SHITAL FIBERS LTD. A

v.

INDIAN ACRYLICS LIMITED

(Civil Appeal No. 1105 of 2021)

APRIL 06, 2021 B

[R.F. NARIMAN, B.R. GAVAI AND HRISHIKESH ROY, JJ.]

Companies Act, 1956: ss. 433, 434 – Circumstances in which company may be wound up by the court – On facts, company petition seeking winding up of the appellant-defaulter company for its inability to pay admitted debts – Company tribunal however gave another opportunity to the appellant to settle the accounts with respect to the respondent and in case of failure, citation was to be published – In appeal, the High Court stayed the publication of the admission notice subject to the appellant paying the outstanding amounts to the respondent and appellant paid the outstanding amounts, and there being no bona fide *dispute persisting, dismissed the appeal, however, held that the respondent's claim towards any interest payments can be made to the Company Judge – On appeal held: Company court cannot decide on default in a winding up proceedings – If the debt is* bona fide *disputed and the defence is a substantial one, the court will not wind up the company – Where the debt is undisputed, the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt – Furthermore, the principles on which the court acts are that the defence of the company is in good faith and one of substance, the defence is likely to succeed in point of law and the company adduces prima facie proof of the facts on which the defence depends, and all this would depend upon the facts of the case – In the instant case, Company Judge as well as the High Court found that the defence of the appellant could not be said to be* bona fide, *in good faith and of substance – Order passed by the High Court upheld.* C D E F G

Dismissing the appeal, the Court

HELD: 1.1 If the debt is *bona fide* disputed and the defence is a substantial one, the court will not wind up the company. It is H

equally well settled, that where the debt is undisputed, the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. It is equally settled, that the principles on which the court acts are first, that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends. As to whether the defence of a Company is in good faith or as to whether it is of a substance and as to whether it is likely to succeed in point of law and as to whether the company adduces *prima facie* proof of the facts on which defence depends, would depend upon the facts of each case. [Para 9, 10][209-G-H; 210-A-C]

1.2 It is amply clear, that both the Company Judge as well as the Division Bench upon appreciation of the materials placed on record have found, that the defence as sought to be raised by the appellant with regard to the quality of the material supplied by the respondent being defective was by way of an after-thought. The Division Bench found, that when the appellant raised a dispute about the quality, the same was acknowledged by the respondent and it was reflected in its conduct by the grant of credit. It observed, that the respondent had fairly acknowledged the defects when there were any and it was reasonable to presume, that if there were any other defects, it would have recorded the same in some manner or the other. The Division Bench further found, that it was difficult to accept the case of the appellant, that the discussions with regard to defective material were only oral. It further found, that in the reply to the statutory notice there were no mention at all with regard to oral agreement. The Division Bench further found, that the contention of the appellant, that the goods manufactured utilizing the defective raw material supplied by the respondent being returned by the dealers and thereby the appellant suffered any damages, was also not supported by any document. It was concurrently found, that the defence of the appellant was not *bona fide* one nor a substantial one. On facts, it was also found, that the appellant had taken contradictory stand in order to defeat the claim of the respondent. It was also concurrently found, that the appellant had failed to

adduce *prima facie* proof of facts contended by it. [Para 19, 20][215-F-H; 216-A-D]

1.3 Insofar as the contention of the appellant, that the appellant was an on-going Company running into profits and that the claim of the respondent was not admitted by it, is concerned, it is not a requirement in law. [Para 21][216-D-E]

1.4 In the instant case, the Division Bench has not issued a direction to grant the interest as claimed by the respondent. On the contrary, it has declined to enter into the question, as to whether the appellant was also liable to pay the interest since the company judge had not referred to the said issue. The Division Bench therefore, while dismissing the appeal, has done so without prejudice to the respondent's contention regarding interest which may be claimed either by way of an application for clarification before the learned judge or by way of an appeal or by any other proceeding. [Para 25][219-C-E]

1.5 The company court while exercising its powers under sections 433 and 434 of the Companies Act would not be in a position to decide, as to who was at fault in not complying with the terms and conditions of the deed of settlement and the compromise deed. A detailed investigation of facts and examination of evidence and interpretation of various terms and conditions of the deed of settlement and the compromise entered into between the parties was necessary in adjudicating the claim, which could not be done in the proceedings under Section 434. [Para 27][220-D]

1.6 The Company Judge as well as the Division bench have found, that the defence of the appellant could not be said to be *bona fide,* in good faith and of substance. [Para 28][220-C-D]

Mediquip Systems (P) Ltd. vs. *Proxima Medical System Gmbh* **(2005) 7 SCC 42 : [2005] 2 SCR 1015;** *Vijay Industries* vs. *NATL Technologies Ltd.* **(2009) 3 SCC 527 : [2008] 17 SCR 972;** *IBA Health (India) Private Limited* vs. *Info-Drive Systems Sdn. Bhd.* **(2010) 10 SCC 553 : [2010] 12 SCR 137 – distinguished.**

A *Madhusudan Gordhandas & Co.* vs. *Madhu Woollen Industries Pvt. Ltd.* **(1971) 3 SCC 632: [1972] 2 SCR 201 – referred to.**

Case Law Reference

B **[1972] 2 SCR 201**	**referred to**	**Para 8**
[2005] 2 SCR 1015	**distinguished**	**Para 22**
[2008] 17 SCR 972	**distinguished**	**Para 24**
[2010] 12 SCR 137	**distinguished**	**Para 26**

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1105 of 2021

From the Judgment and Order dated 29.04.2016 of the High Court of Punjab & Haryana at Chandigarh in Company Appeal No. 58 of 2015 (O&M).

D Karan Nehra, Himanshu Gupta, Manoj C. Mishra, Advs. for the Appellant.

Tarun Gupta, Adv. for the Respondent.

The Judgment of the Court was delivered by

E **B. R. GAVAI, J.**

1. Leave granted.

2. The present appeal challenges the judgment and order passed by the Division Bench of the Punjab & Haryana High Court in Company Appeal No. 58 of 2015 dated 29.4.2016, arising out of the order passed F by the learned Company Judge of the said Court, in Company Petition No.106 of 2009 dated 28.9.2015.

3. The facts, in brief, giving rise to the present appeal are as under:

The respondent – M/s Indian Acrylics Limited is a manufacturer G of acrylic yarn having its manufacturing unit in village Harkrishanpura, District Sangrur. There was a transaction between the appellant – M/s Shital Fibers Ltd. and the respondent - M/s Indian Acrylics Limited under which the respondent was to supply acrylic yarn to the appellant on credit basis. As per the said arrangement, the supply of raw material commenced from 20.4.2007. The respondent supplied material worth

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Rs.81,98,014.45. There were certain issues raised by the appellant with regard to the quality of the material supplied by the respondent. As such, a sum of Rs. 6,22,073/- was credited by the respondent in the account of the appellant on account of material returned and also a credit note of Rs.5,00,000/- was given on account of some defect in quality. As per the respondent, appellant had made a payment of Rs.61,83,218/-. However, there was an outstanding balance of Rs.8,92,723/- as on 28.7.2008. Since despite repeated requests, balance amount was not paid, the respondent issued a statutory notice to the appellant. The same was duly responded to. As the payment was not made despite notice being duly served on the appellant, the respondent filed the aforesaid Company Petition seeking winding up of the present appellant for its inability to pay admitted debts. The learned Company Judge vide order dated 28.9.2015 admitted the Company Petition. However, while doing so, the learned Company Judge observed, that since the appellant was an on-going concern, an opportunity should be granted to it to settle the accounts with the respondent by 31.12.2015. Only in case of failure of the settlement, the citation was directed to be published.

Being aggrieved thereby, the appellant preferred an appeal before the Division Bench of the High Court. By an order dated 24.12.2015, the Division Bench of the High Court, while issuing notice, stayed the publication of the admission notice, subject to the appellant paying the amount in question by 31.12.2015. Accordingly, the amount was so paid by the appellant.

Though the Division Bench of the High Court came to a conclusion, that there was no bona fide dispute and as such, there was no question of directing the respondent to repay the amount, since the appellant had satisfied the respondent's claim to the extent mentioned in the order impugned in the appeal, it dismissed the appeal.

However, insofar as the claim of the respondent with regard to interest at the rate of 24% per annum is concerned, the Division Bench of the High Court found it not necessary to enter into the question, as to whether the appellant was liable to pay interest to the respondent since the learned Company Judge had not gone into that issue. However, the Division Bench clarified, that the dismissal of the appeal was without prejudice to the respondent's contention regarding interest which may be claimed either by way of an application for clarification before the learned Judge or by way of an appeal or by any other proceeding.

A Being aggrieved thereby, the present appeal.

4. Shri Karan Nehra, learned counsel appearing on behalf of the appellant submits, that the defence of the appellant was a *bona fide* one. He submitted, that it was a specific case of the appellant, that on account of the defective material supplied by the respondent, the appellant B had suffered huge losses and as such, it was the appellant who was entitled to receive the damages from the respondent. He submitted, that in view of the specific defence, which could not be said to be a moonshine defence, the learned Company Judge ought not to have admitted the Company Petition. He submitted, that the claim of the respondent could not stand even if it was made in summary proceedings under Order C XXXVII of the Code of Civil Procedure, 1908. He submitted, that requirements under Section 433(e) and (f) of the Companies Act, 1956 (hereinafter referred to as "the said Act") stood on a much higher pedestal and as such, the learned Company Judge has erred in admitting the petition. He submitted, for the same reason, the Division Bench has D also erred in not interfering with the direction of the learned Company Judge.

5. Shri Nehra further submitted, that since there was no agreement between the parties to pay interest on the balance/delayed payment, the direction issued by the Division Bench of the High Court to consider the E claim of the respondent for interest does not stand the scrutiny of law.

6. Shri Nehra relies on the judgments of this Court in ***Mediquip Systems (P) Ltd.*** vs. ***Proxima Medical System Gmbh***[1]**,*****Vijay Industries*** vs. ***NATL Technologies Ltd.***[2]**,** and ***IBA Health (India) Private Limited*** vs. ***Info-Drive Systems Sdn. Bhd.***[3].

F 7. Shri Tarun Gupta, learned counsel appearing on behalf of the respondent submits, that since the appellant, in spite of various communications sent by the respondent requesting it to pay the outstanding amount, had failed to do so, it was required to issue statutory demand notice under Section 434 read with Section 433 (e) of the said G Act. It is submitted, that the said notice was duly served upon the appellant and also replied to. Apart from making a vague denial and stating that the claim of the respondent is a matter of record, no specific defence was taken. He further submits, that the appellant had totally changed

[1] (2005) 7 SCC 42
[2] (2009) 3 SCC 527
H [3] (2010) 10 SCC 553

the stand taken by it before the learned Company Court as against the stand taken by it in the reply to the statutory notice. He therefore submits, that the learned Company Judge as well as the Division Bench of the High Court had rightly held, that the defence of the appellant was not a *bona fide* one. He submitted, that no interference would be warranted in the concurrent findings of fact.

8. This Court in the case of ***Madhusudan Gordhandas & Co.*** vs. ***Madhu Woollen Industries Pvt. Ltd.***[4]**,** observed thus:

> **"20.** Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See *London and Paris Banking Corporation* [(1874) LR 19 Eq 444]) Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been properly was not allowed. (See *Re. Brighton Club and Horfold Hotel Co. Ltd.* [(1865) 35 Beav 204])
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> **21.** Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt, see *Re. A Company.* [94 SJ 369] Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely See *Re Tweeds Garages Ltd.* [1962 Ch 406] The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends."

9. It is therefore well settled, that if the debt is *bona fide* disputed and the defence is a substantial one, the court will not wind up the company. It is equally well settled, that where the debt is undisputed, the

[4] (1971) 3 SCC 632

court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. It is equally settled, that the principles on which the court acts are first, that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

10. As to whether the defence of a Company is in good faith or as to whether it is of a substance and as to whether it is likely to succeed in point of law and as to whether the company adduces prima facie proof of the facts on which defence depends, would depend upon the facts of each case.

11. In the present case, in the statutory notice dated 25.8.2008, the respondent – Company has specifically stated as under:

"4. That in that regard a sum of Rs.35,14,776.30 was outstanding against you against various bills as on 25.8.2007 against the material supplied to you by my client, vide following invoices:

S.No.	Invoice No.	Date	Amount (Rs.)
1	162	26.6.07	8,55,370.65
2	177	30.6.07	8,66,788.29
3	216	16.7.07	9,07,891.19
4	300	25.8.07	8,84,726.17
	Total		35,14,776.30

5. That after the said invoices no material has been supplied to you by my client and the above amount of Rs.35,14,776.30 was payable by you to my client. My client requested to you vide various communications dated 16.11.07, 22.11.07, 23.11.07, 26.11.07, 27.11.07, 28.11.07, 26.11.07, 1.12.07, 3.12.2007, 5.12.2007, 6.12.2007, 7.12.2007, 8.12.2007, 10.12.2007, 11.12.2007, 12.12.2007, 13.12.2007, 15.12.2007, 17.12.2007 and 21.12.2007 to pay the above said outstanding amount.

6. That in response to the above letters/faxes no communications have been received from you by my client rather you made lumpsum payments of Rs.15 lac through cheques, material

returned by you worth Rs.6,22,073.00 and adjustment of Rs.5 lac was made by way of credit note. The details of which are as follows:

S.No.	Date	Particulars	Amount (Rs.)
1	29.9.07	Material returned	6,22,073.00
2	21.3.08	Chq. No. 935641/ 20.3.08	4,00,000.00
3	4.4.08	Chq. No. 935692/ 31.3.08	6,00,000.00
4	7.5.08	Credit Note	5,00,000.00
5.	8.5.08	Chq. No. 990459/ 7.5.08	5,00,000.00
			26,22,073.00

The total amount remains recoverable by my client from you is Rs.8,92,723.45p (8,92,703.30 + 20.15) as on 8.5.2008 after receipt/ credit of the above amounts of Rs.26,22,073.00 as mentioned above."

12. In reply to the said notice, the appellant has stated thus:

"4. In reply to para no.4 of your notice, it is a matter of records and it clearly shows about the business worth of my client.

5. In reply to para no.5 of your notice, it is a matter of record. However, there is nothing due to your client from my client, rather on the contrary is true as mentioned in previous paras.

6. Para no.6 of the notice is not correct and does not depict the correct picture, rather on the contrary your client himself had been coming to my client and settled the amount and agreed to return Rs. 25 Lacs out of which Rs.5 lacs returned, rest of the amount was not returned.

7. Para no.7 of your notice is wrong and incorrect. Detailed reply has already been given in previous paras."

13. It is thus clear, that in response to paragraph 4 and 5 wherein the respondent has specified its claim, the only reply given is, that it is a

matter of record and that it shows about the business worth of his client. No doubt, that in paragraph 6, it is stated, that the respondent had himself been coming to the appellant and settled the amount and agreed to return Rs.25 lakh out of which only Rs. 5 lakh was returned.

14. From the perusal of the written statement filed to the Company Petition, it would reveal, that the main contention of the appellant was, that it was a running company making profits and further, that the claim of the respondent was not admitted by it. It was contended, that the petition was filed only to pressurise the appellant to pay the dues which were neither admitted nor legally due.

15. It was also stated in the written statement that till 26.6.2007 there was no issue with regard to supply of raw material by the respondent. However, with effect from 26.6.2007 it was noticed, that raw material supplied was defective and the goods which were sold in the market utilizing the said raw material were received back with some complaints. It was stated, that the goods which were supplied by the respondent vide invoices dated 26.6.2007 onwards were defective and the products manufactured by the appellant – company using the said raw material (i.e. acrylic yarn) were returned by the dealers and importers due to defective quality. It was stated, that the appellant – Company had returned the defective raw material to the respondent – Company, which remained unused. It was stated, that the respondent had acknowledged the same and credited an amount of Rs.6,22,073/- in the account of the appellant. It is further stated, that after various meetings and negotiations, the respondent agreed to compensate the appellant on account of supply of defective material by issuing a credit note of Rs.5 lakh. It was further stated, that as per the account of the appellant, an amount of Rs.53,648/- was receivable from the respondent after making all the adjustments.

16. The learned Company Judge after considering the rival contentions observed thus:

> "8. There is no document referred to by learned counsel for the respondent – Company written by it to the petitioner – Company regarding defect in quality. In response to the statutory notice issued by the petitioner – Company, the stand taken by the respondent – company in reply was that raw material worth Rs.25,00,000/- supplied by the petitioner – Company to the respondent – company was lying with it in poor condition and

could not be used in production. Against promised compensation of Rs.25,00,000/-, credit note of only Rs.5,00,000/- was given. As against a claim of Rs.8,92,723/- claimed by the petitioner, a sum of Rs.11,07,297/- is due from the petitioner – company to the respondent – company on account of losses suffered due to poor quality of yarn supplied. Demand of the aforesaid amount was raised. In reply to the petition, the stand taken is altogether different. No doubt, the issue regarding defective material was raised, however, it was stated that the entire material supplied by the petitioner – company was used, as a result of which the product was defective, which was not marketable and on that account, the respondent – company suffered losses. The products were sold in the market, which were returned back. No communication has been referred to, which was addressed by the respondent – company to the petitioner – company, pointing out such defects. It was further sought to be claimed that after giving credit note of Rs.5,00,000/- in May, 2008, the petitioner – company agreed to give rebate to the extent of 50% on the total invoices on account of the defective material. The calculations were made in the following terms.

Inv. No.162	Rs.8,55,370.65
Inv. No.177	Rs.8,66,788.29
Inv. No.216	Rs.9,07,891.19
Inv. No.300	Rs.8,84,726.17
Total :	Rs.35,14,776.30
Less: Goods returned	Rs. 6,22,073.00
Balance	Rs.28,92,703.30
Less: 50% Rebate	Rs.14,46,351.30
Balance payable	Rs.14,46,352.00
Already paid	Rs.15,00,000.00
Excess paid:	Rs. 53,648.00

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9. From the aforesaid calculations, it is evident that now the stand is that the respondent- company is to recover a sum of Rs.53,648/

A - from the petitioner – company, whereas in reply to the notice, the claim was to the tune of Rs.11,07,297/-. It is further relevant to add here that in reply to the petition, the story that settlement between the parties had taken place in May, 2008 regarding rebate on the invoice value is merely an after thought just to defeat the petition, as no such plea was taken when reply to the statutory notice was given in September, 2008.

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10. In view of the aforesaid discussion, I do not find that the defence raised by the respondent – company is reasonable as the debt cannot be said to be disputed, which has not been paid despite statutory notice and even pendency of the present petition in this court for a period of about six years. Hence, the petition deserves to be admitted. Ordered accordingly."

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17. It could thus be seen, that the learned Company Judge has found, that the defence taken by the appellant with regard to the products of the respondent being defective in quality was by way of an after-thought, inasmuch as, no document was placed on record in support of such contention. It was further found, that whereas in reply to the notice the appellant had claimed, that it was entitled to recover an amount of Rs.11,07,297/-, in the calculations given in written statement, the amount is Rs.53,648/-.

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E 18. This finding of fact is affirmed by the Division Bench of the High Court with following observations:

"7. The contention is not well-founded. We see no reason to draw such an inference. Indeed, the grant of credit would also indicate that the respondent fairly acknowledged the defects when there were any and that the rest of the consignment met with the contractual specifications. It is necessary, therefore, to examine the other surrounding facts and circumstances to judge the rival contentions.

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8. Firstly, when the appellant raised a dispute about the quality and the same was acknowledged by the respondent it was reflected in its conduct by the grant of credit. It is reasonable to presume that if there were any other defects and, in any event, if the appellant's case was that the goods were defective, it would have recorded the same in some manner or the other. The appellant, however, contends that the discussions in this regard

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were only oral. In the facts of this case it is difficult to accept this contention. The appellant's case has varied between its reply to the statutory notice and its written statement.

The respondent served a statutory notice dated 25.08.2008. The appellant's reply dated 10.09.2008 to the statutory notice does not refer to an oral agreement much less an agreement by the respondent to pay the appellant compensation for the alleged defective goods. This belies the defence now raised in the reply.

9. There is yet another fact which clearly disentitles the appellant to any credit in respect of the balance goods. The appellant, admittedly, retained the goods and, in fact, used the goods, namely, synthetic yarn, in the manufacture of its products, such as blankets. Having done so, the appellant cannot refuse to pay for the same. If the goods were defective, the appellant ought to have rejected the same. Having utilised the raw material supplied by the respondent, it is now not even possible for the appellant to return the same to the respondent.

Moreover, the appellant nowhere raised the contention that its customer, who purchased the final product, raised grievance regarding the quality of the product. Moreover, the appellant has not furnished any details regarding its transactions with its customers involving the sale of goods manufactured from the raw material supplied by the respondent. There is nothing to indicate that the appellant suffered any damages on account thereof or that the appellant was not paid for the same.

10. In these circumstances, the learned judge rightly rejected the appellant's contentions. In our opinion, there is no bona fide dispute raised by the appellant in respect of the respondent's claim."

19. It is thus amply clear, that both the learned Company Judge as well as the Division Bench upon appreciation of the materials placed on record have found, that the defence as sought to be raised by the appellant with regard to the quality of the material supplied by the respondent being defective was by way of an after-thought. The Division Bench found, that when the appellant raised a dispute about the quality, the same was acknowledged by the respondent and it was reflected in its conduct by the grant of credit. It observed, that the respondent had fairly acknowledged the defects when there were any and it was

A reasonable to presume, that if there were any other defects, it would have recorded the same in some manner or the other. The Division Bench further found, that it was difficult to accept the case of the appellant, that the discussions with regard to defective material were only oral. It further found, that in the reply to the statutory notice there were no mention at all with regard to oral agreement. The Division Bench
B further found, that the contention of the appellant, that the goods manufactured utilizing the defective raw material supplied by the respondent being returned by the dealers and thereby the appellant suffered any damages, was also not supported by any document.

C 20. It was concurrently found, that the defence of the appellant was not *bona fide* one nor a substantial one. On facts, it was also found, that the appellant had taken contradictory stand in order to defeat the claim of the respondent. It was also concurrently found, that the appellant had failed to adduce prima facie proof of facts contented by it.

D 21. Insofar as the contention of the appellant, that the appellant was an on-going Company running into profits and that the claim of the respondent was not admitted by it, is concerned, it is not a requirement in law. Reliance in this respect could be placed on various judgments of this Court including the one in the case of ***Vijay Industries*** (supra).

E 22. Insofar as the reliance placed by the learned counsel for the appellant on the judgment of this Court in the case of ***Mediquip Systems (P) Ltd.*** (supra) is concerned, in the said case this Court came to a finding, that there was a bona fide dispute concerning the claim of the appellant. It was also found, that there was no clear cut finding by the learned single judge, that a debt is *prima facie* due and payable by the
F Company to the petitioning creditor. It was further found, that the company court had no jurisdiction to direct the company to deposit the amount payable to a third party or to a party other than the petitioning creditor. As such, on facts, the said judgment would not be applicable to the facts of the present case.

G 23. In the case of Vijay Industries (supra) relied by the appellant,the learned single judge after finding, that a prima facie case has been made out, admitted the company petition. However, in appeal, the Division Bench set aside the order of the learned single judge. This Court while setting aside the order of the Division Bench observed thus:

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"41. In the present case, on the date of filing of the application, dues in respect of at least a part of the debt which was more than the amount specified in Section 433 [*sic* Section 434(1)(*a*)] of the Companies Act was not denied. It is not a requirement of the law that the entire debt must be definite and certain. The Division Bench of the High Court proceeded on the basis that the entire sum covering both the principal and the interest must be undisputed, holding:

> "Except making a bald allegation in the company petition that the petitioner had come to know that the respondent Company owes large sums of money to its creditors and it is not in a position to meet its debt obligations and as, therefore, become commercially insolvent, the petitioner has not taken necessary care to prima facie establish the same. The only piece of evidence available on the side of the petitioner is that the respondent is indebted to the petitioner a sum which is claimed towards interest on the delayed payment. Assuming for a moment that the respondent Company is liable to pay interest on the delayed payments and it has not paid the said amount to the petitioner, could it be said that the respondent neglected to pay the debt, particularly when the respondent is disputing the liability of payment of interest on the delayed payments and when there is no such written agreement in between the parties for such payment of interest."

42. The Division Bench upon noticing the facts of the matter formulated the question "as to whether the respondent is liable to pay interest at 2% per month on delayed payments and when that is being disputed would it constitute prima facie a valid ground for admission of the company petition?" It was held:

> "… The petitioner seeks to rely upon the invoices which according to him contain at the foot a clause for payment of interest on delayed payments. Such a clause, even assuming is there, since it has not been placed by means of any cogent evidence in this case, in view of the judgment of the Rajasthan High Court in *Kitply Industries case* [(1998) 91 Comp Cas 715 (Raj)] , cannot constitute an agreement between the parties for payment of interest. The legal position, thus, seems to be obvious. Before seeking a company to be wound up on the

ground that it is unable to pay its debts, it must be shown before the Court that the debt claimed against the company is ascertained and definite and that the company failed to pay the same. Mere failure to pay the amount would not constitute the requisite 'neglect to pay' as envisaged under clause (*a*) of sub-section (1) of Section 434 of the Act when the company bona fide disputes the very liability and hence the defence taken up by it is of substance."

It was furthermore held:

"Having regard to the facts and circumstances of the instant case, we are of the considered view that the claim of the petitioner towards interest on delayed payments since not covered by any specific agreement between the parties inter se is a contentious issue and the dispute as regards the payment of interest is bona fide and it cannot, therefore, legitimately be concluded that the respondent has neglected to pay. The petitioner, who pleaded inter alia in his petition that as per the trade practice payments made shall be adjusted towards interest first and balance, if any, shall be adjusted towards principal later, failed to establish the same by any prima facie evidence. In the absence of any such trade practice, appropriating the amounts towards interest first and the balance, if any towards principal next becomes inappropriate, in which event the claim of the petitioner that the respondent is liable to pay Rs 65,15,947 basing upon such calculations cannot be accurate. The total amount claimed by the petitioner as due in that view of the matter becomes doubtful and not definite. It is still got to be ascertained if the claim of the respondent were to be considered that there has been no agreement for payment of interest on delayed payments. For the above reasons, it cannot be presumed prima facie that the respondent is unable to pay its debts."

43. The findings of the High Court, with respect, are not correct for more than one reason; firstly, because the Division Bench did not hold that the invoices were not proved by cogent evidence; secondly, question of leading evidence would arise only after the company petition is admitted and, thirdly, issuance

of invoices and signature of the respondent thereon is not disputed."

After observing the aforesaid, this Court further held, that the appellant was also entitled to the payment of interest.

24. It can thus clearly be seen, that this Court had clearly held, that it is not necessary while admitting the petition to establish that the entire claim is undisputed. We fail to understand, as to how the said judgment of this Court in ***Vijay Industries*** (supra) would be applicable to the facts of the present case. As a matter of fact, in the said case, this Court on consideration of the invoices had come to a conclusion, that the appellant was also entitled for the interest on delayed payment.

25. In the present case, the Division Bench has not issued a direction to grant the interest as claimed by the respondent. On the contrary, it has declined to enter into the question, as to whether the appellant was also liable to pay the interest since the learned company judge had not referred to the said issue. The Division Bench therefore, while dismissing the appeal, has done so without prejudice to the respondent's contention regarding interest which may be claimed either by way of an application for clarification before the learned judge or by way of an appeal or by any other proceeding.

26. We find, that the judgment of this Court in the case of ***IBA Health (India) Private Limited*** (supra) would also not be applicable to the facts of the present case. In the said case, it will be relevant to refer to the following observations of this Court.

> **"29.** On a detailed analysis of the various terms and conditions incorporated in the deed of settlement as well as the compromise deed and the averments made by the parties, we are of the considered view that there is a bona fide dispute with regard to the amount of claim made by the respondent Company in the company petition which is substantial in nature. The Company Court while exercising its powers under Sections 433 and 434 of the Companies Act, 1956 would not be in a position to decide who was at fault in not complying with the terms and conditions of the deed of settlement and the compromise deed which calls for detailed investigation of facts and examination of evidence and calls for interpretation of the various terms and conditions of the

A deed of settlement and the compromise entered into between the parties."

27. This Court held, that the company court while exercising its powers under sections 433 and 434 of the Companies Act would not be in a position to decide, as to who was at fault in not complying with the
B terms and conditions of the deed of settlement and the compromise deed. It was found, that in the said case, a detailed investigation of facts and examination of evidence and interpretation of various terms and conditions of the deed of settlement and the compromise entered into between the parties was necessary in adjudicating the claim, which could not be done in the proceedings under Section 434 of the said Act. In the said case, it
C was also noticed, that the claim was in respect of contingent debt and that the disputes between the parties had been compromised in terms of settlement deed.

28. Such is not the case here. On facts, the learned Company Judge as well as the Division bench have found, that the defence of the
D appellant could not be said to be *bona fide,* in good faith and of substance.

29. We are therefore of the considered view, that there is no merit in the appeal. The same is accordingly dismissed. There shall be no order as to costs. Pending applications, if any, shall stand disposed of.

Nidhi Jain Appeal dismissed.