IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 154 of 2010
With
COMPANY APPLICATION No. 406 of 2011
In COMPANY PETITION No. 154 of 2010

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BAADER BETEILIGUNGS GMBH - Petitioner(s)
Versus
PARSOLI MOTOR WORKS PRIVATE LIMITED - Respondent(s)

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Appearance :
MS PJ DAVAWALA for Petitioner(s) : 1,
SVRAJUASSOCIATES for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.THAKER

Date : 18/06/2012

ORAL ORDER

1. The petitioner has taken out present petition under Section 433 (e) and (f), Section 434 and Section 439 (1)(b) of Companies Act,1956 (hereinafter referred to as 'the Act'). The petitioner has alleged, inter alia, that the respondent Company has despite repeated reminders and even after statutory notice failed and neglected to discharge its financial liabilities and obligations and has not made payment of Rs.5,96,57,383 and that the respondent's failure to make the payment establishes its inability to discharge its debts. On the premise of such allegations and assertions, the petitioner has preferred present petition and prayed for order of winding up against the respondent Company.

2. The petitioner is a company incorporated in Germany under laws of Germany and has its registered office at Germany and the petitioner company is engaged in the business of asset and wealth management and has invested funds in companies situated in various countries including India. The respondent company is a private limited company incorporated in India under the provisions

of the Act and has its registered office at B-7, 4th Floor, Shalimar Complex, Paldi, Ahmedabad and is engaged in business of retail sales of high-end cars and is authorized dealer of BMW Cars for the State of Gujarat.

3. It is claimed by the petitioner that in two stages it invested, by way of share application money, a sum of Rs.5,96,57,383/- towards 51% equity capital in the respondent company. The said funds, according to the petitioner, were invested on respondent's stipulation and assurance that it will obtain the requisite approvals including the approval from Foreign Investment Promotion Board ('FIPB' for short). According to the petitioner, the said assurance and stipulation turned out to be incorrect and misleading representation and approval from FIPB was not obtained. The petitioner, therefore, demanded refund of the amount paid by it. It is claimed that the respondent company has not refunded the said amount. Even after statutory notice demanding refund of the amount, the respondent company has allegedly failed and neglected to make the payment. According to the petitioner, the respondent is unable to discharge its debts. Hence, present petition.

3.1. The petitioner has averred, in support of its case, in the petition that:

> "6. In or about February 2008, the Respondents and its promoters Mr. Zafar Sareshwala and Mr. Uves Sareshwala approached the Petitioners with a request to invest in the Respondent Company byt way of equity, and assured the petitioners that they will obtain the necessary regulatory approvals including approval from the Foreign Investment Promotion Board (FIPB) for this. As advised and insisted by the Respondents, the Petitioners sent a sum of Rs.5,96,57,383 towards Share Application Money from 51% equity capital in the Respondent Company, in two stages as under:
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> a. Rs.1,01,22,312/- (Rupees One Crore One Lakh Twenty Two Thousand Three Hundred and Twelve

only) on February 25, 2008.

b. Rs.4,95,35,071.20/- (Rupees Four Crores Ninety Five Lakh Thirty-Five Thousand and Seventy One and Twenty Paise only) on March 17, 2008.

7. The petitioners learnt thereafter that no prior permission was received from the FIPB, and only after a number of requests and upon insistence of the Petitioners, the Respondents finally made an application to the FIPB on October 10, 2008 (about 7 to 8 months after the receipt of the funds). A copy of the said Application dated October 10, 2008 submitted to the FIPB is Annexure P-1. The FIPB rejected this application on January 14, 2009, but the Respondents kept this information back from the Petitioners and the Petitioners learnt of the refusal several weeks later. A copy of the letter dated January 14, 2009 of FIPB Is Annexure-P2. The respondents for all these periods kept the amount with them and used the same for their own purpose. The respondents have still not refunded the said amount of Rs.5,96,57,383. In accordance with the Foreign Exchange Regulations, this should have been remitted back within 180 days, in the absence of issue of shares."

3.2. The petitioner has also mentioned the details of the events which have taken place after the petitioner company invested the aforesaid amounts and having mentioned the said details, it has claimed that the petitioner was, in view of respondent's failure and neglect, compelled to issue and serve statutory notice dated 13.3.2010 at the registered office of the respondent company. It is also claimed that the respondent company initially forwarded an interim reply dated 25.3.2010 stating, inter alia, that the claim was false and baseless. Subsequently, the respondent forwarded detailed reply to the statutory notice vide its communication dated 13.4.2010. The notice and the replies were forwarded by the petitioner and respondent through their respective lawyers.

3.3. It is the case of the petitioner that in its reply dated 13.4.2010, the respondent company admitted the liability to refund the said amount to the petitioner, but simultaneously expressed inability to do so by citing absence of necessary permission from

the Reserve Bank of India ('RBI' for short). In this background, the petitioner has further averred in the petition that:

> "17. The Petitioners' lawyers by their letter dated May 20, 2010 once again called upon the Respondents to deposit the amount in Indian rupees with them, or in the alternative to specify and confirm that this amount was not combined with other funds and also specify the bank account where this was deposited and the corresponding evidence of the same. The petitioners' lawyers further called upon the Respondents to provide copies of the Application made to the RBI for reimbursement of the amount together all follow-up correspondence exchanged in this regard. A copy of the letter dated May 20, 2010 is annexed as Annexure P-13.
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> 18. Despite having admitted their liability to refund the aforesaid amount of 5,96,57,383/- and receipt of several requests and reminders from the Petitioners and their lawyers, the Respondents have neither paid the aforesaid amount nor have they deposited the same in Indian rupees with the Petitioners' lawyers pending the RBI permission, nor have they provided copies of the application, if any, made to the RBI. It is thus clear that no application has been made to the RBI, and the Respondents are unable to pay their debt.
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> 19. The petitioner further states that the company is commercially insolvent and is unable to discharge its debts in normal course of business. It is, therefore, not in the interest of the creditors of the Company to allow the Company to function. It would be therefore, just, necessary and expedient for protecting interest of the company that this Hon'ble court be pleased to pass an order of winding up of the company."

3.4. After hearing the learned counsel for the petitioner, the Court directed office to issue Notice making it returnable on 18th October, 2010. In response to the notice, the respondent company entered its appearance and has resisted the petition by filing reply affidavit.

4. In its reply affidavit, the respondent company has, at the outset, raised certain objections against maintainability of the petition, inter alia, on the ground that the petition has been filed without complying the requirements prescribed under Company Court Rules, 1956 (hereinafter referred to as 'the Rules'). The

respondent company has alleged that proper and necessary authorization and/or resolution passed by the company to institute present petition are not placed on record and there does not appear to be any resolution passed by the company and/or authorization in favour of the deponent. It is also claimed that the petition is accompanied by an affidavit, however, the said affidavit is not in accordance with Rule 21 read with Form-3 prescribed under the Rules. It is also claimed by the respondent company that the power of attorney in favour of the deponent who has made the affidavit in support of the petition, is not proper and effective in law. Besides the said objections against the maintainability of the petition, the respondent company has claimed that the petitioner was aware about the requirements of Indian laws applicable in case of transfer of Foreign Funds and Investments in Indian companies and that the amount brought by the petitioner was under the Foreign Direct Investment Scheme and not under FIPB Scheme. It is also claimed by the respondent company that while injecting the funds the petitioner was aware about the fact that the prior permission for bringing funds into the respondent company was not received.

4.1. As regard the details about the correspondence which ensued between the petitioner and the respondent and petitioner with RBI and between the respondent and RBI, the respondent company has further stated in its reply affidavit that:

> "18.....It was pointed out that in spite of efforts by the Respondent Company for getting the approval of the Government of India for allotment of shares, the Respondent's application was rejected. It was pointed out that the Respondent Company was seeking approval of the Reserve Bank of India for refund of share application money to the foreign investor and requested Axis Bank Ltd. to forward the Respondent's application for refund to regional office of the Reserve Bank of India. The Reserve Bank of India has put forth condition of compounding of the offence/wrong. The violation of the Rules and laws while bringing the foreign funds into the Company was entirely on account of defaults of the Petitioners and Mr. Uto Baader. If the petitioners and Mr.

> Uto Baader are ready and willing to deposit upfront with the Respondent Company the penalty amount that the Reserve Bank of India may impose while compounding the offence, the Respondent Company is ready to go for compounding and the share application money can be refunded to the Petitioners."

4.2. The respondent company has then mentioned the details about its profit and loss account, the sales figures, its funds position etc. and it has claimed that it is not an insolvent company and/or that it is also incorrect that it is unable to discharge its debt.

5. The details mentioned by the respondent company in its reply affidavit are countered by the petitioner in its rejoinder affidavit. One of the aspects asserted by the petitioner in its rejoinder affidavit is that the copy of the affidavit which was served to the petitioner company by the respondent's advocate is different from the reply affidavit filed on Court's record by the respondent company and some of the documents which were annexed to the copy of the reply affidavit served on petitioner's counsel by respondent's counsel are not placed before the Court along with the reply affidavit which has been filed by the respondent company on Court's record and the respondent has not come with clean hands before the Court and has tried to suppress or keep back the documents from the Court. The said rejoinder affidavit of the petitioner is then countered by the respondent company.

6. Mr.Saurabh Soparkar, learned Senior Counsel has appeared with Ms.Davawala, learned advocate for the petitioner company and Mr.Ashok L. Shah, learned counsel has appeared with S. V. Raju Associates for the respondent company.

6.1. The counsel for the petitioner company enumerated in detail the relevant facts and he also extensively referred to the correspondence and other documents available on record of the

petition so as to substantiate the submission that it was on the representation by the respondent company and in light of the respondent's stipulations and assurances that the petitioner company invested a sum of about Rs.95 crores and although, the RBI has in clear terms directed the respondent company to refer the amount deposited / invested by the petitioner, a foreign company, the respondent has stead fastly neglected and failed and refused to refund the amount and is unathorizedly holding back the amount in question. On the premise that despite repeated request and in spite of the instruction by RBI, the respondent company has not returned the amount, the petitioner has claimed that the circumstances and eventuality contemplated and provided for under sub-clause (e) and (f) of Section 433 exist in present case. Consequently, the petitioner is entitled for the order of admission of petition and then, order of winding up against the company.

6.2. Per contra, Mr.Shah, learned counsel for respondent company would contend that in view of the defects in the presentation of the petition and non-compliance of the requirements prescribed under the Act and the Rules, the petition is not maintainable. Mr.Shah, learned counsel for the respondent would concede to the fact that the alleged defects cannot be said to be fatal, but since they are not cured the petition is not maintainable and should be rejected. He has also submitted that the facts stated by the petitioner and respondent company brings out the position that the matter involves disputed facts and the debt is disputed and therefore, instead of entertaining the petition, the petitioner should be relegated to the ordinary civil remedy before the trial court. It is also claimed that the representative of the petitioner company were on the Board of the respondent company and that therefore, they were aware about all facts. Hence, they now cannot claim that the defect about the permission was not known to the petitioner and/or was not informed to it before the amounts came to be invested.

6.3. The respondent has also claimed that RBI has informed that there will be order of penalty and that therefore the petitioner is not justified in claiming repayment of its investment before the said issue of penalty is finally decided and settled. The respondent has, accordingly, opposed the petition and petitioner's request.

7. In view of the rival contentions and particularly the defence – opposition against the petition when a petition invoking provision under Section 434 and 433 of the Act is resisted on the ground that the debt is disputed then it becomes necessary to ascertain as to whether the dispute sought to be raised by the respondent is bonafide, genuine and substantial, or not and whether it is an afterthought or a facade to avoid its obligation. In present case, having regard to the rival contentions and so as to appreciate the aforesaid aspects and also to consider whether the dispute with reference to the debt are *bonafide* or not, it is necessary to take into account the relevant facts and the documents available on record.

7.1. The relevant aspect which emerge from the reply filed by the respondent company and the submissions made on its behalf by the learned counsel are:-

(a) the fact that petitioner company invested a sum of Rs.5.97 crores; and the fact that (b) the respondent has not issued equity shares of the respondent company to the petitioner and (c) the petitioner has, therefore, demanded refund of the invested amount and also the fact that (d) the RBI has instructed the petitioner to refund the amount as well as the fact that (e) even after RBI’s instruction the respondent company has withheld the amount and not refunded the amount in question to the petitioner. The aforesaid aspects are not in dispute.

8. It would be appropriate to examine the respondent's defence

in light of the factual backdrop.

8.1. It emerges from the record that in February, 2008 the respondent company in its extraordinary general meeting passed resolution to increase its authorized share capital from Rs.1 lac to Rs.1 crore and also to amend its memorandum. Thereafter, on or about 25th February, 2008, the petitioner company paid a sum of Rs.1,01,22,312/- towards share application money to the respondent company. The respondent company has, vide its letter dated 27.2.2008 (Annexure-R-I, Page-115) addressed to FIPB, acknowledged the receipt of said amount from the petitioner company. Subsequently, on or around 24th March, 2008 the petitioner company paid further sum of Rs.4,95,35,071/- to the respondent company towards share application money and the respondent company, vide its letter dated 4th April, 2008 (Annexure-R-I, Page-116), informed FIPB about receipt of the said amount from the petitioner company.

8.2. The respondent company, thereafter, vide E-mail dated 8th May,2008 informed the petitioner that the issue about the allotment of shares will be considered and decided in the Board's meeting scheduled to be convened on 14th May,2008. The petitioner has also claimed that in June,2008 the respondent company allotted 4,38,543 equity shares in favour of Uves Sareshwala, Talha Sareshwala and Zafar Sareshwala, at a premium of Rs.115/- per share. It appears from the record that on or about 25th June,2008 the petitioner's lawyer requested the respondent's chartered accountant to confirm as to whether the application for approval of investment by petitioner was submitted to the FIPB or not.

8.3. It also emerges from the record that on or around 4th November, 2008 the respondent company made application to RBI seeking extension of time for allotment of shares to the petitioner

because it did not issue and allot shares to the petitioner company within 180 days of the receipt of the remittance from the petitioner company and accordingly, it had not complied the requirement prescribed by RBI.

8.4. It also comes out from the record that the respondent company submitted the application seeking permission for approval of investment, only on or around 10th October, 2008 i.e., after substantial delay inasmuch as the remittance from the petitioner company were received by the respondent in February, 2008 and March, 2008.

8.5. In this backdrop, the application – proposal made by the respondent company came to be rejected by the Ministry of Commerce and Industry, on behalf of Union of India and the said decision was conveyed to the respondent company vide Ministry's communication dated 27th January, 2009 (Annexure-P-2, Page-12) which reads thus;

> "Sir,
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> I am directed to refer to your above proposal dated 30.12.2008 and to say that the Government of India has taken a decision that the foreign investor in the India entity engaged in Single Brand retarling should be the owner of the international brand. It is noted that the proposal does not meet the above requirement. Hence the proposal cannot be acceded to."

8.6. It is claimed and asserted by the petitioner company that though the proposal was rejected and the decision was conveyed to the chartered accountant of the respondent company vide said communication dated 27th January, 2009. The said information was not intimated to the petitioner by the said chartered accountant or the respondent company for considerably long time. It is also claimed that it was somewhere in June,2009 that the petitioner company, after having learnt about the rejection of the application, requested (through its advocate) the respondent's chartered

accountant to provide copy of FIPB's letter rejecting the application and also to explain the reason for not intimating the said fact to the petitioner. The respondent company claimed that it did not know about rejection of the application. The respondent company claimed that:-

> "3. You have stated that you have recently come to learn that the said application rejected by Department of Industrial Policy and Promotion on January 2009. However, till date we have not received any formal communication for either approval or rejection of the application, therefore we sincerely request you to kindly provide us rejection letter if possible. We now understand that certain fax communication is received by company's consultant on it being requested by your lawyer to him in a direct communication. We certainly do not have any deliberate intention of not informing you on the subject.
>
> 4. Moreover during the personal meeting of your good self and Mr. Zafar Sareshwala along with Mr. Mahesh Bhatt in Mumbai you had told us that you wanted to repatriate the money back to Germany and you were informed that it was a simple procedure wherein the present application had to be withdrawn first. You had then informed us that you would start the withdrawal procedure immediately after speaking with your lawyers and would inform us about it. However, till date we have not received any intimation about the same till date."

8.7. It appears from the record that having learnt about the rejection of the application for approval of investment, the petitioner company addressed communication to the respondent that since the respondent cannot allot shares to the petitioner, the amount paid / invested by it may be refunded.

> "4. We have recently come to learn that in fact in January 2009 the Application was rejected by Department of Industrial Policy and Promotion. However, inspite of regular follow-up from our side on the status of the Application you deliberately did not inform us that the Application has been rejected.
>
> 5. In the circumstances, it is clear that the Company cannot allot us shares in the company, and we therefore

> call upon you to urgently repatriate to us the full amounts remitted by us into the Company as set out above. We understand that the Company has committed certain irregularities with regard to the remitances received from Baader Beteiligungs GmbH, and we call upon you to urgently make the necessary applications to the concerned regulatory authorities for regularizing these and to obtain permission to repatriate the monies to us."

8.8. The said communication was followed by petitioner's another communication dated 19th August, 2009 addressed to the respondent company asking refund of the amount invested / paid by it.

> "3. In light of the Application filed by the Company being rejected, and as already mentioned in our letter of June 30, 2009, it is evident that the company cannot allot any shares to us and must therefore take urgent steps to repatriate to us the share application monies received from us. However, as more than 180 days have passed from the time we sent the monies into India, the Company must obtain the previous approval/permission/NOC of the necessary regulatory authorities for sending back our monies.
>
> 4. We have been advised that the Company is required to make the application to the Reserve Bank of India for approval to repatriate the monies to us. We are therefore writing to you to urgently file the application and to take timely steps for obtaining the necessary permission/approval. In the meantime, please confirm to us that the monies sent by us are still available in full with the company for repatriation to us.
>
> 5. Please note that at this stage it is not relevant to go into whether or not there was any delay on our part in sending the information or details to the Company in connection with the Application to be filed, and what is relevant is that at the advice of the company we sent the monies into India although the approval of the Government of India had not been obtained. We are therefore not commenting on the contents of your letter in this regard, but once again call upon the Company to take all steps required to remit back the entire said amount to us at the earliest."

8.9. In reply to the petitioner's request for refund of the share

application money, the respondent company informed the petitioner vide its letter dated 2nd September, 2009 that it will obtain appropriate legal advice and will do the needful.

8.10. Since the amounts in question were not being repaid by the respondent company to the petitioner, despite requests, the petitioner company through its lawyer, served the statutory notice dated 13th March, 2010 and demanded re-payment / refund of the amounts in question within 21 days. The respondent did not make the payment, instead it forwarded its interim reply, through its lawyer, vide communication dated 25th March, 2010 which was followed by further reply dated 13th April, 2010. In Paragraph No.5 of the said reply dated 25th March, 2010, it is stated by the lawyer on behalf of the respondent company, that:-.

> "5. With reference to paragraphs 3 and 4 of the said notice, our clients state that they have not been able to refund the said amount to your client as they have yet not received the requisite permission from RBI. It is denied that my clients have used or continue to use the said amount or any part thereof, as alleged or at all."

8.11. Thus, the respondent company tried to hide behind the excuse of having not received necessary permission from RBI. Furthermore, in the same reply the respondent company through its lawyer also stated that:-

> "10. With reference to paragraphs 9 and 10 of the said notice, our clients state that they shall remit the said amount to your client upon receipt of permission from RBI. Your client cannot call upon us to remit any amount to your client in contravention of law. Despite this, if your client insists on initiating any legal proceeding against our clients, the same shall be defended by our clients, entirely at your client's risks as to costs and consequences thereof, which you may kindly note."

8.12. Therefore, vide its letter dated 6th May, 2010 the petitioner demanded copy of the application said to have been made by the respondent company to RBI for permission to refund the amount to

the petitioner so that it can be ascertained as to whether such an application was actually ever submitted to RBI or not. Despite such request, the respondent company did not supply copy of such application to the petitioner.

8.13. In this background, the petitioner company through its lawyer, again asked the respondent, vide its letter dated 20.5.2010, to pay the amount, but to no avail.

8.14. It is pertinent that the RBI, vide its letter dated 8th July, 2010, permitted the respondent company to refund the share application money, of course without interest. The said communication dated 8th July, 2010 by RBI, reads thus :

> "Dear Sir,
>
> **Approval for refund of Share Application Money**
> **M/s. Parsoli Motor Works Pvt. Ltd., Ahmedabad.**
>
> Please refer to your letter No.AXIS/AHM/Forex/2010-11/7503 dated May 10, 2010 on the captioned subject.
>
> 2. In this connection, you may allow M/s. Parsoli Motor Works Pvt. Ltd., Ahmedabad to refund the share application money without interest to non-resident investor M/s. Baader Betelligungs GmbH, Germany, subject to the captioned company applying for compounding of contravention of para 3 of Schedule-1 to Notification No.FEMA-20/2000-RB dated May 3, 2000 read with Para 6 of our A.P. (DIR Series) Circular No.20 dated December 14, 2007, to the Compounding Authority, CEFA, Mumbai as per guidelines contained in our A.P. (DIR Series) Circular No.56 dated June 28, 2010 under advice to us."

8.15. Even after the said communication by RBI, the respondent company did not make the payment to the petitioner. The respondent company also did not make any application for compounding the contravention, as intimated by RBI vide its letter dated 8th July,2010. It was after delay of almost 4 months since the intimation from RBI, the respondent company made application on

or around 10th November, 2010 for compounding of contravention.

8.16. It appears that somewhere in May, 2010, SEBI found and held that the respondent company had committed fraud of worst kind in the matter of its public issue.

8.17. It appears that on 15th March,2011 RBI had given its response to the above mentioned application dated 10th November, 2010 made by the respondent company.

8.18. It is alleged by the petitioner company that while the respondent company filed its reply affidavit on 23rd June,2011, it suppressed the said fact and documents from the Court. RBI had also addressed a communication dated 31st March, 2011 to the respondent company with reference to the application dated 10th November, 2011 and according to the petitioner's allegation, the said fact and document is also suppressed from the Court by the respondent while it filed the affidavit dated 23rd June, 2011.

8.19. A communication dated 6th September, 2011 addressed by RBI to the respondent company is placed on record, during the hearing of present petition. Under the said letter, RBI has advised / instructed the respondent company to refund the share application money to the petitioner. The said communication dated 6th September, 2011 reads thus:

> "Dear Sir,
>
> **Refund of share application money – Compounding of contravention of provisions under FEMA, 1999 (CA No. 1727/2011)**
>
> Please refer to letter No.FE.CO.CEFA/4372/15.20.67/2011-12 dated August 22, 2011 issued by our Central Office on the captioned subject.
>
> In this connection, as mentioned therein, you are advised

> to refund the share application money immediately under advice to us."

9. In backdrop of the above mentioned facts it is claimed that the respondent is unable to pay the debt and that therefore, provisions and eventuality contemplated under Section 433 (e) and (f) exists in present case and since despite the statutory notice the respondent has failed to make the payment within 21 days, the said failure and neglect by the respondent company amounts to inability to pay the debt as contemplated under Section 434(1)(a) of the Act.

9.1. The respondent company has, on the other hand, contended that the application for compounding has not been decided and therefore, it has not refunded the amount. After raising objections on ground of maintainability of the petition and other objections including those related to defects in submission of the petition, the respondent company has in the end, in one of its affidavits, also come out with the submission that if the petitioner company agrees to pay the fine / penalty for compounding, it may make the payment of the amount in question.

9.2. It is in light of such facts that the Court has to examine, as observed by the Apex Court, as to whether the respondent's defence and dispute can be said to be bonafide, substantial and genuine or not and as to whether it is merely ingenuous masks for defeating petitioner's claim.

10. Before considering the said aspect, it is appropriate to consider the objections raised by the respondent company on the ground of defects in the petition.

11. On this count, it is necessary to take note of and to mention the fact that in view of the objections raised by the respondent

company with reference to the power of attorney and absence of resolution by the petitioner company, the petitioner company has taken out Judges Summons dated 28th July, 2011 seeking below mentioned permission and direction:

> "(a) to permit the duly authorized attorney of the petitioner company to affirm the petition on behalf of the company

11.1 The said summons is registered as COMA 406 of 2011. In support of the summons, the petitioner – applicant has filed affidavit dated 13th July,2011 wherein it is stated, inter alia, that:-

> "2. I, being the sole Director of the Petitioner Company have given authority through a validly executed Power of Attorney in favour of Mr. Sudarshan Pradhan and Mr. Parminder Singh Dadhwal to do, execute and perform all and any of the acts mentioned in the said Power of Attorney. Annexed hereto and marked as Annexure-A is a copy of deed of Power of Attorney issued by the Petitioner Company.
>
> 3. I state that being a German citizen and as advised by the local Counsel, the above Petition was filed through the local Attorneys for expeditious disposal of the Petition.
>
> 4. In the instant Petition filed under Sec 433 and 434 of the Companies Act, an objection is raised that there is no affidavit, as the leave which is required to be taken has not been taken from this Hon'ble Court under Rule 21 of Companies (Court) Rules."

11.2. The applicant – petitioner has annexed a copy of power of attorney and also a certificate by the Notary at Munich in Germany.

11.3. On behalf of respondent company, further objections have been raised with reference to the said Judge's summons as well as affidavit in support of the summons.

11.4. Mr.Shah, learned counsel appearing for the respondent company has, so as to support the contentions and objections,

relied on the decision by the Apex Court in State Bank of Traven Court v. Kingston Computers (I) Pvt. Ltd. [(2011) Vol.3 Scale 33] and the order dated 26th December, 2006 in Company Petition No.163 of 2006.

11.5. On the other hand, the learned senior counsel for the petitioner company has relied on the decisions in 108 Company Cases 747, 1993 Supp. (3) SCC 565 and 132 Company Cases 470 and 103 Company Cases 467, 111 Company Cases 471 and 88 Company Cases 673, so as to support the submission that even if it is established that there are defects in submission of the petition and/or in the affidavit in support of the petition, then also such defects are not fatal, but are curable and for such reason, petitioner ought not be dismissed.

11.6. In light of the said decisions, the objections raised by the respondent may now be considered.

11.7. One of the objections is that the petition is not supported by proper affidavit as required under the Companies (Court) Rules, 1959 and the Gujarat High Court Rules, 1993. Reliance is placed on the provisions contained under Rule 21 of the Company (Court) Rules, 1959. The opponent has contended that the affidavit should categorically delineate as to which are true to knowledge and which paragraphs are true to the information of the deponent.

11.8. Section 643 of the Act prescribes that the Supreme Court shall, after consulting the High Courts, make the rules. Accordingly, the Apex Court has framed the said rules in exercise of power under Section 643. Rule 6 of the said Rules provides as to how the affidavit shall be drawn and Rule 21 prescribes as to how the affidavit shall be verified. Rule 21 of the Company (Court) Rules, 1959 reads thus:

> "21. Every petition shall be verified by an affidavit made by the petitioner or by one of the petitioners, where there are more than one, and in case the petition is presented by a body corporate, by a director, secretary or other principal officer thereof; such affidavit shall be filed along with the petition and shall be in Form No.3:
>
> **Provided** that the Judge or Registrar may, for sufficient reason, grant leave to any other person duly authorised by the petitioner to make and file the affidavit."

11.9. According to the said provision, the affidavit should be in Form No.3. The said Form 3 reads thus:-

> "I, A.B., son of_____, aged_____residing at_____, do solemnly affirm and say as follows:-
>
> 1. I am a director/secretary/_____/of_____ Ltd., the petitioner in the above matter [* and am duly authorised by the said petitioner to make this affidavit on its behalf.]
> *Note:* This paragraph is to be included in cases where the petitioner is the Company.
>
> 2. The statements made in paragraphs_____of the petition herein now shown to me and marked with the letter 'A', are true to my knowledge, and the statements made in paragraphs____ are based on information, and I believe them to be true.
> Solemnly affirmed, etc.
>
> **Note:* To be included when the affidavit is sworn to by any person other than a director, agent or secretary or other officer of the company."

11.10.On the other hand the affidavit which is made in support of and attached to the petition – against which the respondent has raised objection citing above mentioned provisions – reads thus:-

> "I Sudarshan Pradhan, son of late Mr. N. K. Pradhan, aged about 52 years, resident of Shivam House, 14-F, Connaught Place, New Delhi – 110001, do hereby solemnly affirm and state as under:
>
> (1) I am the constituted attorney of the Petitioners and am acquainted with the facts of the case and am authorized to swear this Affidavit on their behalf.
>
> (2) I state that the contents of the accompanying Petition filed under Section 433(e) and (f) read with Section 434 and 439(1)(b) of the Companies Act, 1956 are true and

> correct to my knowledge derived from the records available with the Petitioners and nothing is false."

11.11.The defect, if any, in making the affidavit of its verification amounts to irregularity and irregularity is not fatal. It can be cured at any stage of the proceedings. For such purpose, the petitioner may make a request by submitting proper application or, for doing substantial justice, the Court may in exercise of inherent power and in light of Rule 9 of the Company (Court) Rules, 1959, itself allow the petitioner to cure the defects.

11.12.In light of the above provisions, if the objection is considered, then it emerges that the allegation by the respondent is that the paragraphs are not properly delineated in accordance with Form No.3 read with Rule 21. Having regard to the said provisions and what is actually stated in the affidavit attached to the petition, it comes out that the deponent has stated in the affidavit that:

> '*the contents of the accompanying petition filed under Section 433 (e) and (f) read with Sections 434 and 439 (1) (b) of the Companies Act are true and correct to my knowledge derived from the records available with the petitioners and nothing is false*'.

11.13.Thus, the deponent has expressly stated that the entire contents of the petition are made on the basis of the record and the details mentioned in the petition are derived from the record. When a person derives all information, from relevant record and he neither claims nor he possesses personal knowledge, then all that he, as a deponent, would and could say, in the affidavit, would be that what is stated is on the basis of information or knowledge derived from record but he cannot claim and say, that the details stated in the affidavit are stated on (basis of) personal knowledge. In such circumstances the prescribed format have to be construed practically and pragmatically and not in mechanical and verbatim manner more so when the Rule and/or the Act do not prohibit

affidavit by “any other person” duly authorized by the company. The value and veracity of the assertions and statements made in the affidavit can be tested, in accordance with law and well settled tenets of law of evidence, at the relevant time and stage.

11.14.True it is that even procedural requirements should be diligently complied with, more so when the procedural requirements prescribed by the Act or the Rules have specific purpose. So far as the petitions filed under Sections 433 and 434 of the Act are concerned, the affidavit constitutes evidence and that, therefore, the affidavit and its verification ought to be in accordance with Rule 21 and Form No.3. However, strict adherence would be insisted so far as contents are concerned, but when it comes to the format any defect therein is not incurable or fatal and can be permitted to be cured by the Court either at the request of the petitioner or in light of the objection by the opponent or suo motu in exercise of inherent powers of the Court as well as the power available under Rule 9 of the Rules. However, if in a particular case, the Court finds that the petition brought by the creditor is substantive and requires consideration, i.e. deserves order of admission then merely because some defect in the affidavit or its verification is pointed out or comes to the notice of the Court, then the Court would, merely because of the defect not, ordinarily, deny opportunity to cure the defect/s, of course subject to the petitioner's conduct and upon appropriate order to the petitioner. Instead, the Court would be justified in allowing opportunity to the petitioner to cure the defect. In present case, as the discussion which follows would demonstrate that the petitioner has made out a case for order of admission and that, therefore, the Court is inclined to grant opportunity to the petitioner to remove and cure the defects.

12. Another objection which is raised by the respondent, is that the petition is not made and verified by a person competent to

make and verify the affidavit on behalf of the petitioner company.

12.1. It is claimed that the affidavit can be made and verified by the Director, Secretary or Principal Officer whereas, in present case, the deponent (viz. Mr. Sudershan Pradhan) who has made the affidavit is neither Director nor Secretary nor Principal Officer of the company and that, therefore, the affidavit cannot be considered as affidavit made by a person competent to make the affidavit. It is also claimed that the power of attorney is granted by Mr. Baader and not by the company.

12.2. In this context, when the record is examined, it emerges that said Mr.Pradhan who has made the affidavit, is a constituted attorney of the petitioner. The power of attorney in favour of said Mr. Pradhan is placed on record, along with the petition (at Annexure-P13, pages 48 to 50).

12.3. Rule 21 requires that the affidavit should be made, in case the petitioner is body corporate, by Director or Secretary or Principal Officer.

12.4. The proviso of the said Rule 21 confers power on the Judge or the Registrar to permit "any other person duly authorized by the petitioner" to make and file the affidavit. Thus, power is conferred to permit any other person to make and file affidavit. By the application dated 13.7.2011, the applicant-petitioner company has prayed for order permitting the duly authorized attorney to affirm the petition. If such permission is granted then it would, subject to the compliance of other aspects comply the requirement.

12.5. The power of attorney declares that:-

> "*by this power of attorney Baader Beteiligungs GmbH, a company incorporated and organized under the Laws of*

> *Germany and having its registered office at Weihenstephanner Strasse 4, 85716, Unterschleissheim, Germany (the company), hereby appoints and constitutes Mr.Parmindersingh Dedhwal (son of late Mr. Kanwar Swaroopsingh Maulseri House, 7, Kapashera Estate, New Delhi 110037, India) and Mr. Sudershan Pradhan (son of late Mr. N.K. Pradhan, Shivam House, 14 F, Connaught Place, New Delhi 110001, India) (the attorneys and each an attorney), jointly and severally as its true and lawful attorney(s) to do, execute and perform all and any of the following acts, deeds, matters and things in its name and on its behalf or otherwise:*
>
> *(1) to institute court proceedings including winding up petition....*
>
> *(2) to sign, verify, file and deliver all petitions, affidavits, letters, applications, appeals....* (emphasis supplied)
>
> *(3) ... ...*
> *... ... ...*
> *... ... ...*
> *... ... ...*
> *... ... ...*
> *... ... ...”*

12.6. Furthermore, it is it is also stated in the said power of attorney that:

> ‘*and the company hereby declares that ....*’. It is also mentioned that ‘*and the company hereby ratifies and confirms and agrees to ratify and confirm whatever the attorneys or any of them shall lawfully do or cause to be done...*’.

12.7.The text and contents of the document shows that it is the company who has appointed and constituted the person who has made the affidavit (i.e. the deponent) as its constituted attorney. The above-quoted details from the said power of attorney clarify that the power of attorney is granted by the company and not by Mr.Baader in his personal or individual capacity. Thus, in present case, the affidavit is made and verified by “other person who is duly authorized by the petitioner” as contemplated and permitted in view of the proviso of Rule 21 and that, therefore, the said objection should not detain the Court from examining the petition on merits.

13. The respondent has then contended that an individual or one of the Directors of the company will have no power to act on behalf of a body corporate because a company acts through resolutions of its Board of Directors. It is contended that any resolution resolving to file the petition and/or authorizing Mr.Uto Baader to appoint a constituted attorney and/or to initiate the proceedings is not placed on record and such resolution does not accompany the petition. It is also contended that the power of attorney is not duly stamped and the petition is signed by Mr. Pradhan in his individual capacity without stating that he is signing the same for and on behalf of the company. It is also claimed that the power of attorney (at page 48 of the petition) does not state the place where it has been executed.

13.1. In this context, it is necessary to mention that pursuant to the respondent's affidavit raising such objections, the petitioner has taken out Judge's summons dated 28.7.2011 and an affidavit in support of said summons is filed wherein, it is stated, inter-alia that:

> "2. I, being the sole Director of the Petitioner Company have given authority through a validly executed Power of Attorney in favour of Mr Sudarshan Pradhan and Mr. Parminder Singh Dadhwal to do, execute and perform all and any of the acts mentioned in the said Power of Attorney. Annexed hereto and marked as ANNEXURE-A is a copy of deed of Power of Attorney issued by the Petitioner Company.
>
> 3. I state that being a German citizen and as advised by the local Counsel, the above Petition was filed through the local Attorneys for expeditious disposal of the Petition.
>
> 4. In the instant Petition filed under Sec 433 and 434 of the Companies Act, an objection is raised that there is no affidavit, as the leave which is required to be taken has not been taken from this Hon'ble Court under Rule 21 of Companies (Court) Rules.
>
> 5. I say that no such permission/leave is required, but to avoid further complication in the matter and as an abundant caution, I am filing this Application for seeking leave of this Hon'ble Court. I hereby ratify all the acts done so far by Mr. Sudarshan Pradhan as the Authorized Attorney and that which will be done by the said Attorney in accordance with the Power of Attorney under eth said authority.

> 6. I say that being the sole director of the Petition Company, I am duly authorized to represent the Petitioner company and file this affidavit for seeking leave of this Hon'ble Court to permit my Power of Attorney holder to file, verify and do all other acts required to be done in the aforesaid matter. It is therefore, submitted that the leave/permission as sought for in the Judges Summons to grant leave to my power to file, affirm, verify and do all other acts necessary for the purpose of the present proceedings may kindly be granted."

13.2. The said affidavit is made by Mr. Uto Baader who has claimed that he is the "Sole Director" of the company and he is authorized to represent the company and file the affidavit seeking permission for constituted attorney to file the petition and do all other acts. A copy of the power of attorney is annexed to the said application.

13.3. The said power of attorney shows that it was executed on 3.9.2010 at Munich, Germany before a Notary and that subsequently, it has also been stamped in the office of Collector of Stamps, New Delhi and stamp duty of Rs.50/- seems to have been deposited.

13.4. It, therefore, emerges that this power of attorney is stamped in India and requisite stamp duty has been paid thereon. It also transpires that the said power of attorney was executed on 2.9.2010 and the affidavit in the petition is made by the constituted attorney on 22.9.2010 and the petition appears to have been admitted to the file by the Registry on 27.9.2010.

13.5. However, from the stamp of the office of Collector of Stamps, it seems that the stamp duty has been paid vide challan dated 2.12.2010. The said detail demonstrates that there is some anomaly inasmuch as from the power of attorney it appears that it was not duly stamped on the date on which the petition came to be instituted, although it was executed on 2.9.2010, i.e. before the petition was instituted. This anomaly may also give rise to the issue

about the date of institution of the petition.

The said issue can be considered when the stage of considering the date of institution of petition arises. For the present purpose and so far as the objection raised by the respondent is concerned, what is relevant is the fact that a power of attorney duly executed and granted by the company i.e. the petitioner on 2.9.2010 authorizing Mr. Parmindersingh Dadhwal and Mr. Sudershan Pradhan as constituted attorneys is placed on record.

13.6. Thus, even if the permission as requested for is granted, it would still leave behind the issue related to the resolution by the company resolving to institute winding up petition and authorizing Mr. Uto Baader to appoint constituted attorney for the said purpose since such resolution is not placed on record.

13.7. The respondent has also alleged that the copy of the petition, which was served to the respondent and particularly the affidavit attached to the memo of petition, reflects that the affidavit was made on 18.9.2010 whereas, the affidavit, which is attached to the petition filed in the Court, reflects 22.9.2010 as the date of attestation.

13.8. As mentioned above, the defects in the format of affidavit and/or in making or affirming the affidavit are curable defects, which aspect is not disputed even by the respondent. Actually, the respondent has itself acknowledged the said settled position.

13.9. Nonetheless, it would be appropriate, in this context, to refer to the decision by Division Bench of this Court in case of Welding Rods Pvt. Ltd. vs. Indo Borax and Chemicals Ltd., wherein the Court observed, inter-alia, that:

'in the case of verification to the plaint, it is now settled

> *that a defect in verification is only an irregularity in procedure and will not be ground for rejecting the plaint and that could be cured at any stage of the suit. A defect in the form of verification or affidavit is only a technical irregularity and an opportunity should be given to the concerned parties to cure such defect....'.*

13.10.In this context, a reference can also be made to the order by the Apex Court in case of Malhotra Steels Syndicate vs. Punjab Chemi-Plants Ltd. [1993 supp. (3) SCC 565], wherein the Apex Court has observed in paragraphs 2 and 3 that:

> "2. We have heard both the counsel. We have looked at the form and verification of the affidavit filed before the High Court in support of the application for winding-up. We are satisfied that the verification, on a proper and liberal construction, does contain an averment to the effect that the statements made in the affidavit are true and correct tot eh knowledge of the appellant. We do not think that the affidavit can be described as defective in any respect. But that apart, we are of the opinion that even if there is some slight defect or irregularity in the filing of the affidavit, the appellant should have been given an opportunity to rectify the same.
>
> 3. We are, therefore, of the opinion that the Division Bench was in error in dismissing the appeal on the short ground that the affidavit filed in support of the petition was not in proper form and that the petition could not be entertained. We, therefore, set aside the order of the Division Bench dated August 21, 1991."

13.11.Rule 9 of the Company (Court) Rules deserves a reference at this stage. The said rule reads thus:

> "9. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

13.12.It can be seen from the said rule that the Company Court has inherent power to make such orders as are considered necessary and are appropriate for the ends of justice.

13.13.Of course, the Court would not mechanically permit the petitioner to cure/remove and rectify the defects and before granting permission or before allowing/requiring the petitioner to

make rectification or to cure defects, the Court would take into account relevant facts, attending circumstances as well as conduct of the parties.

13.14.In present case, earlier narration of factual aspects and the discussion to follow would demonstrate that despite the requirement of law (the provision under the Act prescribes that if allotment of share is not made, then the money should be returned within 180 days) and despite instructions by R.B.I. (vide letter dated 8.7.2010 and thereafter vide letter dated 31.3.2011) and even after admitting, in principle, the liability to refund the amount paid by the petitioner for allotment of shares (in the letter dated 13.4.2010 and the letter dated 15.5.2010), the respondent has not returned the amount paid by the petitioner for allotment of shares.

13.15.In such circumstances, it appears appropriate and reasonable, in light of the observations by the Apex Court in case of Malhotra Steels Syndicate (supra) and by the Division Bench of this Court in the case of Welding Rods Pvt. Ltd. (supra) and by the Bombay High Court – Panaji Bench in the case of Suvarn Rajaram Bandekar vs. Rajaram Bandekar (Sirigao) Mines Pvt. Ltd. [1997 (88) Company Cases 673], that instead of rejecting the petition in view of the defects pointed out by the respondent, opportunity and time may be granted to the petitioner to cure and remove the defects, i.e. to place the resolution on record and to place valid and duly stamped power of attorney on record.

13.16.Therefore, the petitioner is allowed 30 days' time from the date of this order to remove the defects.

13.17.After the said defect/shortfall are removed within the above mentioned time limit, then the permission to affirm the petition to

the constituted attorney, as requested for by Application No.406 of 2011 will stand granted and in view of such permission, the constituted attorney may affirm the petition, but after curing the defects.

13.18.Now, the petitioner's request made in the petition may be considered.

14. So as to consider the said request and submission by the petitioner, it is appropriate to recall some of the relevant dates and events of which reference has been made earlier.

14.1. The petitioner has claimed that it has paid a sum of Rs.1,01,22,312/- (on 25.02.2008) and a sum of Rs.4,95,35,071/- (on 24.03.2008) as share application money for allotment of shares of the respondent company. It is also claimed that since the payment by the petitioner company for purchase of shares of the respondent company would amount to foreign investment, approval of investment by petitioner from the Foreign Investment Promotion Board (FIPB for short) was necessary and the respondent was supposed to make necessary application for the said purpose.

14.2. It is further claimed that the respondent delayed the said application beyond the prescribed time limit and that the application belatedly made by the respondent company came to be rejected by the FIPB on or around 14th January 2009.

14.3. Since the respondent did not return its share application money despite rejection of the application by FIPB and even after requests for returning the amount was not accepted, the petitioner, through its lawyer, served, at the Regd. Office of the respondent, statutory notice dated 13.03.2010 calling upon the petitioner to repay/return the entire amount paid by it as share application

money, i.e. Rs.5,96,57,383/-, within 21 days.

14.4. In the aforesaid background it is relevant to note that even the said excuse or the reason given by the respondent did not survive after 8.07.2010 inasmuch as RBI granted approval vide its letter dated 8th July 2010 and permitted the respondent to return the share application money to the petitioner, however, without payment of any interest thereon and subject to the respondent company making application for compounding the contravention.

14.5. Despite such approval by RBI the respondent neither returned the amount to the petitioner nor made the application for compounding the contravention. It was only on or around 10th November 2010 i.e. 4 months after the RBI's approval vide letter dated 8th July 2010, that the respondent submitted the application for compounding the contravention.

14.6. In the meanwhile, on or around 24th May 2010, Security & Exchange Board of India (SEBI for short) held that the promoters of the respondent company had committed fraud of worst kind in its public issue and the respondent company and its promoters / directors had perpetrated large scale fraud on the shareholders.

14.7. The respondent, instead of returning the amount in question to the petitioner filed complaint against the petitioner before the Income Tax Department.

14.8. From subsequent correspondence by RBI it appears that on or around 15th March 2011 RBI had directed the respondent to return the amount in question to the petitioner and then apply for compounding the contravention. Similar intimation was given by RBI on or around 31.03.2011 in view of which respondent was under obligation to first return the amount in question to the

petitioner and thereafter make application for compounding the contravention.

14.9. It is pertinent that the respondent has not come out with a case that it has challenged the intimation and direction by RBI, before competent forum.

14.10.Again on or around 26.09.2011 RBI directed the respondent to return the amounts to the petitioner and then apply for compounding the contravention.

14.11.Despite such instructions and directions from RBI and inspite of the petitioner's statutory notice dated 13.03.2010 the respondent has until now not returned the amount in question i.e. Rs.5,96,57,383/- to the petitioner.

14.12.It is relevant to mention at this stage that the provision under Companies Act, 1956 makes it obligatory for the respondent company to return the amount paid towards share application money, within 180 days if allotment of shares (as applied for) is not made. Despite such provision and statutory obligation the respondent has not returned the amount in question to the petitioner.

14.13.Now, in its reply affidavit the respondent has come out with altogether new submission viz. that if the petitioner deposits, beforehand, the amount which may have to be paid by way of penalty for compounding the contravention then it would make the payment of the amount in question. Before making such submission, the respondent has, as mentioned earlier, resisted the petition on diverse grounds against maintainability of petition in view of certain defects in submission of the petition and then aforesaid submission i.e. the petitioner should deposit, beforehand

(i.e. even before RBI passes an order actually imposing penalty and quantifying the amount of penalty) the amount towards penalty which may be imposed by RBI.

15. In view of the rival submissions it has to be considered as to whether the dispute sought to be raised by the respondent is bond fide, substantial and genuine or not or as to whether it is an afterthought or, a façade to avoid its obligation to discharge the debt.

15.1. Recently, in the decision in case of IBA Health (supra) the Apex Court has observed that:

> "20. The question that arises for consideration is that when there is a substantial dispute as to liability can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the Court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt."
>
> "31. Where the company has a bona fide dispute, the petitioner cannot be regarded as a creditor of the company for the purpose of winding up. "Bona fide dispute" implies the existence of a substantial ground for the dispute raised. Where the Company Court is satisfied that a debt upon which a petition is founded is a hotly contested debt and also doubtful, the Company Court should not entertain such a petition. The Company Court is expected to go into the causes of refusal by the company to pay before coming to that conclusion. The Company Court is expected to ascertain that the

> company's refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated by a trial in a civil Court." (emphasis supplied)

15.2. Thus, in given set of facts and circumstances and in view of the nature of the dispute sought to be raised by the defendant and the stage at which the dispute is sought to be raised i.e. so as to ascertain as to whether the dispute was raised contemporaneously or is raised merely as an afterthought, the Court can, rather is expected to, go into the causes of refusal by the defendant to discharge the debt. The Court is, as observed by the Apex Court, expected to ascertain that the refusal is supported by reasonable cause and to ascertain that the dispute is not spurious or speculative or illusory or misconceived and an ingenious mask invented by the defendant to avoid or delay the obligation to discharge the debt.

15.3.This Court, keeping in focus and having regard to the said observations, has examined the case put up by the respondent company and on such examination it emerged that (i) there is no dispute about the fact that the petitioner company has paid a sum of Rs.5,96,57,383/- as share application money and for allotment of shares, (ii) It is also not in dispute that the request for foreign investment in case of respondent company is not approved by FIPB and the application came to be rejected as back as in January 2009, (iii) It is also not in dispute that RBI has instructed and directed the respondent company (vide its letters dated 15.03.2011, 31.03.2011 and 26.09.2011) to return the amount in question to the petitioner, (iv) and yet the respondent has, despite such directions and even after service of statutory notice, not returned the amount in question to the petitioner, (v) It is also not in dispute that the relevant provision under the Act obliges the respondent to return such amount to the applicant within 180 days after the allotment is declined/not made in favour of the applicant, and yet the

respondent did not pay the amount in question, (vi) the petitioner served a statutory notice dated 13.03.2010 and the petitioner did not make the payment within statutory time limit, or even thereafter.

There is, thus, no dispute about relevant factual aspects.

15.4. On overall consideration of the relevant factual aspects particularly the events/developments (mentioned earlier) and their dates and chronology as well as the conduct of respondent emerging from the relevant facts and events the Court has found, and the Court is satisfied, that the dispute sought to be raised by the respondent is an afterthought, spurious and speculative and illusory and falls in the category described by the Apex Court as "ingenious mask invented by the defendant" to resist the petition and frustrating and/or delaying the obligation to discharge the debt.

15.5. The Court is also of the view that the respondent has failed and neglected to make the payment of the amount in question and according to the provisions contained under Section 434(1)(a) the company is unable to pay and discharge its debt.

15.6. Thus, the eventuality contemplated under Section 433 of the Act exists in present case.

15.7. Section 433 of the Act provides, inter alia, that if any or more eventuality prescribed under Clauses (a) to (i) thereof exist then the Court may make order of winding up against such company.

15.8. The eventualities prescribed under clause (a) to (i) are:-

> "(a) if the company has, by special resolution, resolved that the company be would up by the Tribunal;
>
> (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 Tribunal is of the opinion that it is just and equitable that the company should be wound up;

(g) if the company has made a default in filing with the Registrar its balance sheet and profit and loss account or annual return for any five consecutive financial years;

(h) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(i) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in section 424G;

Provided that the Tribunal shall make an order for winding up of a company under clause (h) on application made by the Central Government or a State Government.]"

15.9. In present case, it has emerged from relevant facts that the eventuality contemplated under Clause (e) under Section 433 exists and the petitioner is justified in claiming order of admission of petition.

15.10.The petitioner has also prayed for order of winding up against the respondent.

15.11.In this context, it is relevant to mention that the respondent has tried to rely on the claim that it is a going concern and has mentioned details about its financial position so as to contend that order of winding up does not deserve to be and may not be passed. The said defence raised by the respondent company and its conduct amounts to not making payment of the

debt / the due and payable amount and taking up a stand that though it has the capacity to pay the due amount it does not intend to and it will not pay the due and payable amount. If at all the said submissions by the respondent company were to be taken into consideration for the sake of examining such contention and testing the respondent's intention and conduct then also such submission would amount to a submission to the effect that it (i.e. the respondent company) has its pocket full of money but it will not discharge its financial obligations.

15.12.Even if a company which has good and solid financial foundation and it also has capacity to pay cannot avoid its obligation to pay and be allowed to neglect its financial obligations and when a company which is really financially sound and healthy does not make and neglects to make payment of the amount due and payable by it then the court cannot fail in its duty to take note of such intentional neglect and court cannot entertain and allow such stand or defence and, consequently, the court cannot deny the petitioner – creditor an order of winding up against the company which neglects, rather willfully neglects, to discharge its financial obligation / debt.

15.13. Besides this, submission on ground of financial health can be considered in aid of the contention that the debt is bona fide disputed and not independently i.e. not as a stand alone contention. When the Court finds that there is bona fide dispute as to the debt in question, then Court may also take into account the financial health of the respondent. However, when it is noticed, at first stage, that the dispute sought to be raised is not bona fide and is merely an afterthought or spurious then such details would not rescue the respondent.

15.14.The primary and relevant consideration or factor to determine as to whether petitioner deserves the order of

admission of the petition seeking winding up of the debtor company or not, is as to whether there is a genuine, substantial and bonafide dispute as to the debt and respondent's liability to pay the same. If the petitioner's claim / respondent's debt is not disputed or if it is disputed on unjustified or imaginary or an afterthought dispute or where the dispute raised by the respondent is, as observed by the Apex Court, spurious or speculative or illusionary or misconceived then the court may not accept such defence and hold that the petitioner's claim and the respondent's debt are not disputed. The dispute, if any, as to the petitioner's claim and respondent's debt should be bonafide and substantial and genuine. In absence of any genuine, bonafide and substantial dispute or in absence of any substantial convincing and strong reason e.g. collective and majority view of creditors that winding up order is not required or would not be justified the court would, ordinarily, not deny an order of admission of petition seeking winding up of a company if the petitioner – claimant / creditor makes out a case and satisfy the court that one or more reasons – grounds specified under Section 433(a) to (i) exists in the given case. Consideration of respondent's solvency would be useful while deciding as to whether the refusal to pay the debt is result of bona fide dispute as to the debt or liability or whether it reflects inability to pay. In former situation the respondent's solvency may be relevant consideration but not as a separate ground to reject the petition seeking order of winding up. Differently put, when there is no bona fide dispute as to the respondent's obligation and liability to pay the debt and such liability is not disputed on any bona fide, genuine, real and substantial ground then the defence on the ground of solvency or on the ground that it is a financially sound establishment would not be available to the respondent as an independent or a stand alone defence to support the request to reject the petition. The proceedings under Section 434 of the Act is not legitimate means

to enforce payment of debt and cannot be permitted to be converted into proceedings which are ostensibly for winding up but actually are meant to enforce payment of debt therefore the Court would also not allow the petitioner – claimant to use the remedy as arm twisting method and pressure tactics or as a weapon or a means for enforcing recovery / payment of debt which is bonafide and substantially and genuinely disputed.

15.15.The Apex Court has, in the above mentioned decision in the case of IBA Health (I) Pvt. Ltd. (supra) observed that,

> "if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial ground it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance under the presumption under Section 434(1)(a) that the company is unable to pay its debt, the law should take its own course and the company of course will have an opportunity on liquidation application to rebut the presumption."

15.16.In present case, as mentioned above, on overall consideration of relevant factual aspects and details the Court has found that the dispute sought to be raised by the respondent is not bona fide but it is an afterthought and speculative and illusory.

15.17.In present case, Court is prima facie satisfied from the facts that the respondent appears to be unable, within the meaning contemplated under Section 434(1) of the Act, to pay its debts and it prima facie appears that it would be just and equitable to grant order of admission of petition and winding up.

15.18.However, before making such order the Court, having regard to the observations made in the decision in case of Conart Engineers Ltd. v. Laffans Petrochemicals Ltd. [(2001) Vol. 103 Company Cases 396], considers it appropriate to allow an

opportunity to the respondent company to deposit the amount in question. In the aforesaid case the Court has observed, inter alia that:

> "The Court has to examine the nature of the respective cases pleaded by the parties and if a prima facie case is made out by the petitioner, the company should shoulder the onus of disproving it, by showing that its defence is in good faith and is one of substance and it is likely to succeed in point of law. The defence must be substantial and not mere moonshine. So also where the dispute is a mere after thought, an adverse inference may have to be drawn against the Company that the defence being an afterthought, is a mere cloak to cover up its inability or refusal to pay. Adverse inference may also have to be drawn where the cheque/s issued by the Company for the debt in question or a part thereof is/are dishonoured. For determining whether a debt is disputed bona fide or not, the conduct of the parties in relation to the transaction in question, the character of the pleas and the circumstances which will be peculiar to each case will have to be considered.
>
> IV. Court's findings on bona fides of company's defence and orders which may be passed upon such findings:
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> (1) After considering the material on record, if the Court comes to the conclusion that the defenceraised by the Company is not only not bona fide, but the defence is reeking with mala fides or the company's conduct leading to the dispute (in respect of which the Company's defence is found to be not bona fide) was dishonest, the Court would admit the petition and pass an order for advertisement.
> (2) Where the Court comes to the conclusion that the defence is not bona fide (as distinguished from the conclusion that the defence is mala fide), the Court may give the Company an opportunity to pay the debt to the petitioner within the stipulated time limit. If the debt is not paid, the Court would ordinarily admit the petition, unless a strong case is made out for not admitting the petition. The Court may, in its discretion, even pass a conditional order of admission without an order for advertisement while giving the finding that the company's defence is not bona fide.
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> (3) Where the Court gives only a prima facie or tentative finding that the company's defence is not bona fide, before admitting and advertising the petition the Court must also give a prima facie or tentative finding that the Company is commercially insolvent, that is, the Company is unable to pay its debts as a going concern.

> (4) Where the Court gives a finding that the defence raised by the Company is a bona fide one, i.e. substantial, non payment of such debt cannot amount to neglect to pay debt as contemplated by Sec. 434(1)(a) and the petition would have to be dismissed. In such a case, the Company Court may give only a prima facie i.e. tentative finding because the controversy can be finally decided in the civil suit.
>
> (5) If the case falls in the grey area, that is, the Company's defence is neither found to be substantial nor a moonshine and, therefore, the Court is not in a position even tentatively to give a finding one way or the other whether the defence is bona fide or not, the Court may require the company to deposit the claim amount or a part thereof in the Court and require the petitioner to prove its claim before the Civil Court to which the amount deposited will be transferred or the Court may require the Company to give security for the amount claimed."

15.19. One of the tests to determine whether the dispute is genuine, substantial and real and is raised bona fide and whether the refusal to pay is for genuine reason and dispute or to hide inability to pay, is to direct the respondent to pay-deposit the amount. In view of the facts of this case and the findings of the Court and in light of the above quoted observations, it appears appropriate and necessary to direct the respondent, to deposit the amount in question i.e. Rs.5,96,57,383/-, within 4 weeks from the date of present order.

15.20.The respondent is, therefore, directed to deposit the said amount, within 4 weeks in the Registry by Demand Draft issued by a Nationalized Bank. If the directions are complied with by the respondent, then further and appropriate order shall be passed by the Court after hearing the petitioner and the respondent. For the said purpose, the petition may be posted for hearing on 20.07.2012.

15.21.During the said time limit the petitioner shall also take appropriate steps to remove the defects of which reference is made hereinabove earlier. The petitioner shall, inter alia, place on record

the resolution by the company which might have been passed resolving to institute winding up petition against the respondent and authorizing Mr. Uto Baader to take necessary steps for the said purpose including appointing a Constituted Attorney and to make proper affirmation of the petition and file affidavit in accordance with Rule 21 read with Form 3.

15.22.In view of this order and the said directions, the cause for application No.406 of 2011 would not survive and that therefore the said application is accordingly disposed of.

15.23.So far as the respondent's allegation that petitioner has subsequently made corrections or additions in the affidavit (i.e. after the affidavit was duly verified/sworn and notarized) which constitutes contempt, are concerned, it is clarified that the said aspect will be considered by the Court at the time when the petition is heard and adjudicated on merits.

The petition shall be notified for further hearing and order on 20.07.2012.

(K.M.THAKER, J.)

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