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

COMPANY PETITION NO. 276 OF 2011

State Trading Corporation of India Ltd. …Petitioner
V/s
Indo Bonito Multinational Pvt. Ltd. …Respondent

Mr.Pradeep Sancheti, Senior Advocate a/w Mr.Darshit Jain i/by M/s.S.I.Shah and Co. for petitioner.
Mr.Mayur Khandeparkar i/by Jamshed Ansari for respondent.

CORAM: K.R. SHRIRAM J.

RESERVED ON : 15TH MARCH 2018
PRONOUNCED ON : 4th JUNE, 2018.

P.C. :-

1 This petition is for winding up of respondent company- Indo Bonito Multinational Ltd. (the company) under the provisions of the Companies Act, 1956 (the Act) on the ground that the company is unable to discharge its debts and is commercially insolvent.

2 This petition was admitted by an order dated 30th July 2012. The Court was pleased to pass the following order:

> *"By this Company Petition, the petitioner seeks winding up of M/s.Indo Bonito Multinational Ltd. (`the company') which was incorporated under the provisions of the Companies Act, 1956 (`the Act'). The Company petition is at the stage of admission.*
>
> *2 According to the petitioner, an amount of*

Rs.112,99,23,300/- is due and payable by the Respondent Company to the petitioner towards the payment of the outstanding dues of foreign buyers as stated in the Agreement dated 22/06/2006 and Addendum MOU dated 07/07/2009 executed by and between the Petitioner and the Company and under the Post Shipment facility availed of by the Respondent Company through the petitioner's bankers EXIM Bank in the years 2006-07-08-09 for USD 41094627.87 which is equivalent to Indian Rs.184,92,58,254/- aggregating to Rs.215,11,40,300/-/

3 The Petitioner therefore, through its Advocate, served a statutory notice dated 24/12/2010 on the Company calling upon the Company to pay Rs.215,11,40,300/- to the Petitioner within 21 days from the receipt of the said statutory notice. Despite receipt of the statutory notice, the Company failed to respond to the said notice or to make any payment as called upon therein. The Petitioner has therefore filed the present petition seeking winding up of the Company. Copy of the petition has been served at the registered office address of the Company which address is shown as the registered office address of the Company in the records of the Registrar of Companies. However, the packet containing copy of the Petition has been returned with the remark `shifted'. It is therefore submitted that the Company is unable to pay its debts and deserves to be wound up. It is submitted that the Company Petition be therefore admitted and directed to be advertised.

4 From the aforesaid facts, I am prima-facie satisfied that an amount of Rs.215,11,40,300/- is due and payable by the Company to the petitioner. The Company has failed and neglected to respond to the statutory notice or to make any payment as called upon therein. Since the Petition was sought to be served by the Petitioner at the registered address of the Company which address till date is shown as the registered address of the Company in the records of the Registrar of Companies, the said petition is deemed to have been served on the Company though the same has been

> *returned with the remark `Shifted. I am therefore prima facie satisfied that the Company is unable to pay its debts...........”*

3 On 14th November, 2014 an order winding up the company came to be passed. On both these occasions the company was unrepresented.

4 Thereafter, on or about 9th May 2016 an ex-director of the company, filed Company Application No. 448 of 2016 on 9th May 2016, *inter alia,* seeking recall of the order dated 14th November 2014 winding up the company on the ground that the mandatory notice under Rule 28 of the Companies Courts Rules, 1959 was not duly served. By an order dated 22nd February 2017, the said company application came to be allowed and the winding up order dated 14th November 2014 was recalled. Petitioner filed an appeal being Appeal (L) 134 of 2017 impugning the order dated 22nd February 2017. The said Appeal came to be dismissed by an order dated 13th November 2017.

5 In the meanwhile, the company filed an affidavit dated 22nd March 2017 of one Sumana Pandian opposing the petition.

Petitioner filed an affidavit dated 22nd November 2017 of one Ms. Geeta B Govindan, Manager (Marketing), in rejoinder.

6 Petitioner and the company, formerly known as Bonito Impex Private Limited had entered into an Agreement dated 22nd June 2006 ("the Agreement") for export through petitioner to prospective foreign buyers, as identified by the company. Petitioner was referred to as the EXPORTER and the company was referred to as the SHIPPER. The salient Clauses of the Agreement are reproduced as under:-

> *"1. The SHIPPER undertakes to obtain the Export Order from the FOREIGN BUYER in the name of the EXPORTER, which shall then be transferred in the name of SHIPPER for the purposes of execution. It is however agreed that the terms of payment in Export Order shall be DA up to 90 / 120 days usance from the date of Bill of Lading / Airway Bill. The SHIPPER further undertakes to perform all the formalities as required under conditions of the Export Order and/or carry out inspection of the goods. It is agreed that the EXPORTER will accept the certificate from the SHIPPER certifying that the goods proposed to be exported are in accordance with the terms and conditions of the Export Contract and no claim with respect to the same (quality and quantity) shall be raised by them thereafter.*
>
> *2. The SHIPPER share provide names of the FOREIGN BUYERS and details of their bankers along with projected business proposal.*
>
> *3. The SHIPPER undertakes and agrees to obtain/ procure goods from well known manufacturers/suppliers*

holding valid Certificate and further agrees to comply with the quality standards / specifications as required and provided under the Export Order.

4. The SHIPPER shall monitor and carry out all the formalities of procuring the goods, packaging documentation, documentation, pre shipment / load port inspection and movement. Realisation of the export proceeds from the FOREIGN BUYERS shall be the responsibility of the SHIPPER besides successful execution of the Export Order.

5.......
6.......

7. Mode of Payment.
a) The shipping documents will be prepared and signed by SHIPPER A/c. STC and then submitted to EXPORTER who in turn shall present the documents for negotiation to their bank.

b)After negotiation of Export Bills and drawl of post shipment credit up to 90% from the negotiation Bank by the EXPORTER the funds shall be released to the SHIPPER as under:-

i. EXPORTER shell retain 1.5% on CIF value of the export as trading margin plus 5% towards interest bank charges, etc. remaining balance will be paid to the SHIPPER against the Post Dated Cheques of equivalent amount.

ii. The SHIPPER shall furnish Post Dated Cheques equivalent to the amount release to them after negotiation of the documents and the cheques shall be retained by the EXPORTER till realisation of export proceeds from FOREIGN BUYER and final settlement of the accounts. It is however, agreed by the parties that the cheques shall be encashed by the EXPORTER in the event of non-receipt of export proceeds on the due date or on expiry of usance period.

iii. On receipt of payment of Export Bills from the FOREIGN BUYER, after making final adjustment, trading margin, Bank charges, interest and any other dues, and funds release to the SHIPPER on discounting, net available export proceeds will be released to the SHIPPER.

iv. The EXPORTER shall recover interest @ LIBOR + 150 bps + 1% p.a. on post shipment credit from the date of release of funds till realisation of Export bills on its due date at rates to be informed by the EXPORTER to the SHIPPER from time to time. For delayed realisation of the export bills from the Foreign Buyer, the SHIPPER shall bear penal interest on funds released at rates 3% p.a. over and above the normal discounting interest charged by the EXPORTER, after allowing a normal grace period.

8..........
9...........
10.........
11.........

12. Taxes.
a) The SHIPPER hereby undertakes the sole responsibility for settlement of claims for delay, non performance of the agreement and/or any quantity, quality and all other claim of the Foreign Buyer arising under this agreement. And there shall be no claim against the EXPORTER with respect to delay, failure, quality, quantity, etc. whatsoever.

b) That the SHIPPER agrees and declares to indemnify and keep the EXPORTER indemnified against all such actions, claims, proceedings and damages, losses caused and/or expenses, Taxes, levies, duties, cess, present is future in connection with or arising out of any matter under this agreement............

c).......
d) It is clearly understood by the parties that the Export Contract is an integral part of the present

agreement. In the event Foreign Buyers fails to honour its contractual obligations, the SHIPPER shall bear all the risk and cost for the same.

13........
14........
15........
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20........

21. Misc.
The parties to this agreement hereby declare and agree that since the Export Contract between the EXPORTER, subsequently transferred in the name of SHIPPER, is an integral and essential part of this agreement, any failure of the Foreign Buyer for the SHIPPER with respect to the contractual obligations / performance viz. quality, quantity, valuation, etc. shall be to the account, risk and the cost of the SHIPPER and none else."

7 Along with the Agreement, the company furnished personal guarantees of one Sumuna R. Pandian (Director), Debabrata Das (Director), indemnity bond and also corporate guarantee in favour of petitioner.

8 In furtherance of the Agreement, the company obtained various orders from foreign buyers and exported material to the foreign buyers through petitioner. A statement containing details of the post shipment finance availed by the company for the years 2006,

2007 and 2008 is annexed at Exhibit B, page 43 of the petition, which reflects that an aggregate amount of USD 22,277,141.32 was outstanding towards foreign buyers and the same gives invoice wise break up alongwith due dates.

9 As required under Clause 7(b)(ii) of the Agreement, the company furnished postdated cheques equivalent to the amount released to the company after negotiation of the documents. The company has admitted issuance of the cheques but according to the company it was only as security. This is contrary to clause-7(b)(ii) in which it is provided "It is however, agreed by the parties that the cheques shall be encashed by the *EXPORTER* in the event of non-receipt of export proceeds on the due date or on expiry of usance period."

10 Under the Agreement, the company was required to ensure payment by the foreign buyer or else pay the outstanding dues under the Bills/Invoices within the stipulated time. The company, however, failed to do so. There are various letters to petitioner from company/minutes of meeting confirming company's liability and seeking extension of time to make payment. Some of the letters/minutes of meeting are as under:-

a) Letter dated 26th April 2007 seeking extension of credit period since the foreign buyers were unable to make payments within the due dates and the company had foreseen excellent amount of business from those foreign buyers. The company also assured to receive payments within 180 days period.

b) Letter dated 25th July 2007, in response to a letter dated 24th July 2007 from petitioner seeking payment of overdue export bills, stating that it is following up with the overseas buyers and pursuing them to make outstanding payments. The company also gave a schedule for payment of USD 15,45,583.50 (Rs.6,88,55,744/-) by 31st July 2007, USD 70,33,059.20 (Rs.31,07,84,148/-) by 31st August 2007 and balance payment by 15th September 2007.

c) Letter dated 2nd August 2007, in response to petitioner's letter dated 2nd August 2007 seeking payment of overdue export bills, stating that it is making arrangements and pursuing with their clients to clear the balance payment and it will regularize payment of all the bills very soon.

d) Letter dated 6th September 2007 stating that it is aggressively pursuing with the foreign buyers for payment/remittances and assured to resolve all outstanding payment for supplies.

e) Letter dated 13th December 2007 to petitioner assuring that it will bring additional remittances of USD 3 million and requested petitioner to extend support for discounting the bills for new supplies.

f) Minutes of meeting dated 12th June 2008 was drawn up and signed by each of parties, including by Mr. Vinod Motwani as Managing Director of the company. The parties held a meeting on 12th June 2008 to discuss the further course of action regarding outstanding payment receivable from the company. The said meeting was attended by Mr.Vinod Motwani representing himself to be the Managing Director of the company. At the meeting, the company agreed to pursue with its overseas buyers for remittance of an amount equivalent to Rs. 30 Crores by 25th July 2008 and also provided a time frame for remittances into India. The company also agreed to look into all insurance premium payment outstanding and confirmed that same shall be settled within one week.

g) Letter dated 30th July 2008 to petitioner enclosing buyer wise outstanding statement as on 30th July 2008, which reflected that invoices valued at USD 217,77,616.32 (Rs. 92,77,26,455) were outstanding and towards which amount disbursed aggregated to USD 195,99,854 (Rs.83,49,53,780).

h) Letter dated 26th June 2009 to petitioner requesting petitioner to permit to make shipments of cut and polished diamonds, which will help the company to liquidate the overdue outstanding position at a faster pace.

i) Letter dated 13th July 2009 to petitioner enclosing original Addendum and original personal guarantee of Mr. Vinod Motwani.

j) The parties accordingly entered into an Addendum dated 7th July 2009 ("Addendum") to the Agreement for effecting change of name of the company to Indo Bonito Multinational Ltd. and also to include export of items of gold jewelry, cut and polished diamonds."

11 Having accommodated the request of the company from time to time petitioner expected the company to clear the outstanding dues. Despite execution of Addendum, the company failed to maintain financial discipline.

12 The company addressed various letters even thereafter admitting

its liability and seeking extension of time for making payment. Some of the letters are as follows:

> a) Letter dated 14th December 2009 to petitioner seeking party wise statement of amount directly received by petitioner as on 30th June 2009 along with a confirmation from Exim Bank so that the same can be filed with RBI.
>
> b) Letter dated 7th June 2010 stating that it is continuously following up with the foreign buyers however due to recession and crisis in Dubai, the entire payment cycle has-been affected thereby delaying the payments. The company assured that the payment flow will start very soon and the foreign buyers will hopefully start making payments from next month and will soon clear the entire outstanding. This was in response to petitioner's letter dated 14th May 2010 seeking payment of overdue bills and letter dated 7th June 2010 seeking payment of overdue bills wherein it recorded that it was the responsibility of the company to bring in export proceeds from foreign buyer on the due dates, which they have failed to do. Petitioner also reserved its right to take actions against the company in terms of the Agreement in view of its failure to bring in the export proceeds from foreign buyers on due dates.

13 The company failed to make payments of the overdue bills despite repeated requests by petitioner and failed to abide by the assurances and undertakings given by it. Accordingly, petitioner addressed notice dated 29th June 2010 to the registered Office of the company and to Mr. Vinod Motwani being the Managing Director/ Chief Executive Officer of the company at his residential address

demanding payment of principle amount of Rs.184.90 Crores along with accrued interest of Rs.239,955,125 within 15 days of receipt of the said letter.

14 The company issued fresh cheques in February 2010 for due repayment of outstanding dues, details whereof are at Exhibit “F” to the Petition. Since the company failed to make payments despite repeated requests and assurances, petitioner deposited the 68 cheques issued by the company under the terms and conditions of the Agreement aggregating to total sum of Rs.112,99,23,300. All the 68 cheques were dishonoured on 27th July 2010.

15 On 25th August 2010 Petitioner issued notice to the company at its registered address demanding payment of Rs.112,99,23,300/- since the cheques issued by the company towards part repayment of outstanding bills were dishonoured. In response thereto, Mr. Vinod Motwani, through his advocate, addressed a letter dated 13th September 2010 denying execution of the Agreement and issuance of cheques. He also stated that he is not the Chief Executing Officer of the company and his association is for limited purpose of rendering consultancy services to the company. This is contrary to his representation during the meeting as noted earlier that he was the

Managing Director of the company.

16 The company also responded vide its advocate's letter dated 13th September, 2010, in terms admitting issuance of cheques but stating that the same were issued as a substitute for earlier security cheques but not issued against any liability and that since the same were issued as a security the same were not meant for realisation.

17 Pertinently, the aforesaid letter dated 13th September 2010 addressed by the company through its advocate refers to its address as '2nd Floor, 210, Dheeraj Heritage, S.V. Road, Santacruz (West), Mumbai 400 054' ("Santacruz address"). Whereas, in its affidavit in reply to the company petition, the company has stated that its address had changed with effect from 1st September, 2010 to '61-A, Collector Colony, Mahul Road, Chembur, Mumbai 400 074' ("Chembur address").

18 Hence, the company's stand in its affidavit in reply regarding change of address with effect from 1st September 2010 is clearly belied and the same reflects lack of bona fides on the part of the company.

19 Petitioner forwarded a further notice dated 24th December 2010, being the statutory notice, to the company at its Santacruz address demanding payment of Rs.184,92,58,254 along with interest of Rs.30,18,82,046 aggregating to Rs.215,11,40,300. Initially the same was sent by courier. The packet, however, came back with the remark 'Shifted'. Hence, the same was once again sent through registered post, which has been duly delivered and the acknowledgement card has been received with the stamp of the company. Despite receipt of the notice dated 24th December 2010 the company has failed and neglected to respond to the same.

20 The above company petition was accordingly filed by petitioner on 7th May 2011. Copy of the company petition was sent to the Respondent company by Registered Post at its Malad address (then registered address) but was returned with the remark 'Unclaimed'. Thereafter, the above company petition was once again sent to the company by registered post at its new registered address at Koparkhairne but was returned with the remark 'The company is not available at the given address'. Accordingly, this Court passed order dated 30th July 2012 admitting the above Company Petition. It has to be noted, the company has been shifting address from time to time. In the facts of this case it can safely be presumed that it is to avoid the

creditors.

21 Though the company has raised the four points of defence as noted in this paragraph (A to D) in its affidavit in reply, in addition to non-maintainability of the petition as according to the company statutory notice was not served, Shri Khandeparkar, counsel for respondent argued only on the point that the petition is not maintainable as statutory notice was not served at the registered address of the company.

> (A) Postdated cheques were issued as a security but not to be encashed for payment.
>
> (B) Company was not provided copy of Addendum dated 7th July 2009;
>
> (C) Since credit risk on foreign buyers was covered through ICICI Lombard Ltd., Respondent company was not responsible for risk of credit itself.
>
> (D) Petitioner has filed a Summary Suit for recovery of dues.

22 Though the company in its written submissions in paragraph 7, 8, 9 and 10, has raised points that no proof of default in context of any particular bill of exchange has been pleaded against the company, the entire claim of petitioner has been insured with ICICI Lombard under the Agreement, adjustments could not have been made against

the documents submitted for export of diamonds in July 2008 when the export of diamonds had been included under the Agreement only in 2009 by the Addendum, the petition is barred by limitation etc., these were never argued in court. At the same time it should be noted that the present petition is not barred by limitation. Even if one takes the date taken by the company, 8th July 2008 still the petition has been lodged on 7th May 2011. Therefore, within limitation.

23 Shri Sancheti for petitioner submitted that petitioner has in fact served various notices including demand notice dated 29th June 2010 at the Santacruz address of the company. Despite the same, company has not paid the outstanding dues to petitioner.

24 Shri Sancheti submitted, without prejudice to his submission that the statutory notice dated 24th December 2010 is validly served, the Court may consider the authorities cited by him and take the notice dated 29th June 2010 as the demand notice to pass an order winding up the company. Shri Sancheti submitted as under :

(a) There is no particular format of the notice under section 434 (1) (a) [1][**Devendra Kumar Jain vs Polar Forgings & Tools Ltd**.].

1 1992 (24) DRJ 598

(b) Rajasthan High Court (Jaipur Bench) in the matter of [2]**Har Narayan Tandon vs Jaipur Smelting Pvt. Ltd** has held that the demand notice under the Act need not be in a special form.

(c) In [3]**N.K. Gossain and Co. Pvt. Ltd Vs. Dytron (India) Ltd**, the Calcutta High Court has held that the letters wherein the company had admitted the claims of the petitioner would themselves be sufficient as in the present case, to wind up the company.

(d) The Punjab and Haryana High Court has in [4]**J. G. Finance Limited vs Hansaflon Plastochem Ltd.** held that though the notice does not make a specific mention of the provisions of sections 433 and 434 of the Act and does not specify the period of three weeks as postulated in the said provisions, such omissions cannot constitute a valid ground for dismissal of the petition for winding up.

(e) In the alternative, proof of 'inability to pay debts' under section 433 (e) can be in two forms:

<u>(i) By availing of the deeming fiction under Section 434 (1)(a):</u> If the pre-requisites set out in Section 434(1)(a)

2 (2003) 115 Company Cases 231
3 1990 Company Cases Vol.69 page 757
4 (2001) 103 Company Cases 773

are satisfied then it is deemed that a Company is unable to pay its debts. It is in order to fall under this category and to avail of the deeming fiction that a demand notice is required to be delivered at the registered office of the Company.

<u>(ii) By producing independent proof u/s. 434(1)(c) that Company is unable to pay its debts:</u> In this scenario, Section 434 (1) (a) does not apply and it is not necessary to deliver a demand notice at the registered office of company. Hence, a company petition in this category will be maintainable even without delivering a demand notice under section 434(1)(a) at the registered office of company. These 2 modes are independent and not interdependent.

(f) The Andhra Pradesh High Court in [5]**Ramdas vs Kitti Steels Ltd.** has held that even though notice under section 434 (1) (a) was not served on the registered office of the company, a creditor can claim winding up of the company under Section 433(e) of the Act with the aid of Section 434(1)(a) and/or 434(1)(c) of the Act. He submitted that if the case under Section 434(1)(a) is not proved, he can prove

5 (2001) 103 Comp Cases 199

his case under Section 434(1)(c).

(g) The Gauhati High Court in [6]**Goradia Hardware Store, Goradia Engineering Works, Khandelwal Auto Store vs Nimodia Plantations and Industries Private Limited** has held that even without serving the statutory notice if it can be proved that the company is unable to pay the amount the Court cannot ignore the fact that the company was unable to pay the amount.

(h) In [7]**N. L. Mehta Cinema Enterprises Pvt. Ltd. vs Pravinchandra Mehta a division bench of this court in** Paragraph 13 has held :

> *"13……The requirement contained in section 434 has to be strictly complied with in order to raise the legal fiction. It was certainly open to the Petitioner to make a claim in the alternative viz. that is the Company is not only deemed to be unable to paid its debts but that in fact also it is unable to pay debts. For the latter allegation, however, sufficient particulars must be given in the petition for winding up….."*

(i) Similarly, in the matter of [8]**N. N. Valecha vs I. G. Petrochemicals Ltd.** this Court has observed :

> *"11….There is again preponderance of judicial opinion in support of the proposition that apart from the legal*

6 (1997) 1 Gau LR 230
7 1989 (3) BCR 101
8 (2008) 143 Company Cases 122 (Bom)

> *fiction it is open to a petitioner to make and prove an alternative claim that the company is unable to pay its debts".*

25 According to Shri Sancheti, the above judgments clearly reflect that a Company Petition can be filed on both counts, i.e., on the basis of the deeming fiction contained in Section 434(1) (a) of the Act and also on the basis of inability of the Respondent to pay debts under Section 434(1)(c). Shri Sancheti submitted that in view of the numerous admissions made by the company that are on record and the fact that the company has not discharged those debts, the company is not only deemed to be unable to pay its debts but is in fact unable to pay is debts and deserves to be wound up.

26 According to the company, statutory notice was not served at the registered address of the company and hence petition was not maintainable. Shri Khandeparkar submitted as under :

a) The petition has been filed on the basis of the statutory notice dated 24th December 2010 which is addressed to the Santacruz address which was not the registered address of the company at the relevant time. He relied upon Form 18 filed by the company under section 146 of the Companies Act, 1956 to submit that the registered office of the company (at the relevant time) had already been changed with effect from 1st September 2010 to "61-A, Collector Colony, Mahul Road, Chembur, Mumbai 400 074".

b) It is trite law that the deeming fiction, as contemplated under Section 434(1) of the Act, will not be available to a petitioning creditor in case the statutory notice is not served in the manner as contemplated under sub-clause (a) thereof. He relied on the following judgments in support of this contention.

(i). N.L. Mehta Cinema Enterprise Pvt. Ltd. Vs. Pravinchandra Mehta, [Supra] ;

(ii) N.N. Valecha Vs. I.G. Petrochemcials Ltd., [Supra];

(iii) [9]**Vysa Bank Ltd. Vs. Randhir Steel Alloys Pvt. Ltd** ;

(iv) [10]**Kold-Hold Industries Pvt. Ltd. Vs. Arabian Exports Ltd.,**

(v) [11]**Landesban Baden-Wurttemterg Vs. Pushkraj Packaging India Pvt. Ltd.,**

(c) Service of notice on administrative office or any other branch or any other person cannot be regarded as a statutory notice as contemplated under Section 434(1)(a) of the Act. Service of a statutory notice under section 434(1)(a) has been held to be

9 1993(76) Company Cases 244
10 (2004) 119 Comp Cas 1
11 (2016) SCC Online Bom 4135

mandatory by this Court in the case of N. N. Valecha (Supra).

(d) The earlier notices dated 29th June, 2010 and 25th August 2010 cannot be regarded as a statutory notice having regard to the following facts/submissions:

(i) There are no pleadings contained in the company petition or in the affidavit in rejoinder in context of the earlier notice being treated or regarded as statutory notice under section 434 (1)(a) of the Act. The pleadings as contained in the company petition and affidavit in rejoinder are only in the context of statutory notice dated 24th December 2010. The case that these earlier notices can also be regarded as statutory notices has never been pleaded. Petitioner has sought to contend that these earlier notices be treated/regarded as statutory notices for the first time only in its oral arguments. The said oral submission in the context of these earlier notices is in fact contrary to its pleadings and therefore, cannot be considered.

(ii) Form 46 and 47 applicable by virtue of Rule 95 of the Company Court Rules require a specific averment in context of an identified statutory notice. There has to be a categorical charge of insolvency and indebtedness in context of an identified statutory notice. The Petitioners cannot in the course of oral arguments be permitted to alter its case as regards the statutory notices. No inference can be drawn as regards statutory compliances without any pleading in that regard.

(iii) Pleadings on the Original Side of this Court are required to be strictly construed as was held by the Hon'ble Supreme Court in the case of [12]**Badat & Co. vs. East India Trading Co.**

(iv) The present proceedings are of summary nature and therefore, the pleadings are required to be specific. There has to be a specific charge of insolvency in the context of an identified statutory notice of winding up. The argument as regards earlier notice cannot be permitted to be made as the same would be in the absence as well as contrary to the pleadings on record. A winding up proceeding contemplates serious civil consequences and therefore, the pleadings in that regard are required to be categorical.

(v) Section 138 Notice cannot be regarded as a statutory notice under Section 434(1)(a) of the Act as held by the Delhi High Court in [13]**India Foils Ltd. vs. S. R. Foils Ltd.**

(vi) The notice dated 25th August 2010 is given only in context of the dishonour of 68 cheques whereas, the company petition has been filed in context of the said Agreement and Addendum.

12 (1964) 4 SCR 19
13 (2002) Delhi Law Times 824

The basis of demand contained in the earlier notice is completely different from what is averred and claimed in the company petition. As such, the earlier notice cannot be attributed or linked to the demand made in the company petition.

(vii) No proof of service of Notice dated 25th August 2010 has been furnished along with the Company Petition or the Affidavit in Rejoinder.

(viii) The earlier notices are defective inasmuch as they do not speak of the consequences on failure to pay in terms of the said notices. For a notice to be regarded as having been made under Section 434(1)(a) of the Act it would be necessary for a petitioning creditor to mention therein about the consequences of default in making payment by atleast stating in the said notice that the failure to pay would entail filing of proceedings such as winding up under the Act. This Court has in the case of [14]**Perfect Machine Tools Co. Ltd. vs. State of Maharashtra and Ors.** held that that the provisions of law resulting in legal fiction are required to be strictly construed. It was further held that the compliance of the requirements of such provisions and condition precedent to invocation of rights granting such benefit of

14 2008 (6) Bom.C.R.200

deeming/legal fiction would be strict.

(e) A notice issued under section 434(1)(a) is required to enumerate the provision under which it is issued. Any notice which brings about a legal fiction is required to strictly adhere to the requirements under which the said notice is issued. As per section 434(1)(a), the following requirements are mandatory:

(i) Notice has to be issued only on the company.
(ii) It has to be delivered at its registered office.
(iii) Such delivery has to be by Registered Post or otherwise.
(iv) In such notice, the company shall be called upon to pay "sum so due" (specified sum).

In case of failure to pay the said specified sum for three weeks thereafter by the company, the legal fiction would come into play.

(f) Service upon Mr. Vinod Motwani vide earlier letters dated 29th June 2010 and 25th August 2010 cannot be regarded as service "upon the company". Section 434(1)(a) contemplates service on the company.

(g) There is a dispute as regards the designation of Mr. Vinod Motwani of being CEO of the company. Legal fiction contemplated under Section 434(1)(a) cannot be available to a petitioning creditor in case of service of statutory notice only upon the alleged CEO. The earlier notice dated 29th June 2010 is only addressed to Vinod Motwani and not the company.

(h) The earlier notice dated 29th June 2010 has been addressed to Mr. Vinod Motwani in context of a personal guarantee dated 4th August 2009 issued by him. Such a claim would only have been made against him and not the company. Again, the case for demand as contained in the Company Petition is different from the basis on which this earlier notice dated 29th June 2010 was issued and therefore, this earlier notice cannot be regarded as a statutory notice or be attributed to the case contained in the Company Petition.

(i) There is no pleading contained in the company petition as regards Section 434(1)(c) of the Act. The entire case as set up in the company petition as well as in the rejoinder is only in the context of Section 434(1)(a). As such, petitioner cannot, for the first time, in the course of oral arguments, be permitted to set up a new case without any pleadings.

(j) Except in case of a contingent and/or prospective creditors, a petitioning creditor initiating any case under Section 434(1)(c) is required to give a statutory notice. The exception for contingent and/or prospective creditor is created by virtue of Section 439(8) of the Act. No case under sub-clause (c) of Section 434(1) of the Act can be initiated without having issued and served a statutory notice in the manner as contemplated under clause (a) thereof.

The requirement of this prior statutory notice is for the following reasons:

> (i) Sub-clause (c) opens with the expression “if it is proved to the satisfaction of the Court that the company is unable to pay its debts”. This proof can only be discharged by legal fiction as per statutory notice under section 434(1)(a);
>
> (ii) The word “or” appears only between sub-clauses (b) & (c) and not after sub clause (a). The legislature has deliberately excluded the use of the word “or” after clause (a) thereby, suggesting that clause (a) is compulsory and clause (b) or (c) are extensions of clause (a). Hence, clauses (b) or (c) are dependent on clause (a) and not independent thereof.

(i) No Balance Sheet or Annual Returns have been produced by petitioner. There are no pleadings for calling upon the company to produce any such documents for the Court to ascertain the liabilities of the company. Hence, no adverse inference can be drawn against the company in absence of pleadings in that regard.

(j) There is a difference in the amount as claimed in the earlier notices and the amount in terms of the Particulars of Claim of the Petition.

27 It will be useful to quote Section 433 and section 434 that read as under to deal with the rival submissions.

> “433. Circumstances in which company may be wound up by Court.
>
> *“A company may be wound up by the Court-*
> *(a) if the company has, by special resolution, resolved that the company be wound up by the Court;*
> *(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;*
> *(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;*
> *(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;*
> *(e) if the company is unable to pay its debts;*
> *(f) if the Court is of opinion that it is just and equitable that the company should be wound up.”*
>
> 434. Company when deemed unable to pay its debts.
>
> *“(1) A company shall be deemed to be unable to pay its debts-*
> *(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred 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;*
> *(b) if execution or other process issued on a decree or*

order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.
(2) ……………………..."

28 Under Section 434 (1) (a) petitioner is required to only serve a `demand notice', does not mandate any particular format. It also does not state that the section under which the demand notice is issued is required to be mentioned. It also does not state that the consequences of non-compliance of the demand notice has to be specified.

29 I find support in :

A. *Devendra Kumar Jain* [Supra] of the Delhi High Court, wherein court held as follows:-

> *"[9] The validity of the letters of demand is challenged by the Company on the ground that* in the letters of demand the petitioner has not stated as to what would be the consequences in case of non payment of the amount and thus it is contended that the letters alleged as "notices of demand" are not legal and do not constitute proper demand as required by section 434(l) {a) of the Act. …
>
> *[10] The aforesaid provision do not require the creditor to state in the notice as to what would be the consequences if the sum due is not paid by the company to the creditor. Under Section 434(l)(a) presumption about insolvency of the company is liable to be drawn where the creditor serves on the company a demand*

requiring it to pay the sum due and in case the 'company for three weeks after service of demand neglects to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. Neither the Act nor the Rules provide for any particular form of demand. It is also well settled that in the demand served on the company under Section 434(l)(a) the non specification of the period of three weeks does not result in invalidating the demand. According to Palmer's Company Precedents (Part II) 17th "' Edition (Page 26) the demand need not be in a special form. It need not use the word "demand". A pre-emptory request or "call" for payment would no doubt suffice. A demand in excess of what is due can still be a valid statutory demand. It is correct that the petitioner in the letters sent to the company requesting it to make payment of the balance outstanding amount with interest at 18% p.a. has not stated as to what consequences will follow and what he will do in case payment as requested was not made but, in my opinion, it does not affect the validity of the demands made by the petitioner from the company. The law does not require that demand must recite a threat for proceeding for winding up in case of non payment. (See N.K. Gossain and Co. Pvt. Ltd Vs. Dytron (India) Ltd, 1990 Company Cases Vol. 69 Page 757-Calcutta High Court). With respect I am unable to agree with the opinion expressed by Allahabad High Court in Paramjit Lal Badhwar Vs. Prem Spinning and Weaving Mills Co. Ltd., 60, Company Cases Page 420 and the opinion of Kerala High Court in K. Suresh Shenoy Vs. Cochin Stock Exchange Ltd., (1988) 3 Company Law Journal 350 to the effect that though in the notice sought to be given under Section 434(i)(a) it is not necessary that there should be an indication that it is given under section 434(l)(a) and there is no specified mention of that section, there should be some indication given to the company that in the case of non compliance with the terms of the notice, the creditor will take steps for the winding up of the company. The law does not prescribe any such requirement. It also seems that an earlier decision of Allahabad High Court in Babu Ram and another Vs. Krishna Bhamdwaj Cold Stores and General Mills Co. (P) Ltd. and others, 1965(2) C.L.J. Page 215

> *was not brought to the notice of the learned Judge which decided the case of Paramjit Lal Badhwar (Supra). In Babu Ram's case it was held that he law does not require that the notice- must recite a threat of a proceeding for winding up in case of non payment. In my view, prima facie, the letters dated 10th May 1990, 6th June 1990 and 30th June 1990 constitute a valid demand under Section 434(l)(a) of the Act."*

B. *N.K. Gossain and Co. Pvt. Ltd.* [Supra] where the Calcutta High Court held as follows:-

> *"[24] Mr. Sarkar submitted that the case in T. P. Sahu and Sons P. Ltd., In re [1982] 52 Comp Cas 182 (Cal) exactly fits in with the instant case in so far as the company never raised any dispute as to the receipt of the goods or as to the payment of the billed price. On the contrary, the company had asked for time to pay off the dues of the petitioning-creditor.*
>
> *[25] Mr. Sarkar also submitted that if the notice is held to be bad, annexure 'C' to the petition, i.e., the letters wherein the company had admitted the claims of the petitioning-creditor would by themselves prove the case of the petitioning-creditor in the instant case. Mr. Sarkar further submitted that those letters would also raise a presumption as to the insolvency of the company in so far as it was unable to pay a particular debt of the petitioning-creditor.*
>
> *[26] In view of what has been discussed above, I am completely in agreement with the submissions of Mr. Sarkar that the statutory notice under Section 434(1)(a) of the Companies Act does not require giving or specifying any particular date within which the company has to pay and that the mention of a lesser period in the said notice will not invalidate such notice. The true purport of Section 434(1)(a) of the Companies Act has been very clearly discussed by the learned judge in the case Babu Ram v. Krishna Bharadwaj Cold Stores and General Mills*

Co. P. Ltd. [1965] 2 Comp LJ 215 at page 219. The requirement of Section 434(1)(a) is that a demand is to be made by the creditor of the company addressed to the company which has to be left or served at the registered office of the company by registered post. If the company, after such service of the demand, does not pay within a period of 21 days, insolvency will be presumed which will entitle a creditor to present a winding-up petition. Therefore, it is wholly immaterial and unnecessary whether any period is mentioned in the notice under Section 434(1)(a) of the Act. The only requirement of the said section is that the notice has to be served at the registered office of the company and that the right of action of the creditor is only postponed till three weeks from the date of service of such notice. Reading the language of the section and while agreeing with the cases relied on by Mr. Sarkar and considering the surrounding circumstances under which the notice was issued, I hold that the notice in the instant case is a good one and a valid notice and the instant winding-up petition is sustainable on the basis of such notice."

C. Similarly, the Rajasthan High Court has, in *Har Narayan Tandon vs Jaipur Smelting Pvt. Ltd* [Supra] held :

"[8] … Satisfaction required is reasonable satisfaction of the creditor and not the debtor. The demand notice under the Act need not be in a special form. It is also not necessary that the notice should carry warning that if the demand was not met the winding up petition shall be filed. Request for repayment would be sufficient. The law does not require that the demand shall recite a threat for proceeding for winding up in the case of non-payment nor is there any necessity that the demand notice should mention that the notice is being given under Section 434(1)(a) of the Act.

[9] In the present case the petitioner served a notice at the registered office, which is a mandatory requirement, to pay the debt, which is of course more than five

> *hundred rupees and informed the company that failing which legal action shall be taken. Legal action includes action for winding up under Section 433 of the Act. In my opinion there was sufficient compliance with Section 434(1)(a) of the Act and thus it cannot be said that the company petition is not maintainable under Section 433(e) of the Act. That apart even if the notice was bad, that will not debar the petitioner from filing a petition under Section 433(e) of the Act. Legal notice under Section 434(1)(a) only draws a presumption that the company is unable to pay its debt which is rebuttable presumption. If the notice served on the company is not in accordance with law or if no notice is served under Section 434(1)(a) of the Act it cannot be said that independent of the notice under Section 434 the creditor cannot institute the proceedings for winding up under Clause (e) of Sub-section (1) of Section 433 of the Act. The creditor without there being any presumption drawn on account of the service of notice under Section 434(1)(a) can prove the fact that the company is unable to pay its debt. The creditor/petitioner can satisfy the court by placing relevant material and evidence on record that the company is unable to pay its debt and on such proof, a winding-up order can be passed by the court under Section 433(e) of the Act.*

D. Similarly, the Punjab & Haryana High Court has, in *J. G. Finance Limited vs Hansaflon Plastochem Ltd.* [Supra], held :

> *"[8] No doubt the notice does not make a specific mention of the provisions of sections 433 and 434 of the Companies Act, 1956 and does not specify the period of three weeks, as postulated in the said provisions, but such omission cannot constitute a valid ground for dismissal of the petition for winding up. …*

E. In [15]**Agilent Technologies Singapore (sales) Pte Limited versus**

15 2013 (2) BCR 453

KJ

Ashco Niulab Industries Limited, [Cited by Shri Khandeparkar] petitioner had demanded payment of dues within 7 days instead of 21 days. The company argued for dismissal of the company petition on the ground that if petitioner wants the benefit of a legal fiction under section 434 (1)(a) that the company is unable to pay its debts, he has to strictly fulfil all the conditions stipulated therein for raising such legal fiction. While rejecting the above argument, this Court held :-

> *" 13. …In view thereof, even if a shorter period is mentioned in the notice, it cannot be said that the notice has defeated the intention of the Legislature or is likely to introduce any uncertainty, friction or confusion into the working of the system. … If a statutory notice is served at a registered address and if a company has for 3 weeks thereafter, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditors, the legal fiction can be raised as provided under the statute, namely that the company is deemed to be unable to pay its debts. ...*
>
> *14. In the instant case, as discussed herein above, section 434(1)(a) of the Act, does not require any period to be set out in the statutory notice within which the company has to pay the creditor. It only provides that the company shall be deemed to be unable to pay if the company for the period of three weeks after the receipt of the said notice neglect to pay the sum called upon to be paid by the said statutory notice."*

30 Shri Khandeparkar relied on the judgement in the matter of *N. L. Mehta Cinema Enterprises Pvt. Ltd.* [Supra] to contend that the demand notice under section 434 (1) (a) has to be sent to the

registered office address of the company. Petitioner has in fact served various notices including demand notices dated 29th June 2010 and 25th August 2010 at the registered address of the company. However, despite the same, the company has not paid the outstanding dues of petitioner. Though the company contended that the company petition is filed on the basis of notice dated 24th December 2010 as the statutory notice, notices dated 29th June 2010 and 25th August 2010, sent by petitioner and receipt of which has not been denied by the company, have been referred to, annexed and form a part of the company petition.

31 Petitioner addressed letters dated 14th May 2010 and 7th June 2010 to the company seeking payment of overdue bills, which has been responded to by the company vide letter dated 7th June 2010 assuring to clear the entire outstanding soon.

32 Petitioner issued notices dated 29th June, 2010 and 25th August 2010 to the company at its registered address demanding payment of Rs.112,99,23,300/- since the cheques issued by the company towards part repayment of outstanding bills were dishonoured. The company responded vide its advocate's letter dated 13th September 2010, in terms admitting issuance of cheques but incorrectly stating that the

same were not issued against any liability. Pertinently, the aforesaid letter dated 13th September 2010 addressed by the company through its advocate refers to its address as '2nd Floor, 210, Dheeraj Heritage, S.V. Road, Santacruz (West), Mumbai 400 054', whereas, in its reply to the company petition, the company has sought to contend that its address has changed with effect from 1st September, 2010. Therefore, the company's stand in its affidavit in reply regarding change of address with effect from 1st September 2010 is clearly and a complete afterthought. Even if it has changed, it does not help the company. The same smacks of mala fides on the part of the company. Petitioner forwarded notice dated 29th June 2010 to the company through its Managing Director Mr. Vinod Motwani (at the registered office at Santacruz address) demanding payment of Rs.184.90 crores with interest of Rs.23.99 crores. However, despite receipt there was no response thereto.

33 Therefore, petitioner has demanded the outstanding amounts due from time to time, despite which the company has failed and neglected to make payments.

34 In [16]**Luxmi Industrial Gases Pvt. Ltd. vs Punjab Chemi Plant**

16 (2001) 103 Comp Cases 429

International the Punjab and Haryana High Court held as follows:-

> *"[10] The bona fides of the stand taken by the respondent-company are doubtful and it is clear from the record that the respondent-company on flimsy excuses is trying to evade its liability, which otherwise stands established on record. By merely averring that the case requires evidence, the company cannot be permitted to frustrate the proceedings under the Companies Act. The provisions of the Companies Act would certainly come to the rescue of the petitioner whose liability is admitted by the respondent or is established on record by documentary evidence. Lack of bona fides in the defence of the respondent-company itself is a ground for admission of the petition. In any case, the respondent-company is indebted to the petitioner to the extent of Rs. 3 lakhs which it ought to have paid without protest and demur. Admitted default of payment and lack of bona fides in the stand taken by the respondent-company would fully justify the admission of this petition.*
>
> *"[11] The other contention raised on behalf of the respondent-company that the notice has not been served in accordance with the provisions of Section 434 of the Companies Act, is also misconceived. No doubt the notice, in question, was addressed to the managing director but as the managing director of the respondent-company. It may be true that the notice ought to be addressed to the respondent-company and not to the managing director but that would be true if the receipt of the notice on the respondent-company was not proved or not admitted. In the present case, the receipt of the notice has been duly proved. The written statement has also been filed on behalf of the respondent-company. In paragraph No. 12 of the reply/written statement filed on behalf of the respondent-company, it has been admitted that the notice was served and received by the managing director of the respondent-company. Admission of this fact cannot be ignored for the purposes of determining this controversy. Once notice is received by the respondent-company, may be through its managing director, and this fact is admitted, there would be substantial compliance of the*

provisions of Section 434 of the Companies Act. The notice served under Sections 433 and 434 of the Companies Act had clearly given all the facts. The period of 21 days was also specified in the notice and it was specifically averred that in default a petition for winding up would be filed. It is also not disputed in the reply that the registered office of the respondent-company is at the address, on which the notice was sent."

35 In the matter of [17]**Anjaneya Cotton Mills Ltd vs M/s. Sheela Rani Textiles & Anr.** the Madras High Court has held as follows-

"[14] The present company petition was filed by the petitioner under Section 433(e) read with Section 434(1) on the ground that the company is unable to pay off its debts. …

Section 434(1), especially Sub-clause (a) makes it a condition that the creditor shall serve a notice on the company at its registered office by registered post and it is only such creditor who can file application before this Court under Section 434(1)(b). It is also no doubt true that the petitioner filed a suit in the year 2007 against the first respondent for recovery and got an ex parte decree and in the said suit, the petitioner chose to give the address of the first respondent as 'Thenur, Samayanallur Post, Madurai.

[15] On the above said background, we have to approach the question of maintainability raised by the first respondent. Under similar circumstances, N.V. Balasubramanian,J. (as His Lordship then was) in Indian Oil Corporation Ltd. v. NEPC India Limited, (2003) 114 Comp. Cas 207 held that in the winding up proceedings under the Company law being the recognition of law of insolvency, the main issue to be decided is as to the financial status of the company taking into consideration that the general interests of the creditors and contributors are to be protected. Even though the statutory notice is a

17 (2010) 160 Comp Cases 211

condition precedent for maintaining a company petition for winding up, it was held that when it is proved that the respondent company received such notice and acted upon the same, the non-sending of letter to the registered office need not stand in the way of proceeding further with the winding up petition. The operative portion of the judgment is as follows:

Though it is essential that notice must be addressed and sent to the registered office, on the facts of the case, the fact remains that the notice was received by the respondent. The Department of Post, India has also issued a certificate to the effect that the registered notice was delivered to the addressee on July 22, 1997. I am of the view that the petitioner has acted in good faith and it is also seen that the company petition was also served on the respondent. I therefore hold that the petitioner has acted bona fide, because the respondent had issued more than one letter to the petitioner and in all letters the address of the registered office of the respondent was shown as No. 36, Wallajah Road, Chennai. Further, prior to the issue of the statutory notice, viz., July 16, 1997, the petitioner had received the letter of the respondent dated June 17, 1997, showing the address of its registered office as No. 36, Wallajah Road, Chennai. Even assuming that the respondent has already changed its registered office to the new address with effect from May 1, 1997, when the petitioner has acted on the basis of the letter issued by the respondent immediately before the despatch of the statutory notice, I hold that it is not open to the respondent to contend that the statutory notice was addressed to the old address and hence, the statutory notice is not valid. The address of the registered office is mentioned as 36, Wallajah Road, Chennai, not only in the letters issued prior to the statutory notice, but also in the letters subsequently issued by the respondent from August, 1997 to January, 1998. Moreover, subsequent to the statutory notice, the respondent has admitted its liability in the agreement dated September 20, 1997. The purpose of issuing notice is to give an opportunity to the respondent to discharge the liability and when subsequent to the notice the respondent admitted the liability and *agreed to pay the amount, the wrong reference as to the address of the registered office of the respondent in the statutory notice would not vitiate the notice. Further, this Court in Rajerajeswari Packaging Products v. Dev Fasteners Ltd., (2002) 108 Comp Cas 715 :, (2002) 2 LW 658 has taken the view that in the case of petition filed under Section 433(e) read with Section 434 of the Companies Act, notice served on the administrative office is a valid notice. Here also, it is a case filed under Section 433(e) read with Section 434 of the Companies Act and the decision of this Court in Rajerajeswari Packaging Product's case, (2002) 108 Comp Cases 715 would squarely apply to the facts of the case.*

[16] Holding that such a stand of not sending the statutory notice to the registered office, when admittedly the company received the statutory notice, is hyper-technical, under similar circumstances, E. Padmanabhan, J. in Rajearajeswari Packaging Products v. Dev Fasteners Limited, (2002) 108 Comp. Cas 715, after referring to two judgments of Bombay High Court in N.L. Mehta Cinema Enterprises (P) Ltd. v. Pravinchandra P. Mehta, (1991) 70 Comp. Cas 31 and Vysya Bank Ltd."

36 This Court in [18]**Cavendish Shipping Ltd vs Polaris Marine Management Pvt Ltd and Others** has held as under:

"The deeming fiction under Section 434(1)(a) is, however, not exhaustive of the power of the Company Court if a Company is unable to pay its debts within the meaning of clause (e) of Section 433. The effect of Section 434(1)(a) is to create a deeming fiction that the Company is unable to pay its debts if a creditor has served upon the Company by registered post or otherwise a demand under his hand requiring the Company to pay the sum due and the Company has neglected to pay the sum or to secure or to compound it for a period of three weeks. In Tailors Industrial Flooring Ltd. vs. M& H Plant

18 (2010) 156 Comp. Cases 108 Bom.

Hire (Manchester) Ltd. [1990 BCLC 216] the Court of Appeal in the U.K. Held:

> "There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who seek to petition for the winding up of companies do not serve statutory demands. The practical reason for that is that if a statutory demand is served, three weeks have to pass until a winding up petition can be presented. If, after the petition has been presented, a winding up order is made, the winding up is only treated as commencing at the date of the presentation of the petition; thus, if the creditor takes the course of serving a statutory demand, it would be giving the company an extra three weeks' grace in which such assets as the company may have may be dissipated in attempting to keep an insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So there are practical reasons for not allowing extra time, particularly where commercial conditions and competition require promptness in the payment of companies' debts so that the creditor companies can manage their own cash flow and keep their own costs down. ... The first limb is that if a debt is due and an invoice sent and the debt is not disputed, then the failure of the debtor company to pay the debt is itself evidence of inability to pay."

37 It is well settled that in order to take advantage of a deeming provision, it has to be strictly complied with. Section 434 (1) (a) is one such deeming provision. Shri Sancheti has no dispute with this proposition. His submission, is that apart from this deeming provision, the Court can also look to section 434 (1) (c) for winding up the

company on the ground that the company is in fact unable to pay its dues. I am inclined to agree with Shri Sancheti.

38 It is correct that petitioner has not pleaded that the earlier notices being the notice dated 29th June 2010 and the notice dated 25th August 2010 be considered as statutory notices. Since petitioner is relying upon notice dated 25th December 2010 to avail the benefit of the deeming fiction of section 434 (1) (a), it would have to be duly received by the company at its registered address and even if I proceed on the basis that petitioner has failed to serve the notice dated 25th December 2010 at the registered address of the company (Order of admission dated 30th July 2012 says "...........at the registered address of the company which address till date is shown as the registered address of the company in the records of the Registrar of company.........") and the company cannot be deemed to be unable to pay its debts, this Court can still consider whether or not the company is in fact unable to pay its debts in view of the observations made in *N.L. Mehta Cinemas* [Supra] and *Cavendish Shipping* [Supra].

39 Shri Khandeparkar cited various authorities in support of his contention that the provisions of section 434 (1) (a) are mandatory and the court cannot consider section 434 (1) (c) without being

satisfied that provisions of section 434 (1) (a) are strictly complied with. However, it is settled law that a judgment has to be read in the context of its facts. [19][**Islamic Academy of Education vs. State of Karnataka.**

40 In *N.L Mehta Cinema Enterprises* [Supra], the petition proceeded on the allegation that the company was unable to pay its debts and this allegation was based upon the fiction contained in section 434 of the Act. It was in these facts that the Court held the requirement contained in section 434 (1) (a) to be strictly complied with. The division bench, however, also observed that it is certainly open to the Petitioner to make a claim in the alternative, viz., that the Company is not only deemed to be unable to pay its debts but in fact, also is unable to pay its debts. Whether or not sufficient particulars are given in the present case will have to be seen.

41 In *N.N. Valecha* [Supra], the contention of the petitioner that the respondent having replied to the statutory notice should be deemed to be a waiver the provision of Section 434(1) (a) of the Act was rejected. The Single Judge also considered that apart from the legal fiction it is open to a petitioner to make and prove an alternative

19 (2003) 6 SCC 697

claim that the company is unable to pay its debts. Eventually the petition was dismissed on the ground that it raised disputed questions of fact. It is not the case of petitioner herein that respondent has waived service of statutory notice. Therefore this judgement is of no assistance to the company.

42 In *Vysya Bank Ltd.* [Supra], the petition was filed on the basis of a statutory notice that was admittedly not served on the registered office of the company at all. That is not the case at hand. The statutory notice in *Vysya Bank* had come back undelivered. In the facts of that case the Single Judge was of the view that it was possible for the petitioners to serve the demand in the manner provided in section 434(1)(a) at the registered office of the company. As that was not been done, the petition was dismissed.

43 In *Kold Hold Industries* [Supra], the petition was filed only on the basis of the deeming fiction contained in Section 434 (1) (a), the Court did not have an opportunity to consider whether or not the company is actually unable to pay its debts. In fact in that case the company had even responded to the statutory notice though the registered office of the company had been shifted almost a year before the statutory notice was issued. The respondents therein took the plea

of substantial compliance of section 434 (1) (a). In the circumstances, the Single Judge held that the requirement of serving of demand notice on registered address of the company was a mandatory requirement and, therefore, there was no question of considering whether though the notice was not served at the registered office of the company, it has been replied to or that it was sent at the address which was not a registered address because of a representation made by the company.

44 In *Pushkraj Packaging India Pvt. Ltd.* [Supra], the statutory notice sent by petitioner had come back with the remark “I.P”. This Court held that presuming the letters “I.P.” stood for “intimation posted”, it only indicates that intimation was posted and does not satisfy the requirement of the notice being actually delivered. Further, the petition was dismissed on the ground that another petition against a guarantor to the same principal borrower (S.K. Agrotech), where the same defence was raised by the company, had been dismissed. The facts of that case are clearly distinguishable from the case at hand.

45 The company contended that even for relying on Section 434 (1) (c), it is mandatory for petitioner to raise a demand under section 434 (1)(a). In order to support the said contention, Shri Khandeparkar

argued that the word 'or' is present between sub-sections (b) and (c) of Section 434, whereas the word 'or' is not present between sub-sections (a) and (b) of Section 434.

46 I do not agree with Shri Khandeparkar. Section 434 (1) (c) will apply only when it is proved to the satisfaction of the Court that the company is otherwise also unable to pay its debts.

47 Moreover, under Section 439 (7) (a) a winding up petition can be filed even by a Registrar under Section 434(1)(b); however, the Registrar is not a creditor and he cannot issue demand notice for payment of debt under Section 434(1)(a).

48 Similarly, a petition under section 434(1)(c) can also be filed by a contingent/prospective creditor as prescribed under section 439(8). It would therefore not be possible for such creditor to issue a demand notice demanding payment within 3 weeks. Yet such a petition is maintainable by a contingent / prospective creditor.

49 Hence, the company's contention that even for entertaining a petition under section 434(1)(c) it is mandatory to issue a notice under section 434(1)(a) cannot be accepted. The two provisions act

independently and are not interdependent.

50 The company in its affidavit in reply has also sought to distance itself from the involvement of Mr. Vinod Motwani in the affairs of the company. However, this stand taken by the company is contrary to the facts and documents on record for the following reasons:

(A) The company has addressed a letter dated 29th January 2008 to the Petitioner regarding realisation of overdue export bills, which was signed by Mr. Vinod Motwani as Managing Director of the Respondent Company.

(B) Mr. Vinod Motwani has also submitted personal guarantee dated 19th May 2008 representing himself to be the President of the company.

(C) Mr. Vinod Motwani represented himself to be the Managing Director of the company in the meeting held on 12th June 2008. The minutes of meeting dated 12th June 2008 is signed by each of parties, including by Mr. Vinod Motwani as Managing Director.

(D) Mr. Vinod Motwani has also submitted a personal guarantee dated 27th March 2009 representing himself to be the Chief Executive Officer.

(E) The company addressed a letter dated 13th July 2009 to

Petitioner enclosing original Addendum to Memorandum of Understanding and original Personal Guarantee of Mr. Vinod Motwani.

(F) The Addendum dated 7th July 2009, which was submitted by the company to the Petitioner, is signed by Mr. Vinod Motwani on behalf of the Company.

51 The company has not produced any document on record to show that Mr. Vinod Motwani was neither the director or officer of the company at the relevant time.

52 In an attempt to explain the issuance of cheques by the company to petitioner, which were dishonoured, the company has belatedly stated in its affidavit in reply to the company petition that the post-dated cheques dated 3rd February 2010 were issued by the company to replace the guarantee cheque issued by the Company to guarantee quality, rejection or Logistic issues. However clause 3, 7, 12 and 21 of the Agreement clearly reflect that postdated cheques were issued for encashment in the event of non-receipt of export proceeds and that the company was solely responsible for complying with the quality, quantity, etc of the goods.

53 Moreover, petitioner had addressed notice dated 25th August 2010 to the company informing about dishonouring of the cheque with a demand to pay the same within 15 days. The company has responded, vide its advocates' letter dated 13th September 2010 where in the company has nowhere stated that the cheques were issued to guarantee quality, rejection or Logistic issues, as sought to be argued for the first time in the affidavit in reply to the company petition.

54 In the matter of [20]**M/s. Ashok Commercial Enterprises and another vs Parekh Aluminex Limited,** a similar defence taken by the Defendant, viz. that cheques were issued as a mere collateral security or comfort was dealt with and rejected with following observation:-

> *"6. It is next contended by the Defendant that the cheques were merely a collateral security for repayment of the loan. The defence is merely illusory. One fails to see the significance of an alleged collateral security, which is not meant to be enforced. 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. The defence that the cheque was a mere collateral security and did not, therefore, amount to and negotiable instrument, can only be termed as bogus."*

20 (2014) SCC Online Bom. 4681

55 The company has not only issued cheques towards repayment of the amount but has also replaced the same with fresh cheques in February 2010, which were admittedly dishonoured. The aforesaid facts clearly reflect that the company was liable to pay the amounts to petitioner for which the cheques were issued and that the company is unable to pay its debt including the debt of petitioner. Clause 7(b)(ii) of the agreement provides "It is however, agreed by the parties that the cheques shall be encashed by the EXPORTER in the event of non-receipt of export proceeds on the due date or on expiry of usance period.

This stand has been taken by the company as an afterthought, reflects lack of bona fides on the part of the company, is illusory and bogus.

56 So far as the contention of Shri Khandeparkar that there is a difference in the amounts claimed in the earlier notices and the amount in the Particulars of Claim, it is settled law that mere difference in the amount claimed by petitioner in its demand notice and the amount referred to in the company petition is not a ground to disregard the demand notice all together and the same cannot be a ground for refusing to wind up the company. This is more so when the company has not stated that it is not liable to pay any amount to

petitioner. The company has not even produced a single document to show that it is in a position to discharge its debts and is financially sound. The company has also not produced any documents showing its financial position/net worth.

57 I have perused the petition, affidavits, heard Shri Sancheti and Shri Khandeparkar and also considered the documents annexed/relied upon by the parties. I am also satisfied that the company is indebted to petitioner, unable to discharge its debts and is commercially insolvent.

58 Therefore, the petition is allowed in terms of prayer clause (a) and (b) which read as under:-

> *"(a) that the Respondent Company, i.e. Indo Bonito Multinational Ltd., be ordered to be wound up by an order of this Hon'ble Court;*
>
> *(b) that the Official Liquidator, High Court, Bombay be appointed as liquidator of the Respondent Company with all powers under the Companies Act, 1956 including the power to take possession of all the assets, books of account, stock in trade, cash on hand, moveable properties including furniture and fixtures as well as all immovable properties of the Respondent Company."*

59 The advocate for petitioner shall furnish a copy of this order, duly authenticated by the Associate of this court with the office of the

Official Liquidator. The official Liquidator shall forthwith act thereupon without waiting for any notification appointing him as liquidator.

60 Registry to return the amount of Rs. 10,000/- deposited by petitioner subject to deductions, if any.

61 Petition disposed accordingly.

(K.R. SHRIRAM, J.)