IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 496 OF 2014

Janak Herkishen Vaswani)
residing at Vaswani Garden, Ground Floor,)
Behind Atur Terraces, 25, Sobani Road,)
Cuffe Parade, Mumbai – 400 005) ….. Petitioner

Versus

M/s.Parekh Aluminex Ltd.,)
having their registered office at)
601, Auto Commerce Centrekennedy Bridge)
Nana Chowk, Grant Road, Mumbai – 400 007)
CIN No.L2703MH1994PLC080732) ….. Respondent

ALONGWITH
CIVIL APPLICATION (L) NO. 890 OF 2015
IN
COMPANY PETITION NO. 496 OF 2014

Ashok C. Babu,)
Adult, Indian Inhabitant,)
Navinbhai Patel Chawl, Mayawanshi Falia,)
Dadra Nagar Haveli, Silvassa) ….. Applicant

IN THE MATTER OF

Mr.Janak Herkishen Vaswani)
residing at Vaswani Garden, Ground Floor,)
Behind Atur Terraces, 25, Sobani Road,)
Cuffe Parade, Mumbai – 400 005) ….. Petitioner

VERSUS

Parekh Aluminex Ltd.)
a Company incorporated under the)
Companies Act, 1956, having its registered)
office at 601, Auto Commerce House,)

Kennedy Bridge, Nana Chowk, Grant Road,)
Mumbai – 400 007)
and also at)
G-11, Everest Building, 8th Floor, Tardeo,)
Mumbai Central, Mumbai – 400 034)
CIN No.L2703MH1994PLC080732) ….. Respondent

AND

Ashok C. Babu,)
Adult, Indian Inhabitant,)
Navinbhai Patel Chawl, Mayawanshi Falia,)
Dadra Nagar Haveli, Silvassa) ….. Applicant

ALONGWITH
COMPANY PETITION NO. 497 OF 2014

Mrs.Renuka Herkishen Vaswani)
residing at Vaswani Garden, Ground Floor,)
Behind Atur Terraces, 25, Sobani Road,)
Cuffe Parade, Mumbai – 400 005) ….. Petitioner

Versus

M/s.Parekh Aluminex Ltd.,)
having their registered office at)
601, Auto Commerce Centrekennedy Bridge)
Nana Chowk, Grant Road, Mumbai – 400 007)
CIN No.L2703MH1994PLC080732) ….. Respondent

ALONGWITH
COMPANY APPLICATION (L) NO. 886 OF 2015
IN
COMPANY PETITION NO. 497 OF 2014

Ashok C. Babu,)
Adult, Indian Inhabitant,)
Navinbhai Patel Chawl, Mayawanshi Falia,)

Dadra Nagar Haveli, Silvassa	**)**	**….. Applicant**

IN THE MATTER OF

Mrs.Renuka Herkishen Vaswani	**)**	
residing at Vaswani Garden, Ground Floor,	**)**	
Behind Atur Terraces, 25, Sobani Road,	**)**	
Cuffe Parade, Mumbai – 400 005	**)**	**….. Petitioner**

VERSUS

Parekh Aluminex Ltd.	**)**	
a Company incorporated under the	**)**	
Companies Act, 1956, having its registered	**)**	
office at 601, Auto Commerce House,	**)**	
Kennedy Bridge, Nana Chowk, Grant Road,	**)**	
Mumbai – 400 007	**)**	
and also at	**)**	
G-11, Everest Building, 8th Floor, Tardeo,	**)**	
Mumbai Central, Mumbai – 400 034	**)**	
CIN No.L2703MH1994PLC080732	**)**	**….. Respondent**

AND

Ashok C. Babu,	**)**	
Adult, Indian Inhabitant,	**)**	
Navinbhai Patel Chawl, Mayawanshi Falia,	**)**	
Dadra Nagar Haveli, Silvassa	**)**	**….. Applicant**

ALONGWITH
COMPANY PETITION NO. 498 OF 2014

Mr.Ravi Herkishen Vaswani	**)**	
residing at Vaswani Garden, Ground Floor,	**)**	
Behind Atur Terraces, 25, Sobani Road,	**)**	
Cuffe Parade, Mumbai – 400 005	**)**	**….. Petitioner**

Versus

M/s.Parekh Aluminex Ltd.,	**)**	

having their registered office at	**)**	
601, Auto Commerce Centrekennedy Bridge	**)**	
Nana Chowk, Grant Road, Mumbai – 400 007	**)**	
CIN No.L2703MH1994PLC080732	**)**	**….. Respondent**

ALONGWITH
CIVIL APPLICATION (L) NO. 885 OF 2015
IN
COMPANY PETITION NO. 498 OF 2014

Ashok C. Babu,	**)**	
Adult, Indian Inhabitant,	**)**	
Navinbhai Patel Chawl, Mayawanshi Falia,	**)**	
Dadra Nagar Haveli, Silvassa	**)**	**….. Applicant**

IN THE MATTER OF

Mr.Ravi Herkishen Vaswani	**)**	
residing at Vaswani Garden, Ground Floor,	**)**	
Behind Atur Terraces, 25, Sobani Road,	**)**	
Cuffe Parade, Mumbai – 400 005	**)**	**….. Petitioner**

VERSUS

Parekh Aluminex Ltd.	**)**	
a Company incorporated under the	**)**	
Companies Act, 1956, having its registered	**)**	
office at 601, Auto Commerce House,	**)**	
Kennedy Bridge, Nana Chowk, Grant Road,	**)**	
Mumbai – 400 007	**)**	
and also at	**)**	
G-11, Everest Building, 8th Floor, Tardeo,	**)**	
Mumbai Central, Mumbai – 400 034	**)**	
CIN No.L2703MH1994PLC080732	**)**	**….. Respondent**

AND

Ashok C. Babu,	**)**	
Adult, Indian Inhabitant,	**)**	
Navinbhai Patel Chawl, Mayawanshi Falia,	**)**	

Dadra Nagar Haveli, Silvassa) ….. Applicant

Mr.Sharan Jagtiani, a/w. Mr.Nirman Sharma, a/w. Ms.Pinky Patel, i/b. M/s.Desai & Diwanji for the Petitioner.

Mr.Simil Purohit, a/w. Mr.Punit Damodar, Ms.Nikita Vardhan, i/b. Kanga & Co. for the Respondent.

Ms.Ankita Singhania, a/w. Mr.Aamir Ali Shaikh, Mr.Punit Kachalia, i/b.I.V.Merchant & Co. for the Intervenor/Applicants in CAL/890/2015, CAL/886/2015, CAL/885/2015.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 26th APRIL, 2017
PRONOUNCED ON : 5th MAY, 2017

JUDGMENT :

The petitioner in Company Petition No.496 of 2014, Company Petition No.497 of 2014 and Company Petition No.498 of 2014 have prayed for winding up of the respondent on the ground that the respondent is unable to pay its debts. Company Application (L)No.890 of 2015, Company Application (L)No.886 of 2015 and Company Application (L)No.885 of 2015 are filed by the applicants *inter alia* praying for impleadment as party respondent in the aforesaid company petitions respectively.

2. The facts of all the three matters being identical were heard together for the purpose of considering admission of these petitions and are decided by a common order.

3. Some of the relevant facts for the purpose of deciding whether these petitions shall be admitted or not are as under :-

4. Insofar as Company Petition No.496 of 2014 is concerned, it is the case of the petitioner that the petitioner gave loan to the respondent on 19th March,2012 in the sum of Rs.50,00,000/- by a cheque. The said amount was repayable by the respondent with interest at the rate of 12% per annum. The respondent vide its letter dated 16th December,2012 acknowledged its liability to the petitioner in the said sum of Rs.50,00,000/- and assured repayment of the said loan with interest at the rate of 12% per annum thereof. The respondent handed over to the petitioner a post dated cheque dated 16th March,2013 for Rs.50,00,000/- in favour of the petitioner and also handed over another cheque dated 15th December,2012 for Rs.1,35,000/- towards interest component on the amount of Rs.50,00,000/- to the petitioner.

5. On 4th April, 2013 the petitioner deposited the said post-dated cheque with his bankers viz. Citi Bank and the said cheque was dishonoured with a remark 'Exceeds Arrangement'. The petitioner has already filed a separate criminal proceedings against the respondent and the same are pending.

6. The petitioner issued a notice through his advocates' letter dated 3rd October,2013 and called upon the respondent to clear the outstanding amount with interest. There was no payment made by the respondent in response to the said notice.

7. The petitioner thereafter through its advocates' letter issued a statutory notice dated 22nd October,2013 under sections 433 and 434 of the Companies Act, 1956 calling upon the respondent to pay a sum of Rs.50,00,000/- with interest. The said notice was served at the registered office of the respondent. The respondent replied to the said notice in the month of October 2013 (Ex.D to the petition) and vaguely denied the claims. It was conveyed to the petitioner that the respondent was facing a temporary liquidity crunch and was therefore unable to make certain repayment obligations towards its lenders. The company was most likely to overcome its present liquidity crunch and meet its payment obligations in the near future. The respondent informed that the respondent had approached the Corporate Debt Restructuring (CDR) Cell of the Reserve Bank of India to restructure its debts and improve the overall financial help of the respondent.

8. In the said reply, the respondent alleged that Mr.Amitabh Parekh, Chairman and Managing Director of the respondent had issued cheques to various parties with an express understanding not to deposit the same without his consent and permission to which the petitioner had agreed at the time of advancing the alleged loan. It was alleged that the subject cheques were comfort cheques and were never meant for repayment of alleged loan. It was contended that the subject cheques were without any mandate as the drawer of the cheque had expired before presenting the cheques for payment in the bank. According to the petitioner in the Company Petition No.496 of 2014, the respondent is liable to pay a sum of Rs.54,63,635/- with further interest thereon from 20th December,2013 at the rate of 18% per annum

till payment.

9. Insofar as Company Petition No.497 of 2014 is concerned, the petitioner had granted a loan in the respondent to the sum of Rs.1,00,00,000/- by two cheques dated 19th March,2012 and 17th December,2012. The other facts in the said petition are identical to the facts in Company Petition No.496 of 2014. According to the petitioner as on the date of filing of the petition, the respondent is liable to pay a sum of Rs.1,09,27,270/- and further interest at the rate of 18% per annum from the date of filing company petition till realization.

10. Insofar as Company Petition No.498 of 2014 is concerned, the petitioner had granted loan of Rs.50,00,000/- to the respondent vide cheque dated 19th March,2012. The other facts in Company Petition No.498 of 2014 are identical to the facts of Company Petition No.496 of 2014. According to the petitioner, as on the date of filing of the petition, the respondent is liable to pay a sum of Rs.54,63,635/- with further interest thereon at the rate of 18% per annum from the date of filing of the petition till realization.

11. Mr.Jagtiani, learned counsel appearing for the petitioner invited my attention to the annexures to the company petitions and also to the allegations made in the affidavit in reply dated 5th December,2014. Mr.Jagtiani placed reliance on the order passed by this court on 24th February,2014 in Summons for Judgment No.21 of 2013 in Summary Suit No.203 of 2013 filed by M/s.Ashok Commercial Enterprises & Anr. against the respondent herein *inter*

alia praying for a recovery of sum of Rs.68,37,96,666/-. It is submitted by the learned counsel for the petitioner that the defence raised by the respondent in the affidavit in reply to these company petitions were also raised in the reply to the Summons for Judgment before this court in the said summary suit filed by M/s.Ashok Commercial Enterprises & Anr. against the respondent herein. He submits that this court has rejected the plea raised by the respondent herein in the said order dated 24th February,2014 that the transaction between the parties was a money lending transaction and was hit by section 10 of the Bombay Money Lenders Act, 1946. The respondent herein had also contended in the said proceedings that since the said summary suit was filed for recovery of a loan amount given by the plaintiff which was an act of money lending without holding of a valid licence and thus the same was barred by the provisions of Bombay Money Lenders Act, 1946.

12. It is submitted that this court considered the said issue in detail in the said judgment and after adverting to the judgments of this court in cases of (1) ***M/s.Rushabh Precision Bearings Ltd. vs. M/s.Marine Container Services (India) Pvt. Ltd., 1993(3) Bom.C.R.760***, (2) ***Bharati Surendra Khandhar vs. Deepak M.Shah in Summons for Judgment No.727 of 1998*** decided on 8th October,2001, (3) ***Jatin Jashwantrai Bhagat vs. Dayaram Waghji Thakar in Summons for Judgment No.309 of 2006*** decided on 4th October,2006, (4)***Sha Damji Deraj vs. Megraj Bhikumchand & Ors., 1958 Bombay Law Reporter Vol.LX 1366*** and (5) ***Khayati Realtors Pvt. Ltd. vs.M/s.Zenal Construction Pvt.Ltd. in Company Petition***

No.243 of 2012 decided on 29th August,2013 has culled the principles laid down in those judgments.

13. It is submitted that this court has already rejected the said plea on the ground that the loan advanced against the Negotiable Instrument Act is excepted from the application of the Bombay Money Lenders Act, 1946. Such a loan is not only a valid consideration of the negotiable instrument, but would itself be recoverable even if the creditors were not to sue on the negotiable instrument. It is held that had the suit been a suit for recovery of a loan, the defences raised by the defendant under the provisions of Bombay Money Lenders Act, 1946 would have given rise to triable issues, but the suit was based on dishonoured cheques which were issued towards refund of the loan and were negotiable instruments issued in consideration of an antecedent transaction viz. the loan.

14. It is submitted by the learned counsel for the petitioner that no such plea has been raised by the respondent in the affidavit in reply filed in any of these petitions. It is submitted that the provisions of Bombay Money Lenders Act, 1946 does not apply to the transaction in question between the parties. He submits that the winding up petitions filed by the petitioner in the aforesaid three matters are not for the recovery of any amount but are filed for seeking winding up of the respondents. He submits that in any event, in these three cases also the petitioner has filed winding up proceedings based on the dishonoured cheques and thus the principles laid down by this court in the said judgment in case of ***M/s.Ashok Commercial Enterprises & Anr.***

(supra) would apply to the facts of this case.

15. Insofar as the plea of the respondent in the affidavit in reply that the cheques were issued and were handed over to the petitioner only as a collateral security for the repayment of the loan is concerned, it is submitted that a similar defence raised by the respondent in the said summary suit also has been rejected by this court by holding that the said defence was merely illusory. It is held by this court that if a cheque is issued as a security to repay the amount, it would necessarily mean that in the event of non-payment of the amount secured by the cheque, the cheque can be deposited and would be honoured. This court held that the said defence can only be termed as bogus.

16. Insofar as the defence raised by the respondent that since the signatory of the cheque had expired before presentation of the cheque by the petitioner and thus there was no valid presentation for payment is concerned, similar defence was also raised by the respondent in the said summary suit. This court considered the said defence in the said order dated 24th February,2014 and rejected the said defence on the ground that the signatory of the cheque was the managing director of the defendant company and his death had nothing to do with the validity of the presentment of the cheques for payment. It is submitted by the learned counsel that by the said order dated 24th February,2014, the respondent herein was granted leave to defend the said summary suit on the condition of deposit of Rs.67 crores in this court within a period of eight weeks from the date of the said order.

17. Learned counsel for the petitioner also invited my attention to the order passed by the Division Bench of this court on 20th November,2014 in Appeal (L) No.252 of 2014 arising out of the said order dated 24th February,2014 in Summons for Judgment No.21 of 2013 which was filed by the respondent herein. It is submitted by the learned counsel that the Division Bench of this court has rejected each and every submission made by the respondent herein and has dismissed the said appeal. It is submitted that the defence raised by the respondent in affidavit in reply to these petitions are already considered and rejected by the learned Single Judge of this court and also by the Division Bench of this court in the appeal arising out of the said order. The principles laid down by this Court are squarely applicable to the facts of this case. The respondent herein was a party to the said proceedings. Special Leave Petition filed by the respondent herein against the said order passed by the Division Bench of this court is also dismissed.

18. Learned counsel appearing for the petitioner also invited my attention to the order passed by this court in Company Petition No.136 of 2014 filed by M/s.Ashok Commercial Enterprises against the respondent herein. It is submitted by the learned counsel that this court has rejected various contentions raised by the respondent and has admitted the said Company Petition No.136 of 2014 against the respondent herein.

19. Insofar as the CDR proposal relied upon by the respondent is concerned, it is submitted by the learned counsel for the petitioner that the said CDR scheme has already failed which is noticed by this court in the order dated 11th April,2017 in Company Petition No.136 of 2014.

20. Mr.Purohit, learned counsel appearing for the respondent on the other hand invited my attention to the averments made in paragraphs 10 to 14 of the company petition and submits that the statutory notice was not served at the registered office address of the respondent but was served at the administrative address of the respondent and thus the petition itself is not maintainable. He also invited my attention to the affidavit of service filed by the petitioner on 22nd August,2014 and submits that event the said affidavit of service would clearly indicates that the papers and proceedings and the notice were not served at the registered office address of the respondent.

21. Insofar as plea under the provisions of Bombay Money Lenders Act, 1946 is concerned, Mr.Purohit, learned counsel appearing for the respondent placed reliance on the judgment of this court in case of ***M/s.Rushabh Precision Bearings Ltd. vs. M/s.Marine Container Services (India) Pvt.Ltd., 1993(3) Bom.C.R.760*** and in particular paragraphs 1, 10 to 13 and submits that since the petitioner had not obtained money lending licence before grant of any loan to the respondent, the debt of the petitioner if any, was not legally recoverable and thus the petition for winding up under section 433(e) read with section 434(1)(a) of the Companies Act, 1956 itself would

not be maintainable. He also invited my attention to the averments made in paragraph (7) of the company petition and would submit that it is the case of the petitioner himself that he had agreed to give loan of Rs.50 lacs to the respondent. He submits that the company petition is not filed based on the dishonoured cheque but has been based on the loan advanced to the respondent.

22. Learned counsel also invited my attention to the demand notice issued by the petitioner on 22nd October,2013 in support of his submission that the said statutory notice was also based on the loan advanced by the petitioner to the respondent and not based on the dishonoured cheque. He submits that the petitioner has not claimed interest at the rate of 18% per annum under the provisions of Negotiable Instrument Act. It is submitted that the principles laid down by this court in case of ***M/s.Rushabh Precision Bearings Ltd.*** (supra) would squarely apply to the facts of this case. This company petition would not be maintainable since the debt itself was not legally recoverable. He submits that the petitioner has not expressed anywhere in the company petition as to why the petitioner could not be considered as a money lender within the meaning of money lenders under the provisions of Bombay Money Lenders Act, 1946. He submits that the order passed by the S.C.Gupte, J. may be a good law but in the facts of that case.

23. Mr.Jagtiani, learned counsel for the petitioner in rejoinder invited my attention to the contents of paragraphs 4, 7 and 9 of the statutory notice annexed at Ex.'C' to the petition and would submit that

by the said notice, the petitioner had called upon the respondent to pay a sum of Rs.50 lacs based on the dishonoured cheque. He submits that the loan given by the petitioner to the respondent was an anticipated transaction. There was no writing executed between the parties giving such loan. The respondent had along with its covering letter dated 16th December,2012 had acknowledged the said amount and had issued post-dated cheque towards the repayment of the said loan. It is submitted that the order passed by S.C.Gupte, J. on 24th February,2014 and the order passed by the Division Bench of this court in Appeal (L) No.252 of 2014 would squarely apply to the facts of this case.

24. Insofar as judgment of this court in case of ***M/s.Rushabh Precision Bearings Ltd.*** (supra) relied upon by the learned counsel for the respondent is concerned, Mr.Jagtiani, learned counsel for the petitioner invited my attention to the paragraphs 10 to 12 of the said judgment. It is submitted that in the said judgment this court has categorically held that there was no material on record that the petitioner was carrying on business of money lending. There is no regularity or continuity or no notion of system of repetition. It was not the primary object of the Company to carry on business of money lending and thus the said transaction would be excluded from the definition of money lending by virtue of section 2(g)(f). He submits that in this case also, it is not the case of the respondent that there were any continuity or repeated loan transactions between the petitioner and the respondent or that the petitioner was regularly carrying on business of money lending. He submits that in all three petitions, three separate individuals have granted loan to the respondent and thus in no

circumstances, the provisions of Bombay Money Lenders Act could be attracted to the facts of this case.

25. Insofar as the issue raised by the respondent across the bar that the statutory notice or the papers and proceedings of the company petition was not served at the registered office of the respondent is concerned, learned counsel appearing for the petitioner invited my attention to the averments made in paragraphs 10 to 14 of the company petition. He submits that no such plea is raised by the respondent in the affidavit in reply. It is submitted that even in the reply to the statutory notice dated 22nd October,2013 issued by the petitioner, the respondent never raised an issue about service of the statutory notice at the registered office address. The petitioner had issued two statutory notices one at the address G-11, Everest Building, 5th Floor, Tardeo, Mumbai – 400 034 and another at 601, Auto Commerce Centrekennedy Bridge, Nana Chowk, Grant Road, Mumbai – 400 036. The respondent had responded to the statutory notice issued by the petitioner on 3rd October,2013 vide reply dated 21st October,2013.

26. Ms. Singhania, learned counsel for the intervenor adopted the arguments advanced by Mr.Purohit, learned counsel for the respondent and submits that the workers of the respondent would be affected by any orders if passed by this court against the respondent and are entitled to be heard and oppose the admission of the company petition. She submits that this court has already permitted the applicant to intervene in Company Petition No.136 of 2014 filed by M/s.Ashok Commercial Enterprises.

REASONS AND CONCLUSIONS

27. Insofar as the issue raised by the respondent that the transaction between the petitioner and the respondent was a money lending transaction and would fall within the definition of loan under section 2(a) of the Bombay Money Lenders Act, 1946 and in view of the petitioner not holding the money lending licence, company petition itself is not maintainable being hit by section 10 of the Bombay Money Lenders Act, 1946 is concerned, this court in the order dated 24th February,2014 in Summons for Judgment No.21 of 2013 filed against the respondent herein has considered this issue at length. This court after adverting to four judgments of this court including the judgment in case of ***M/s.Rushabh Precision Bearings Ltd.*** (supra) has rejected the plea of the respondent raised in the said summons for judgment. This court in the said order held that had the suit for recovery of a loan, those defences raised by the respondent herein under the provisions of Bombay Money Lenders Act, 1946 would have given rise to triable issue but the suit was based on the dishonoured cheque and thus those defences were untenable.

28. The Division Bench of this court in the appeal filed by the respondent herein has also dealt with this issue in detail. The Division Bench of this court held that as the advances were made by the plaintiff on the basis of the negotiable instrument as defined in the Negotiable Instrument Act, 1881, the loan did not fall within the purview of clause (f) of section 2(g) of the Bombay Money Lenders Act, 1946. This Court held that the cheques were forwarded by respondent herein to the

petitioner therein after the loans were advanced makes no difference. The amounts were advanced by the petitioner therein to the respondent herein and the cheque and bill of exchange were issued by the respondent herein to the petitioner therein as a part of one composite agreement and was entered into at the same time. In this case, the petitioner had given loan on 19th March,2012 by a cheque. There was no writing executed between the parties while the petitioner had given loan to the respondent. On 16th December,2012, the respondent acknowledged the receipt of the said loan only at the rate of 12% per annum and assured to make repayment of the loan and issued a cheque of Rs.50 lacs dated 16th March,2013 towards repayment. The said cheque was admittedly dishonoured.

29. In my view, the issue raised by the respondent is thus no longer *res integra* and is already concluded in the said order dated 24th February,2014 passed by this court to which the respondent herein was a party and by an order dated 20th November,2014 passed by the Division Bench of this court in the appeal filed by the respondent herein which is dismissed. The principles laid down by this court in the said two judgments are squarely applicable to the facts of this case. I am respectfully bound by the said judgment.

30. Section 10 of the Bombay Money Lenders Act, 1946 reads thus :-

> “10. (1) No court shall pass a decree in favour of a money-lender in any suit to which this Act applies

[including such suit pending in the court before the commencement of the Bombay Money-lenders (Amendment) Act, 1975] unless the court is satisfied that at the time when the loan or any part thereof, to which the
suit relates was advanced, the money-lender held a valid licence, and if the court is satisfied that the money-lender did not hold a valid licence, it shall dismiss the suit."

(2) Nothing in this section shall affect -

(a) suits in respect of loans advanced by a money-lender before the date on which this Act comes into force;

(b) the powers of a Court of Wards, or an Official Assignee, a receiver, an administrator or a Court under the provisions of the Presidency-towns Insolvency Act 1909, or the Provincial Insolvency Act, 1920, or any other law in force corresponding to that Act, or of a liquidator under the Companies Act, 1956, to realize the property of a money-lender."

31. A perusal of section 10 of the said Bombay Money Lenders Act, 1946 provides that if a money lender who has granted a loan or advance did not have money lending licence at the time when such loan or advance was granted and if the provisions of the said

Bombay Money Lenders Act applies to those transaction, no court can pass such a decree in favour of the money lender. In my view the said provision will not be attracted to the winding up proceedings. The winding up proceedings are not filed for recovery of any amount of loan but is for seeking winding up of the respondent company under the provisions of sections 433 and 434 of the Companies Act, 1956. Be that as it may, the onus was on the respondent to prove that the petitioner was a money lender and was carrying on business of the money lending. The respondent has not placed any such material on record before this court. In my view, the said defence thus raised by the respondent is totally frivolous and moonshine.

32. Insofar as other pleas raised by the respondent in the affidavit in reply such as (i) the cheques were given as a collateral security for repayment of the loan, (ii) there was no valid presentment of the cheque in view of the signatory of the said cheque having expired before such presentment are concerned, similar pleas are already rejected by this court in the said order dated 24th February,2014 passed by the learned Single Judge and by the order dated 20th November,2014 passed by the Division Bench of this court to which the respondent herein was a party.

33. Insofar as the plea of the respondent that there was a CDR scheme is concerned, it is not in dispute that the said CDR scheme has already failed.

34. Insofar as submission of the learned counsel for the respondent that the statutory notice or the papers and proceedings were not served at the registered office address of the respondent is concerned, a perusal of the record indicates that no such plea has raised by the respondent in the affidavit in reply. Be that as it may, the fact remains that the petitioner has issued two statutory notices, one at the registered office address of the respondent and one at the administrative office address of the respondent. The respondent has already responded to the one of such statutory notice. Even in the said reply, the respondent did not raise any such issue. It is not the case of the respondent that before filing the company petition, the respondent has notified any other registered office address of the respondent to the Registrar of Companies. In my view no such plea thus can be raised by the respondent and that also across the bar. Even otherwise, there is no merit in this submission of the learned counsel as the same is contrary to the admitted facts on record.

35. This court has already delivered a detailed judgment on 11th April,2017 in Company Petition No.136 of 2014 filed by M/s.Ashok Commercial Enterprises against the respondent herein and has rejected several issues raised by the respondent. This court has also considered an admitted fact that the CDR scheme has already failed. The respondent had several opportunities for revival if any, in last three years but the respondent has failed to revive. This court has also held that the petitioner in that case being an unsecured creditor is not a party to the said joint lender forum and thus even if any decision is taken by Joint Lenders Forum at some stage in future, the said

decision would not be binding on the unsecured creditors like the petitioner. In the said judgment, this court has noticed that large number of creditors have already filed winding up petitions against the respondent. It is brought on record in the CDR scheme that the respondent has admitted its liabilities to the secured creditors in an aggregate sum of Rs.2912,90,39,247/- as on 30th November, 2015 to its secured creditors.

36. Several proceedings are also filed before DRT against the respondent. Indian Overseas Bank has already filed 52 original applications before Debt Recovery Tribunal, Bombay against the respondent for recovery of over Rs.1123,19,62,542/-. This court also noticed that the account of the respondent has been declared as fraudulent by the secured creditors in the CDR meetings and all the lenders have already exited and have decided to file the recovery proceedings against the respondent. The respondent though had applied before BIFR for revival, could not succeed. This court has held that there are not even remotest possibility of revival of the respondent company. Before the remaining assets of the respondent are friterred away, appointment of the Official Liquidator as Provisional Liquidator is absolutely warranted. This court placed reliance on the judgment delivered on 19th March,2010 in case of ***Sublime Agro Limited vs. Indage Vinters Limited in Company Petition No.960 of 2009*** and has held that CDR scheme is admittedly a voluntary scheme and not binding on the unsecured creditors of the company. It is held that the provisions pertaining to winding up proceedings under the Companies Act are more particularly meant for protecting the interest of the

unsecured creditors of the company who are most affected lot when a company becomes commercially insolvent. The secured creditors of the company can always pursue their claim by keeping themselves out of the winding up proceedings. By the said judgment this court admitted the said Company Petition No.136 of 2014 and has also appointed the Official Liquidator as the provisional liquidator. At the request of the learned counsel for the respondent, this court has directed not to advertise the petition for a period of two weeks from the date of the said order. In my view the said judgment delivered by this court in Company Petition No.136 of 2014 applies to the facts of this case. I am respectfully bound by the said judgment.

37. In my *prima facie* view, the respondent is heavily indebted and is unable to pay its debts.

38. I, therefore, pass the following order :-

(a) Applicants in Company Application (L)No.890 of 2015, Company Application (L)No.886 of 2015 and Company Application (L)No.885 of 2015 are allowed to intervene in the Company Petition No.496 of 2014, Company Petition No.497 of 2014 and Company Petition No.498 of 2014 respectively. Company applications are disposed of in the aforesaid terms.

(b) Company Petition No.496 of 2014, Company Petition No.497 of 2014 and Company Petition No.498 of 2014 are admitted and are directed to be heard along with Company Petition No.136 of 2014.

(c) If the petitioner in Company Petition No.136 of 2014 has not advertised the petition, the petitioner in Company Petition No.496 of 2014 shall advertise the petitions in two local newspapers, namely (i) Free Press Journal (in English) and Navshakti (in Marathi) as also in the Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959.

(d) The petitioner shall deposit Rs.10,000/- towards publication charges with the Prothonotary & Senior Master, under intimation to the Company Registrar, within three weeks from the date of admission, failing which the petition shall stand dismissed for the non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the petitioner.

(e) The service of the petition under Rule 28 of the Companies (Court), Rules, 1959 shall be deemed to have been waived.

(f) In view of the fact that this court has already appointed the Official Liquidator as the provisional liquidator in Company Petition No.136 of 2014, prayer for appointment of the Official Liquidator as provisional liquidator is not considered by this court at this stage.

(g) The petitioner however will have liberty to apply for appointment of the provisional liquidator as Official Liquidator in case the order dated 11th April,2017 in Company Petition No.136 of 2014 appointing the Official Liquidator as provisional liquidator of the respondent is set aside and/or vacated.

(R.D.DHANUKA, J.)

At the request of Mr.Purohit, learned counsel appearing for the respondent, which is vehemently opposed by Mr.Jagtiani, learned counsel appearing for the petitioner the aforesaid three petitions shall not be advertised by the petitioner for the period of six weeks from today.

(R.D.DHANUKA, J.)