am unable to accept the submission of Mr. Cama that the Petitioner is fully secured as contemplated under Section 434 (1) (a) of the companies Act, 1956. Secondly, even otherwise, it is not in dispute before me that after valuation of the mortgaged property (valued at approx Rs.74 Crores) was done by this Court, it was put up for sale. Despite this valuation, the highest bid received was only for a sum of Rs.22.82 Crores. In view of the fact that the valuation of the said property was much higher, the parties agreed that the same should not be sold for Rs. 22.87 Crores. Thereafter, two further attempts were made to sell the mortgaged property. The first attempt was made on 15th July, 2015, fixing the reserve price at Rs. 31 Crores. During this attempt, not a single bid was received. Thereafter another attempt was made on 15th October, 2015, when the reserve price fixed was Rs.25 Crores even though the distress value of the mortgaged property was Rs. 31 Crores. The Petitioner received a bid only for Rs.25.25 Crores and therefore decided not to sell the mortgaged property. As rightly submitted by Mr. Rajadhyaksha, the maximum bid that has been received for the sale of the mortgaged property, despite three attempts, is approximately Rs.25 Crores. This, at least at this stage, would indicate that notwithstanding the valuation, the realisable value of the mortgaged property is much lower than the claim of the Petitioner. In these circumstances, and considering these facts, at least, at this stage, it cannot be said that the value of the mortgaged property is more than the claim of the Petitioner or that the claim of the Petitioner is adequately secured as contemplated under section 434 (1) (a) of the Companies Act, 1956. In any event, I find that the question whether the security is adequate or otherwise is something that would be investigated by this Court at the hearing and final disposal of the Petition. At this stage and when I am hearing the Company Petition for admission, prima facie, on the facts narrated above, I am not satisfied that the security is sufficient to cover the claim of the Petitioner. This view that I have taken, is also supported by a decision of a Division Bench of this Court in the

case of *Bharat Overseas Bank Limited v/s Shree ARCEE Steels Pvt Ltd.*¹ The relevant portion of the said decision reads thus:

“ We are of the opinion that bearing in mind the clear provisions of the Companies Act and the principles which have been discussed in detail in the Madras High Court and the Calcutta High Court judgments above-cited, the rejection of the petition in this case at the stage of admission was not at all justified. The petition was required to be admitted and advertised and it is at that stage that the court could go into the question as to whether the security is sufficient or not and exercise its discretion to accept the petitioning creditor's claims and request for winding up or to reject the same on judicial consideration.”

19 This being the position, I am unable to accept the submission of Mr. Cama that the claim of the Petitioner is adequately secured, and therefore, the Company Petition ought to be dismissed.

20 The next argument canvassed by Mr. Cama was that the Petitioner was guilty of suppression, and therefore, not entitled to any equitable reliefs in company jurisdiction. The instances of suppression narrated by Mr. Cama have been set out by me earlier. In the facts of the present case and on going through the Petition as well as the affidavits filed, I do not find that there has been any suppression as contended by Mr. Cama. It is true that in the Petition, none of these facts have been disclosed. However, before the matter was argued for admission, the Petitioner has filed a further affidavit dated 2nd February, 2016 making clean breast of affairs and have revised their claim as mentioned in their further affidavit. It has been clearly disclosed in the said affidavit that the Respondent Company was not a Guarantor in relation to the Term Loan of Rs. 12 Crores granted by Borrower No.1 and therefore the claim to that extent stands reduced against the Respondent Company. In the further affidavit it has also been stated that even though the loan sanctioned to Borrower No.2 was for Rs.25 Crores, only a sum of Rs. 20 Crores has been disbursed and details thereof have also been set out in the said affidavit. The fact that a sum of Rs. 9 Crores has been paid by Borrower No.2 to the Petitioner and how the same has been appropriated has also been

disclosed along with the fact that proceedings have been filed in the DRT against the Respondent Company as well as Borrower Nos.1 and 2. It is true that this further affidavit has been filed after the affidavit-in-reply was filed by the Respondent Company. In my view, it would be an extremely hyper-technical approach to reject this Petition on the ground that these facts were not initially disclosed in the Company Petition and have been brought to the notice of this Court only after the affidavit-in-reply of the Respondent Company was filed. Mr. Rajadhyaksha and in my view correctly so, submitted that these omissions in the Company Petition were not to gain a march or advantage over the Respondent Company. It was a genuine mistake because the notice of invocation of the Deeds of Guarantee in relation to Borrower No.1 was a consolidated notice issued to the Respondent Company as well as one Mr. Manish Kalani. Even though the Respondent Company stood as a Guarantor only for the Term Loan of Rs.35 Crores, Mr. Kalani stood as a Guarantor for both the loans (Term Loan of Rs.35 Crores and Term Loan of Rs.12 Crores) sanctioned to Borrower No.1. This is the reason why even the claim against the Respondent Company in relation to the Term Loan of Rs. 12 Crores was included in the Company Petition despite the fact that the Respondent Company is not liable as a Guarantor to the said loan. What is important to note is that the notice invoking the Guarantee (in relation to the loans given to Borrower No.1) specifically sets out the dues that are payable with reference to the Term Loan of Rs. 35 Crores as well as the Term Loan of Rs. 12 Crores. Since the said letter was addressed to both Guarantors and one of them being liable for both the loans, is why this mistake has crept in. I do not think that every mistake would amount to suppression. It is also important to note that all these facts have been specifically disclosed in the further affidavit dated 2nd February, 2016. The Respondent Company was given an opportunity to respond to the said affidavit, if it so chose. However, it chose not to controvert any of the contents made in the said further affidavit. I therefore do not find that the Petitioner is guilty of suppression on this count.

21 As far as the issue of not giving credit of Rs.9 Crores is concerned (even though the same was paid before filing of the Company Petition), Mr. Rajadhyaksha submitted that this

mistake occurred because the claim made in the Petition was as on 12th December, 2012 (as mentioned in the particulars of claim) whereas the payment of Rs.9 Crores was made only sometime in March 2013. He very fairly did not try to justify this and in fact submitted that the particulars of claim in the Petition ought to have been set out as on the date of filing of the Company Petition. However, this was not done and this is why a mistake was made in not giving credit of Rs.9 Crores to the Respondent Company in the Company Petition. He however submitted, and in my view rightly so, that credit for the same has in fact now been given to the Respondent Company which is duly reflected in the further affidavit dated 2nd February, 2016 filed on behalf of the Respondent Company. He submitted that even if one were to reduce the claim of the Petitioner by Rs. 9 Crores, there is still a huge amount due and payable by the Respondent Company to the Petitioner which would entitle the Petitioner to a winding up order. I find considerable force in this submission. In company jurisdiction, I am not adjudicating the claim of the Petitioner and neither am I passing any decree. As laid down by the Supreme Court in the case of *M/s Madhusudan Gordhandas and Co v/s Madhu Woollen Industries Pvt Ltd.* 2 it is well settled that the Court will not act on a defense that the Company has the ability to pay the debt but it chooses not to do so. Where there is no doubt that the Company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed, the Court will make a winding up order without requiring the creditor to quantify the debt precisely. This proposition has been laid down at paragraph 21 thereof which reads thus:-

“21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt, see *Re. A Company*. [94 SJ 369] Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely See *Re Tweeds Garages Ltd.* [1962 Ch 406] The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces *prima facie* proof of the facts on

which the defence depends.” (emphasis supplied)

22 Therefore, even if one was to reduce the claim of the Petitioner by Rs.9 Crores in view of the fact that no credit of the same was given in the Company Petition, I find that a substantial sum is due and payable by the Respondent Company to the Petitioner. This would entitle the Petitioner to seek a winding up order from this Court. In this view of the matter, the argument of Mr. Cama that payment of Rs.9 Crores is suppressed in the Petition pales into insignificance.

23 In view of what I have held, I find that the reliance placed by Mr. Cama on the decision of the Supreme Court in the case of *S. P. Chengalvaraya Naidu (Dead) by LRS v/s Jagannath (Dead) by LRS and Others*³ is wholly misplaced. The facts of this case would reveal that a partition decree was obtained from the Court by suppressing a vital document, namely the “release deed.” It is in these circumstances, that the observations of the Supreme Court as set out in paragraphs 5 and 6 have to be read and understood. In fact, the short question before the Supreme Court was whether in the facts of that case Jagannath had obtained a preliminary decree by playing a fraud on the Court. It is in these circumstances that the Supreme Court held that non-production and even non-mentioning of the “release deed” at the trial tantamounted to playing a fraud on the Court. When a party withholds a vital document in order to gain an advantage on the other side then he would be guilty of playing a fraud on the court as well as on the opposite party, is what was held by the Supreme Court in the said decision. I do not see how this decision advances the case of the Respondent Company any further. In the facts of the present case, before this Company Petition was heard for admission, the Petitioner has filed a further affidavit disclosing all the facts to this Court. It is only after considering all these facts that I have heard the matter, and I therefore do not find that there is any suppression as contended by Mr. Cama which would dis-entitle the Petitioner from approaching this Court in its company jurisdiction. On the same parity of reasoning, I find the reliance placed by Mr. Cama on the judgment of the Supreme Court in the case of *Ram Chandra Singh v/s Savitri Devi and Others*,⁴ also wholly misplaced. I therefore have no hesitation in rejecting the argument of Mr. Cama that the Petitioner is guilty

of any suppression, and therefore, this Company Petition ought be dismissed.

24 The next contention raised by Mr. Cama was that there was a serious dispute with reference to the debt owed by the Respondent Company to the Petitioner. He submitted that even as disclosed in the further affidavit dated 2nd February, 2016, it is now admitted that the Respondent Company is not liable as Guarantor for the Term Loan of Rs.12 Crores sanctioned to Borrower No.1. He further submitted that in the Company Petition as originally filed no credit of Rs. 9 Crores was given to the Respondent Company when in fact now it is clear that the said payment has in fact been made and that too before filing of the Company Petition. He would therefore submit that there is serious dispute with reference to the amounts payable by the Respondent Company to the Petitioner and this being the case, this Company Petition ought not to be entertained. In this regard, Mr. Cama relied upon the decision of the Supreme Court in the case of Mediquip Systems (P) Ltd v/s Proxima Medical System GMBH.5 Mr. Cama relying upon the aforesaid decision, contended that if there is a dispute as regards the payment of the principal sum, however, small that sum may be, a Petition for winding up is not maintainable and the necessary forum for determination of such a dispute is a Civil Court. I will deal with this decision of the Supreme Court a little later in this Judgement.

25 It is true that in the Company Petition as originally filed, the claim made against the Respondent Company was also with reference to the Term Loan of Rs.12 Crores for which admittedly the Respondent Company was not a Guarantor. However, as far as the Term Loan of Rs. 35 Crores is concerned, Mr. Cama has not raised any defense in relation to the same. The fact that the Guarantee was executed by the Respondent Company in relation to the Term Loan of Rs. 35 Crores has been very fairly admitted by Mr. Cama before me. In the further affidavit, a specific statement has been made on behalf of the Petitioner that the Respondent Company is not a Guarantor in relation to the Term Loan of Rs. 12 Crores that was sanctioned by Borrower No.1. After excluding the amounts that were due under the Term Loan of Rs. 12 Crores, the Petitioner has specifically stated in the further affidavit that an amount of Rs.

58.24 Crores, as on 31st July, 2015, is due and payable by the Respondent Company in relation to the Term Loan of Rs. 35 Crores. This statement has remained uncontroverted and I find from the record that in relation to the Term Loan of Rs. 35 Crores, the Respondent Company as a Guarantor, has absolutely no defense.

26 As held by the Supreme Court in the case of *M/s Madhusudan Gordhandas and Co2* it is now settled law that where there is no doubt that the Company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed, the Court will make a winding up order without requiring the creditor quantifying a debt precisely. The principle on which the Court acts are that the defense of the company is in good faith and one of substance; the defense is likely to succeed on a point of law; and the Company adduces prima facie proof of the facts on which the defense depends. In a nutshell, at the admission stage, what the Company Court has to see is whether the Company is indebted to the Petitioner in excess of a sum of Rs. 1 lakh as more particularly set out in Section 434 (1) (a) of the Companies Act, 1956. If this requirement is met, it is not necessary for the Petitioner to quantify the debt precisely. This proposition has been consistently followed by this Court. In the case of *Pfizer Limited v/s Usan Laboratories Pvt Ltd.* a Division Bench of this Court held as under:-

“6. The short question we are considering is the position of the notice or of the subsequent petition when a part of the claim made by the creditor is seriously in dispute, but the remaining portion which prima facie would appear to be in order exceeds the limit of Rs. 500/- indicated in section 434. Shri Tulzapurkar submitted that the position is not res integra being concluded by the decisions both of the English Courts and of the Calcutta High Court, which decisions have taken view contrary to the view which found favour with the learned Company Judge. Our attention was invited to these decisions and it becomes necessary therefore to refer to them.

7. In point of time, the first of the decisions in the decision given by Plowman J. in *In re Tweeds Garages Ltd.*, [(1962) 1 Chancery 406.] The relevant observations are to be found at

pages 413 and 414 of the report. An opinion has been expressed in the said judgment that it would be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing.

8. Almost to the same effect are the observations in *Cardiff Preserved Coal and Coke Company v. Norton*, [(1866-1867) 2 Law Reports Chancery Appeals 405.] . A contention had been advanced before the appellate Court that the winding-up order which was being considered was bad because the creditor had demanded a sum of £628, and it appeared that he was entitled only to £411 7s. 9d. This argument has been decisively rejected by Lord Chelmsfore, L.C. speaking for the Bench at page 410 of the report. It has been observed that even if the creditor has made a demand upon the company for payment of more than was due, that per se will not make the notice or the consequential winding up order bad or invalid, provided that there was a debt in excess of £50 due to the creditor.

9. Both the above decisions have been cited and followed by a Single Judge of the Calcutta High Court in *Ofu Lynx Ltd. v. Simon Carves India Ltd.* [AIR 1970 Cal. 418.] The learned Single Judge was considering the validity of a notice under section 434 of the companies Act, 1956, and the contention raised was that the notice must be deemed to be bad because a portion of the claim in respect of which notice had been given was disputed and prima facie the dispute was required to be upheld. It was observed:

“I, therefore, hold that notice under section 434 of the companies Act, 1956 will not be rendered invalid only because of the fact that the amount of debt mentioned in the notice may not be exactly the correct amount of the debt due, provided the amount mentioned in the notice includes the debt due and exceeds the sum of Rs. 500/-.”

10. In our opinion, the aforesaid decisions set out the correct principle and once we have reached the conclusion, it will have to be held that the dismissal of the winding-up petition on the basis indicated in the impugned order would be clearly bad and

order required to be set aside. Merely because there could be a serious dispute as to the liability to pay interest at all or at the rate of 18% would not render the statutory notice invalid or result in a dismissal of the winding-up petition. The Company Judge was required to consider the claim of the petitioners in respect of the principal amount and to come to a conclusion whether or not there was any real substantial dispute with regard to the said claim. If there was a genuine and bonafide dispute, then certainly it was within his discretion and jurisdiction to dismiss the petition and relegate the petitioners to claim the amount by a regular suit. However, he did not go into this aspect but chose to dispose of the winding-up petition by dismissing the same on an erroneous basis which we have earlier indicated. If that be so, the impugned order will be required to be set aside and the petition will now go back to the Company Judge for reconsideration of the position and to decide whether it is required to be admitted and whether further directions after admission are required to be given.”
(emphasis supplied)

27 The second decision is in the case of *Tata Finance Ltd v/s Kanoria Sugar and General Manufacturing Company Ltd.*, Mumbai. 7 The relevant portion reads thus:-

“8. It is well settled that a winding up petition should not be allowed to be taken as a means to recover debt from the company. It is not a legitimate way to enforce payment of debts which are bona fide disputed by the company and cannot be used as a weapon to pressurise and coerce the company to make payments. But it is also equally well settled that when the debt is undisputed and the defence is not bona fide and genuine, the Court will not act upon a defence that the company has liability to pay but chooses not to pay and the creditors will, in such case, be entitled to a winding-up order. This is clear from the following observations of the Supreme Court in *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries*, (1972) 42 Comp Cases 125:

“Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. The Court has dismissed a 7 (2002) 1 Mh. L. J. 617 petition for winding-up where the creditor

claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corpn., Re. 4) Again, a petition for winding-up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Horfold Hotel Co. Ltd. Re. 5) Where the debt is undisputed the Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. (See A Company, Re. 6) Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding-up order but the exact amount of the debt is disputed the Court will make a winding-up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd., Re. 7). The principles on which the Courts acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and thirdly, the company adduces prima facie proof of the facts on which the defence depends.”

9. In *United Western Bank Ltd.'s case*, (1978) 48 Companies Cases 378 (Bom), Kania, J. (as he then was) observed that when the defence is that the debt is disputed, the Court has to see first whether the dispute on the face of it is genuine or merely a cloak to cover company's real inability to pay the debts. The inability is indicated by its neglect to pay the debt within three weeks, after proper demand was made. He added that neglect is to be assessed on the facts of each case.

10. In *Goel Bros, and Co. Pvt. Ltd.'s case*, 1979 Mh. L.J. 607 : (1980) 50 Comp Cases 356 (Bom.), another Single Judge of this Court, Agarwal, J. held that after the creditor establishes that the debt is clear, valid in law, unimpeachable and indisputable, the creditor is entitled to a winding up order *ex debito justitiae*. But if the debt is disputed and the dispute is *bona fide* and genuine, no winding up order can be made. He clarified that neglect to pay is not equivalent to omission to pay for it requires that such omission is without reasonable cause or valid excuse.

11. Applying now, the law as above, to the case in hand, can it be said that the defence raised by the company is legitimate and the debt of company is bona fide disputed. In the instant case, the Company's case is that the total amount of more than Rupees Two crores is payable by the company. It is true that there is some dispute about the claim of enhanced lease rentals on account of disallowance of claim of depreciation by the Income Tax department. There is, however, absolutely no dispute for the outstanding lease rentals which are in the range of nearly Rupees Thirty Lakhs. The terms of agreement are also very clear and in case of default, the company is liable to pay the service charges. When a part of claim made by the creditor is seriously disputed but the remaining portion is prima facie appear to exceed the limit of Rs. 500/- indicated in section 434 of the Act, it would be unjust to refuse wind up order on the ground that there is dispute as to precise amount owned. In *re Tweeds Garages Ltd.*, (1962) 1 Ch. 406: it was clearly held that it would be unjust to refuse a winding up order to the petitioner who has admittedly owned moneys which have not been paid merely because there is a dispute as to the precise amount owing. Almost to the same effect are the observations in *Cardiff Preserved Coal and Coke Co. v. Norton*, (1867) 2 Ch. App. 405.

12. The learned single judge of Calcutta High Court in *Ofu Lynx Ltd. v. Simon Carves India Ltd.*, (1971) 41 Comp Cas 174 has observed:

“I, therefore, hold that a notice under section 434 of the Companies Act, 1956, will not be rendered invalid only because of the fact that the amount of debt mentioned in the notice may not be exactly correct amount of the debt due, provided the amount mentioned in the notice includes debt due and exceeds sum of Rs. 500/-.”

13. The Judgment of single judge of Calcutta High Court has been cited with approval by the Division Bench of this Court in *Pfizer Ltd. v. Usan Laboratories P. Ltd.*, 1985 Mh. L.J. 554 : 1985 (57) Comp Cas 236. Therefore, merely because a part of the claim was disputed by the company, the defence cannot be said to be legitimate and bona fide .”
(emphasis supplied)

28 In view of this clear enunciation of the law, I find that the defense raised by the Respondent Company is neither in good faith nor bonafide. As stated earlier, as far as the debt of the Respondent Company in relation to the Term Loan of Rs. 35 Crores is concerned, there is absolute no dispute and in fact none has been canvassed before me by Mr. Cama. In this view of the fact, on this count alone, and considering the fact that substantial amounts are due and payable by the Respondent Company to the Petitioner in relation to this Term Loan, the Petitioner would be entitled to an order of admission of the Company Petition.

29 Even in relation to the Term Loan of Rs. 20 Crores disbursed to Borrower No.2 (and for which the Respondent Company stood as a Guarantor), I find that even if one gives credit of Rs. 9 Crores entirely to the Respondent Company in relation to the said loan, substantial amounts would still be outstanding and payable by the Respondent Company to the Petitioner. In this view of the matter, I find no substance in the contention of Mr. Cama that there is a serious dispute with reference to the claim made in the Petition.

30 Ancillary to this argument, Mr.Cama sought to contend that the Petitioner is a financial institution as contemplated under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDB Act") which alone has exclusive jurisdiction to adjudicate upon the claims made by the Petitioner, and therefore, this Court cannot adjudicate and/or compute any dues that may be allegedly payable by the Respondent Company to the Petitioner. He submitted that from a plain reading of the provisions of the RDDB Act (namely Sections 17 and 18 thereof), it is clear that the Debt Recovery Tribunal has exclusive jurisdiction to adjudicate upon the claim made by the Petitioner. The Company Court's jurisdiction therefore is clearly ousted from entering upon any such exercise. He submitted that in view of the dispute raised in relation to the claim made by the Petitioner, this Company Petition ought to be dismissed.

31 I find this argument to be wholly misconceived. It is now well settled that the Company Court does not adjudicate the

claim of the Petitioner nor does it pass any decree ordering the Respondent Company to pay the sum claimed in the Company Petition. It only has to come to the conclusion that the Respondent Company is indebted to the Petitioner in a sum exceeding to Rs. 1 lakh as more particularly set out in Section 434 of the Company Act, 1956 before passing an order of winding up. Any findings given by the Company Court in relation to the indebtedness of the Respondent Company to the Petitioner would certainly not be binding on the Civil Court or the DRT whilst adjudicating the claim made by the Petitioner as to what is the exact amount due and payable by the Respondent Company. If I was to accept the submissions of Mr Cama as canvassed earlier, it would effectively mean that no bank or the financial institution would be able to file a Company Petition and seek orders of winding up. This is not how I understand the law to be. In fact, a Division Bench of this Court in the case of *Viral Filaments Ltd. Vs Indusind Bank Ltd.* has categorically held that the exclusion of jurisdiction as set out in Sections 17 and 18 of the RDDB Act of all other Courts and authorities is only to the extent of the jurisdiction specifically vested in the Debt Recovery Tribunal. The jurisdiction to wind up a Company is not available to the Debt Recovery Tribunal. In this regard, the observations of the Division Bench in paragraph 4,5 and 6 are apposite:-

“4. Mr. Shah, learned Counsel appearing for the Appellant, strenuously contended that the judgment of the Supreme Court in *Allahabad Bank v. Canara Bank*, (2000) 4 SCC 406, supports the proposition canvassed by him. He contends that this judgment of the Supreme Court holds that once a bank or financial institution, which is entitled to move the Tribunal constituted under the RDB Act for recovery of debt, has moved the DRT, then a winding up petition is totally barred. We shall shortly examine whether this contention or has merit.

5. Section 18 of the RDB Act provides that, on and from the appointed day, jurisdiction of Courts and other authorities in relation to matters specified in section 17 is barred. Section 17 provides that on and from the appointed day, a Tribunal constituted under the RDB Act shall exercise the jurisdiction, powers and authority “to entertain and decide applications from the banks and financial institutions for recovery of debts

due to such banks and financial institutions.” Thus, it is obvious that the exclusion of the jurisdiction of all other Courts and authorities is only to the extent the jurisdiction is specifically vested in the DRT. That jurisdiction under section 17 is only the jurisdiction to entertain and decide applications from banks and financial institutions for recovery of debts due to them. On first principles, we are unable to agree with the learned Counsel that a Petition presented under section 433(e) of the Companies Act, 1956 for winding up of a Company is or equivalent to an application seeking recovery of debt due to the petitioning creditor. In the first place, section 433 of the Companies Act, 1956 is not intended to supplant the jurisdiction of a Civil Court to adjudicate a money suit . Section 433(e) vests in the Company Court the jurisdiction to wind up a Company, inter alia , under Clause (e), if the Company is unable to pay its debts. Section 434 creates a statutory fiction that if the creditor has issued a prescribed notice to the Company to pay up the debt and the Company fails to do so or fails to secure the said debt within the prescribed time, the Company shall be deemed to be unable to pay its debt. Once such a contingency has arisen, and the statutory fiction has come into play, it is perfectly open to the Company Court to entertain the petition under section 433(e) of the Companies Act, 1956.

6. The argument of Mr. Shah that what could be done by the Company Court can equally be done by the DRT under the RDB Act is erroneous. There is no provision in the RDB Act empowering the Tribunal to wind up a Company which owes the debt to the applicant financial institution. The jurisdiction of the Tribunal under the RDB Act is only to adjudicate the liability of the respondent before it, ascertain the “debt” due to the bank/financial institution and issue a certificate for recovery thereof. Once such a certificate of recovery is issued to the Recovery Officer, the Recovery Officer is empowered to execute the same in the manner prescribed under the RDB Act. We find that the jurisdiction to wind up the Company is wholly unavailable to the DRT. Hence, what could be done by the Company Court under section 433(e) could obviously not be done by DRT.”

(emphasis supplied)

32 In this view of the matter, I find no merit in this contention

and it is accordingly rejected.

33 The last argument canvassed by Mr. Cama is that this Company is a profit making Company and is a running concern and therefore should not be wound up. In this regard, Mr. Cama relied upon two decisions of a Single Judge of this Court (Kochar J. as he then was) in the case of QSS Investors Pvt Ltd v/s Allied Fibers Ltd. 9 and in the case of Dalmia Cement (Bharat) Ltd v/s Indian Seamless Steels and Alloys Limited.¹⁰ To canvass this proposition, I find the only averment made in the affidavit-in-reply is at paragraph 6 which inter alia states that the Respondent Company is a profit making company having significant assets and investments. Apart from this statement, I find in the affidavit-in-reply, there are absolutely no details with reference to these averments. It is merely a bald statement made in the affidavit without any particulars. Be that as it may, in any event of the matter, once I have come to the conclusion that substantial amounts are undisputedly due and payable by the Respondent Company to the Petitioner, there is no question of dismissing this Petition merely on the ground that the Respondent Company is a profit making company. If I was to do so, I would be acting contrary to the law laid down by the Supreme Court in the case of M/s Madhusudan Gordhandas and Co. as well as two Division Bench decisions of this Court in the case of Pfizer Limited⁶ and Tata Finance Ltd. 7 In this view of the matter, I find no merit in this contention also. As far as the two decisions relied upon by Mr. Cama are concerned, on going through the same, I find that they turned on their own facts and do not in any way lay down any general proposition of law that merely because the Respondent Company is a profit making company, an order of winding up cannot be passed. Therefore these two decisions do carry the case of the Respondent Company any further.

34 This only leaves me to deal with decision of the Supreme Court in the case of Mediquip Systems (P) Ltd . 5 The facts of this case would reveal that the Respondent therein (Proxima Medical System GMBH) issued a legal notice to the appellant company under Section 434 of the Companies Act, 1956, mentioning that the Appellant Company (Mediquip Systems Pvt. Ltd.) was liable to pay to the Respondent a sum of US\$ 5000 and US\$ 11000 aggregating to US\$ 16,000. Since, this

payment was not made, the Respondent filed a winding up petition against the Appellant Company praying that the Company be wound up. The Company Judge disposed of the winding up petition holding inter alia that so far as US\$ 5000 was concerned, there was a serious dispute raised by the Appellant Company. However, in so far as the amount of, US\$ 11,000 was concerned, the learned Company Judge directed the Appellant Company to deposit US\$ 11,000 in the Company Court. This order of the Company Judge was challenged before a Division Bench of Calcutta High Court without any success. Being aggrieved thereby, the Appellant Company approached the Supreme Court. The Supreme Court after considering the facts of the case held that, even with reference to US\$ 11,000 there was a bonafide dispute raised by the Appellant Company. This is evident from paragraph 15 and 16 of the said decision. On going through the aforesaid decision, I do not find that the Supreme Court has held that the dispute with reference to the principal sum, however small, would render a Petition for winding up as not maintainable. The Supreme Court has only referred to the judgment of the Madras High Court in the case of Tube Investments of India Ltd. Vs. Rim and Accessories (P) Ltd. [(1990) 3 Comp L.J. 322] . It has by no means held so. In fact in this very judgment, the Supreme Court has also referred to the decision of Madhusudan Gordhandas and Co.2 . I, therefore, do not think that this decision of the Supreme Court, in any way furthers the submissions made by Mr Cama. As the facts reveal, before the Supreme Court, the entire debt claimed by the Respondent therein was bonafide disputed by the Appellant Company. The observations made by the Supreme Court, therefore, have to be read and understood in the facts, that were before it.

35 It is now too well settled a proposition that the ratio of any decision must be understood in the background of the facts of that case. It has been said a long time ago that a case is only an authority for what it actually decides and not what logically follows from it. If one must refer to any authority on this subject, the Supreme Court in the case of *Sarva Shramik Sanghatana (KV) v/s State of Maharashtra* reported in (2008) 1 SCC 494 has very succinctly and eloquently reiterated the said proposition. Paragraphs 14 to 18 of the said judgment read thus :-

“14. On the subject of precedents Lord Halsbury, L.C., said in Quinn v. Leathem [1901 AC 495 : (1900-1903) All ER Rep 1 (HL)] : (All ER p. 7 G-I)

“Before discussing Allen v. Flood [1898 AC 1 : (1895- 1899) All ER Rep 52 (HL)] and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.”
(emphasis supplied)

We entirely agree with the above observations.

15. In Ambica Quarry Works v. State of Gujarat [(1987) 1 SCC 213] (vide SCC p. 221, para 18) this Court observed:

“18. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.”

16. In Bhavnagar University v. Palitana Sugar Mill (P) Ltd. [(2003) 2 SCC 111] (vide SCC p. 130, para 59) this Court observed:

“59. ... It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.”

17. As held in Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani [(2004) 8 SCC 579 : AIR 2004 SC 4778] a decision cannot be relied on without disclosing the factual situation. In the same judgment this Court also observed: (SCC pp. 584-85,

paras 9-12)

“9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761), Lord MacDermott observed: (All ER p. 14 C-D) ‘The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge, ...’

10. In *Home Office v. Dorset Yacht Co. Ltd.* [1970 AC 1004 : (1970) 2 WLR 1140 : (1970) 2 All ER 294 (HL)] Lord Reid said, ‘Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.’ (All ER p.

297g) *Megarry, J. in Shepherd Homes Ltd. v. Sandham* (No. 2) [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] , observed: (All ER p. 1274d) ‘One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;’ And, in *British Railways Board v. Herrington* [1972 AC 877 : (1972) 2

WLR 537 : (1972) 1 All ER 749 (HL)] Lord Morris said: (All ER p. 761c) ‘There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.’

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision

is not proper.

12. The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus: (Abdul Kayoom v. CIT [AIR 1962 SC 680] , AIR p. 688, para 19)

‘19. ... Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.’

‘Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.’ ”

(emphasis supplied)

18. We have referred to the aforesaid decisions and the principles laid down therein, because often decisions are cited for a proposition without reading the entire decision and the reasoning contained therein. In our opinion, the decision of this Court in Sarguja Transport case [(1987) 1 SCC 5 : 1987 SCC (Cri) 19 : AIR 1987 SC 88] cannot be treated as a Euclid's formula.”

36 In these circumstances, I find that the reliance placed by Mr Cama on the decision of the Supreme Court in Mediquip Systems(P)Ltd⁵ is wholly misplaced and in the facts and circumstances of the present case, is of no assistance to the Respondent.”

5 Mr.Cama appearing for respondents reiterates the submissions made at the time of admission of the petition. This court while considering the petition for admission has extensively dealt with

these submissions and given its findings. Admittedly, order of admission has not been challenged at all. Therefore, I do not see any reason why the defence raised by the company at the time of admission requires to be reopened.

6 This court in its order dated 23.6.2016 had directed the petition to be advertised. Counsel for petitioners relies on an affidavit of one Vishakha J.Tambe affirmed on 19.9.2016 confirming advertisement of the petition in Free Press General, Navshakti and Maharashtra Govt. Gazette. Notice under Rule 28 of the Company Court Rules 1958 has been waived by the company as noted in the order dated 23.6.2016.

7 In the circumstances, I am satisfied that the company is unable to pay its debts. It is commercially insolvent and deserves to be wound up.

8 Company Petition is therefore, allowed in terms of prayer clause-(a) which reads as under :-

“(a) The said Respondent Company viz. Entertainment World Developers Limited, having its registered office at B-701, Poonam Residency, Holy X Road, I.C.Colony, Borivali (West), Mumbai-400 103 be wound up by and under the order and directions of this Hon'ble Court ;

- 9 Official Liquidator shall forthwith act on an ordinary copy of this order without waiting for any notification.
- 10 Company Petition accordingly disposed.

(K.R.SHRIRAM,J)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMPANY PETITION NO.487 OF 2014

SICOM Ltd.)....Petitioner
V/s.

Treasure World Developers Pvt. Ltd.)....Respondent

Mr.Rohan Rajadhyaksha a/w Mr.Dhirajkumar Totala and Ms.Oendri Neogi i/by AZB & Partners for petitioners.

Mr.Rohan Cama a/w Mr.Mihir Mody and Mr.Dhawal A.Patil i/by M/s.K.Ashar & Co. for respondents.

CORAM : K.R.SHRIRAM,J

DATE : 13.11.2017

P.C.:-

COMPANY PETITION NO.487 OF 2014

1 The petition was admitted by an order dated 8.8.2016.

2 Petitioner filed this petition seeking to wind up respondent-company-Treasure World Developers Ltd. (the said company) on the ground that it was unable to pay debts.

3 It is the case of petitioner in the petition that company was indebted in the sum of Rs.28.39 crores as on 24.3.2014. Mr. Rajadhyaksha appearing for petitioners states that by that time petition was taken up for admission, the aggregate amount had increased to Rs.42.45 crores as on 30.6.2016. Subsequent to the order of admission dated 23.6.2016, Mr. Rajadhyaksha states that the property that was mortgaged and given as security to petitioner has

been disposed and petitioner has recovered Rs.25.60 crores Mr. Rajadhyaksha states that appropriate credit of Rs.25.60 crores has been given.

4 The facts giving rise to this petition and the defence raised by the company have been dealt with extensively by this court while considering the petition for admission. It would be useful to reproduce paragraph nos.3 to 16 and the same read as under :-

“3 The brief facts giving rise to the present controversy are that on 21 June, 2010, the Petitioner sanctioned an incorporate deposit by way of a Short Term Loan for Rs.25 Crores to the Respondent Company. This loan was inter alia secured by an indenture of Mortgage dated 25 June, 2010. Additionally, to secure this loan of Rs.25 Crores, a sister concern of the Respondent Company namely, Entertainment World Development Pvt. Ltd. [now known as Entertainment World Development Ltd. (“EWDPL”)] executed a deed of guarantee dated 26 June, 2010. One Mr Manish Kalani also executed a separate deed of guarantee dated 9 June, 2010 in favour of the Petitioner.

4 The terms and conditions of this loan were first modified on 24 June, 2010 and thereafter on 25 August, 2010 inter alia to change the nature of the facility from 'inter corporate deposit' to a 'medium term loan' which was in the nature of a three year revolving limit. Further, this loan was made repayable in a single installment at the end of 180 days from the date of first disbursement. It was specifically stated in this modification letter that all other terms and conditions of the sanction letter dated 21 June, 2010 and modification dated 24 June, 2010 were to remain unchanged.

5 Thereafter, this term loan of Rs.25 Crores was further modified by a further modification letter dated 16 November,

2011. It was specifically stated even in this letter that, all the terms and conditions of the sanction shall continue to be valid and in force. This modification letter dated 16 November, 2011, has been duly executed and signed, not only by the Respondent Company but also by the guarantors. Pursuant to this letter dated 16 November, 2011, the Petitioner disbursed Rs.20 Crores (as against the sanctioned loan of Rs.25 Crores), in two tranches of Rs.10 Crores each (on 27 December, 2011 and 29 December, 2011 respectively)

6 Since, the Respondent Company defaulted in making payments to the Petitioner, the Petitioner issued a demand notice on 17 April, 2012. Since the requisitions in the said notice were not complied with, the Petitioner thereafter issued a recall notice dated 31 May, 2012 recalling the entire outstanding amount of Rs.20.82 Crores (as on 29 May, 2012).

7 Since, the Respondent Company failed to pay the aforesaid sums, on 16 September, 2013, the Petitioner issued a statutory notice to the Respondent Company calling upon it to pay outstanding amount of Rs.25.84 Crores (as on 31 August, 2013) within 21 days from the date of the said notice failing which winding up proceedings would be initiated. It is not in dispute that the statutory notice was duly served on the registered office of the Respondent Company. Despite service, no reply was given to the statutory notice and neither were the requisitions contained therein complied with. It is, in these circumstances, that the present Company Petition has been filed.

8 After the Company Petition was accepted, the same was duly served on the Respondent Company. Despite service of the Company Petition, no affidavit in reply has been filed controverting the averments and the allegations contained in the Company Petition.

9 In this factual backdrop, the learned counsel appearing on behalf of the Petitioner submitted that the dues of the Petitioner and as claimed in their further affidavit dated 7 July, 2016 (Rs.42.45 Crores) are really undisputed. He submitted that there is no dispute with reference to the fact that this term loan of Rs.25 Crores has been availed of by the Respondent Company. It was further submitted by the learned counsel that it was not the

case of the Respondent Company that they had paid the dues of the Petitioner. Barring an amount of Rs.9.50 Crores, which was paid in the month of March, 2013, no further payment was made by the Respondent Company to the Petitioner. The credit of this amount of Rs.9.50 Crores, has been explained by the Petitioner in its further affidavit dated 7 July, 2016. Learned counsel, therefore, submitted that this is the fit case that the Company Petition ought to be admitted and further directions be passed.

10 On the other hand, Mr Cama learned counsel appearing on behalf of the Respondent Company raised the following three defences:

(a) The entire claim of the Petitioner is fully secured by a mortgage of an immovable property, the value of which is far more than the claim of the Petitioner;

(b) The Petitioner is guilty of suppression, and therefore, is not entitled to any equitable orders from this Court in company jurisdiction. To elaborate this point further, Mr Cama submitted the following instances of suppression:-

(i) Even though the Petition proceeds on the basis that the term loan sanctioned to the Respondent Company was for Rs.25 Crores, in fact, only a sum of Rs.20 Crores was disbursed to the Respondent Company;

(ii) A sum of Rs.9.50 Crores was paid by the Respondent Company on or about March 2013, which fact is suppressed in the Petition and no credit for the said amount is given to the Respondent Company;

(iii) Even though the Petitioner has filed proceedings in the DRT for recovery of their dues in respect of this loan, the same is suppressed in the Company Petition.

(c) Since a substantial portion of the debt is disputed by the Respondent Company, this Court, in the peculiar facts of this case, ought not to enter upon any adjudicatory process which is in the exclusive domain of the DRT, by virtue of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

11 For all the aforesaid reasons, Mr Cama submitted that the debt of the Petitioner is bona fide disputed, and therefore, this Petition be dismissed and the Petitioner be left to prosecute the recovery proceedings already initiated by the Petitioner in

the DRT.

12 I have heard the learned counsel for parties and perused the papers and papers in the Company Petition as well as the annexures thereto. At the outset, I must mention here that for this very same loan transaction, a winding up petition was filed by the Petitioner against the corporate guarantor, namely, EWDPL. The exact same arguments that are now canvassed by Mr Cama before me, were also canvassed by Mr Cama on behalf of the guarantor. All these contentions have been negated by me by my Order and Judgment dated 23 June, 2016 passed in Company Petition No.625 of 2013 (which was filed by the present Petitioner against EWDPL).

13 As far as the issue regarding the Petitioner being fully secured is concerned, I have dealt with the aforesaid arguments in paragraphs 18 and 19 of my Judgment and Order dated 23 June, 2016. I am not setting out the said reasons once again to unnecessarily burden this Judgment. On the same parity of reasoning as set out in paragraphs 18 and 19 of my Judgment dated 23 June, 2016 (in Company Petition No.625 of 2013), I am unable to accept the submission of Mr Cama that the claim of the Petitioner is adequately secured, and therefore, the Company Petition ought to be dismissed.

14 As far as the issue of suppression is concerned, the same has been dealt with by me in my Judgment dated 23 June, 2016 in paragraph 20 thereof. On the same party of reasoning I am unable to accept the aforesaid submissions. In any event, in the facts of the present case and going through the Petition as well as the affidavits filed, I do not find that there has been any suppression. Even assuming that there were certain facts that were not disclosed in the Petition itself, before the matter was argued today for admission, the Petitioner has filed a further affidavit dated 7 July, 2016, making a clean breast of affairs and has stated all the necessary facts. In fact, even credit of the sum of Rs.9.50 Crores has been accounted for in the further affidavit dated 7 July, 2016. In the further affidavit, it has also been stated that even though the loan sanctioned to the Respondent Company was for Rs.25 Crores, only a sum of Rs.20 Crores was disbursed and the details thereof have also been set out in the said affidavit. Further, in the said affidavit it is also disclosed that the Petitioner has filed proceedings before the DRT

against the Respondent Company for recovery of its dues. All these facts are today before the Court. In my view and once having looked at these facts, it would be an extremely hyper-technical approach to dismiss this Petition only on the ground that certain facts were not disclosed in the Company Petition, as originally filed, but have been disclosed in the further affidavit dated 7 July, 2016. I must mention here that no affidavit in reply or any other affidavit controverting the averments and allegations contained in the affidavit of the Petitioner dated 7 July, 2016, have been filed by the Respondent Company. I am, therefore, unable to accept the arguments of Mr Cama that this Company Petition ought to be dismissed on the ground that the Petitioner is guilty of any suppression.

15 I find that the argument of Mr Cama, that a portion of the debt owed to the Petitioner is disputed by the Respondent Company is without any substance. The same argument was made by Mr Cama in Company Petition No. 625 of 2013 and the same has been rejected by me by my Judgment dated 23 June, 2016. I have dealt with this argument in detail, in paragraphs 24 and 26 to 29 thereof. For the reasons set out in my Judgment dated 23 June, 2016 (paragraphs 24 and 26 to 29), I am unable to accept this submission. It is not the case of the Respondent Company that they have made full payment with reference to this term loan. It is the case of the Respondent Company that in March 2013, it has made payment of Rs.9.50 Crores. Even if I were to assume that the Petitioner had not given credit of this sum of Rs.9.50 Crores, and the credit for the same is given today, still, it is not in dispute that huge amounts would still be outstanding from the Respondent Company to the Petitioner. This alone would entitle the Petitioner to order of admission of the Petition. It is now trite law that where there is no doubt that the Company owes the creditor a debt entitling him to winding up order but the exact amount of the debt is disputed, the Court will make a winding up order without requiring the creditor to quantify the debt precisely. [See M/s Madhusudan Gordhandas and Co. Vs. Madhu Woollen Industries Pvt. Ltd. reported in (1971) 3 Supreme Court Cases, 632, paragraph 21] . This being the position, I am unable to accept even this submission.

16 For all the aforesaid reasons, I find that substantial amounts

are undisputedly due and payable by the Respondent Company to the Petitioner which would warrant admission of the Company Petition. In this view of the matter, the following order is Passed”

5 Mr.Cama appearing for respondents reiterates the submissions made at the time of admission of the petition. This court while considering the petition for admission has extensively dealt with these submissions and given its findings. Admittedly, order of admission has not been challenged at all. Therefore, I do not see any reason why the defence raised by the company at the time of admission requires to be reopened.

6 This court in its order dated 8.8.2016 had directed the petition to be advertised. Counsel for petitioners relies on an affidavit of one Vishakha J.Tambe affirmed on 19.9.2016 confirming advertisement of the petition in Free Press General,Navshakti and Maharashtra Govt. Gazette. Notice under Rule 28 of the Company Court Rules 1958 has been waived by the company as noted in the order dated 23.6.2016.

7 In the circumstances, I am satisfied that the company is unable to pay its debts. It is commercially insolvent and deserves to

be wound up.

8 Company Petition is therefore, allowed in terms of prayer clause-(a) which reads as under :-

“(a) The said Respondent Company viz. Treasure World Developers Private Limited, having its registered office at B-701, Poonam Residency, Holy X Road, I.C.Colony, Borivali (West), Mumbai-400 103 be wound up by and under the order and directions of this Hon'ble Court ;

9 Official Liquidator shall forthwith act on an ordinary copy of this order without waiting for any notification.

10 Company Petition accordingly disposed.

(K.R.SHRIRAM,J)