Karnataka High Court Airwings Private Ltd. vs Viktoria Air Cargo Gmbh. on 17 August, 1994 Equivalent citations: 1995 82 CompCas 447 Kar Author: S Majmudar Bench: S Majmudar, T S Thakur JUDGMENT S.B. Majmudar, C.J. 1. Common procedural questions arise for our consideration in O.S.A. No. 19 of 1993 and other company petitions. In company petitions, the learned single judge, Rajendra Babu J. has referred the following two questions for our decision. (1) What is the scope of enquiry or hearing ? (2) The nature or contents of the order and whether the usual practice of this court when matters are admitted and interim orders are granted no detailed reasons are set forth, applicable ? 2. As the common reference order shows these questions pertain to the stage prior to the admission and advertisement of the company petition moved by the petitioning creditor seeking an order for winding-up the respondent-company on the ground that the company is unable to pay its debts as envisaged by section 433(e) of the Companies Act, 1956. 3. In O.S.A. No. 19 of 1993, also these procedural questions squarely arise for our consideration. Therefore, they were all heard together and are being disposed of by this common judgment. 4. The common questions pertain to the procedure to be followed by the learned company judge before admitting and ordering advertisement of such petition. When such company petitions are filed, whether they could be straightaway admitted and ordered to be advertised by the learned company judge or whether the learned company judge is required to follow some procedure by way of holding a summary enquiry about the right of the petitioner to move the petition and the nature of the order to be passed in such an enquiry or hearing are the main questions posed for our consideration. As the aforesaid questions are referred in the company petitions and as they also arise in O.S.A. No. 19 of 1993, we shall first deal with these procedural questions before adverting to the merits of O.S.A. No. 19 of 1993, the fate of which will depend upon our decision on these referred questions. 5. Mr. Harikrishna Holla, advocate appearing for the appellant-company in O.S.A. No. 19 of 1993 and other learned advocates appearing for the concerned respondent companies sought to be wound up, have contended before us that in the case of companies which are going concerns and whose commercial-cum-manufacturing activities have not come to a grinding halt and who employ a large number of workers they would suffer very great and disastrous consequences if such petitions moved by the petitioning creditor for their winding-up on the ground that the respondent-companies are unable to pay their debts, are ex parte admitted and ordered to be advertised by the learned company judge. They, however, were not very sanguine about these respondent-companies which had become defunct by passage of time and which had suspended for an indefinite period their commercial-cum-manufacturing activities and which had discharged their workmen by the time the company petitions came to be filed. In the cases of such companies which are already defunct and which otherwise also have no commercial or financial credit in the market, if winding-up petitions against them are ex parte admitted and advertised as per the provisions of the Act and the Rules, no pernicious effect thereof would result on such defunct companies. But, in the case of a company which is a going concern, if petition is moved to wind it up, the learned company judge has to

hold at least a summary enquiry for finding out whether the petitioning creditor is a creditor of the company. If yes, what is the ascertained or substantially ascertained due amount, whether such debt is due and payable and is not barred by time, whether the company is unable to pay this debt and also all its other debts and after satisfying itself on all these preliminary questions, the question of admitting the company petition and directing its advertisement would arise and not before that. That, in the process, the respondent-company will have to be issued a notice and has to be heard. Mr. Holla submitted that such a preliminary enquiry would be in the nature of a decision on the preliminary issues as aforesaid and which may not be lightly reopened in sub-sequent stages of trial of the company petitions if it is found at the stage of this preliminary inquiry after hearing the company concerned that there is an ascertained debt due from the company to the petitioning creditor, that it is not barred by time, that the company is unable to pay this debt and is also commercially insolvent, i.e., its assets cannot meet the liability of paying this debt and all other existing debts of the company. That if these findings on preliminary issues are reached and the winding-up petition is admitted and advertised then at the stage of trial after hearing the other creditors or shareholders, who may like to support or oppose the company petition pursuant to the advertisement and also after hearing the workers, if any, the company judge may ultimately decide whether the company is liable to be wound up by passing an order of winding up or whether the petition is liable to be dismissed on any appropriate ground and at that stage, proper orders under section 443 can be passed by the company judge. But at the stage of admission and advertisement of the petition, at least a summary inquiry of the aforesaid nature has to be held by the company judge in cases of companies which are going concerns. Otherwise, even admission and advertisement of such petitions would have a very grave and pernicious effect on the company's reputation in the commercial world, the source of its finance may get adversely affected and the company which otherwise is not commercially insolvent, because of such premature admission and advertisement of the petition may become insolvent and irreparable damage would be done to the company, that too without hearing the company. Mr. Raghavan and other learned counsel appearing for the petitioning creditors, however, pressed before us a middle course for our consideration. That is, for deciding whether the company petition for winding-up is required to be admitted and advertised the court may after issuing notice to the company which is a going concern, and after hearing the company in a summary inquiry reach a prima facie finding on the question whether there is any ascertained or subsequently ascertained amount due from the company to the petitioning creditors, whether such debt is within limitation on the date of the company petition and whether the company's defence is prima facie valid and tenable or is a mere eye-wash. Mr. Raghavan and other counsel supporting him submitted that this much inquiry will be enough prior to the admission and advertisement of the company petition for winding-up and that it is not necessary to go into the further question at this stage whether the respondent-company is commercially insolvent. Meaning thereby, whether its total assets are not sufficient to meet its total liability both actual and contin-

gent as contemplated under section 434(1)(c) of the Act. That such an exercise can be undertaken only after all the creditors and other shareholders come to know about such proceedings pursuant to the advertisement of the petition and after hearing them and also the workers, if any, who may choose to appear, proper orders can be passed after reaching the finding whether the company is commercially insolvent. Therefore, they submitted it is not necessary to have such an exercise at the stage of admission and advertisement of the petition. Learned counsel for the petitioning creditor Sri Jayaram in O.S.A. No. 19 of 1993, on the other hand vehemently contended that such an inquiry strictly speaking is not contemplated by the Act and the Rules framed by the Supreme Court in exercise of its powers under section 643 of the Act. But because of the judicial interpretation of the scheme of the Companies Act by the Supreme Court in various decisions, the latest being Pradeshiya Industrial and Investment Corporation of U. P. v. North India Petro Chemical Ltd. [1994] 79 Comp Cas 835, a preliminary enquiry at least for a company which is a going concern, can be held after hearing the company sought to be wound up under section 433(e). But that would be only a summary enquiry of prima facie nature and the findings reached therein can be in connection with only two questions, namely, whether the petitioning creditor is a creditor of the company for a fixed amount ascertained or substantially ascertained, whether that debt is within limitation and whether the company's defence in this connection is not valid or is a mere moonshine. That if the case falls under section 434(1)(a) or (b) the company court can also presume by way of a rebuttable presumption that the company is unable to pay its debts. But thereafter, the company petition can be admitted and advertised. The question of commercial insolvency of the company need not be examined at this stage. To that extent, Mr. Jayaram agreed with the submission of learned counsel Sri Raghavan. Mr. Jayaram further submitted that the company petition under section 433(e) for the winding up of a company on the ground that it is unable to pay its debts is not like a suit where the creditor has to prove his case about the debt due from the company and that it is within limitation. The moment that happens, a decree can follow. But these are proceedings having a representative character and they have a drastic effect of causing the commercial or corporate death of the company once it is wound up. Therefore, the question of commercial insolvency of such company has to be examined in the light of the relevant data that may be placed before the company court at the stage of trial by all the contesting parties. All such contesting parties, i.e., all the other creditors including labour and even contributories would not know of the petition unless it is advertised. Therefore, all these questions about the commercial insolvency of the company have to be thrashed out only at the post-admission and advertisement stage, namely, at the stage of trial. Mr. Jayaram further submitted that prior to admission and advertisement, inquiry on the aforesaid questions, which he has indicated for consideration, at that stage by the company court has to be carried out in a summary manner with a view to finding out that there is a prima facie case made out for winding up by the petitioning creditor and for going to trial after admission and advertisement of the petition. Such findings cannot be final by

way of findings on the preliminary issues as Mr. Holla submitted for the company in O.S.A. No. 19 of 1993. That even after such summary enquiry of prima facie nature, if at the stage of trial, after hearing the parties, the court reaches the final conclusion that in fact the debt is not due or it is barred by time or that the presumption arising under section 434(1)(a) or (b) has been rebutted by the company, the earlier prima facie findings on the aforesaid questions also would not survive and will have to give way to the final finding reached by the learned company judge at the stage of trial after hearing all concerned and even other creditors and shareholders, who may like to support or oppose the petition for winding-up. This will also include the labourers whose dues may not have been paid by the company. 6. Mr. Jayaram also submitted that at the stage prior to admission and advertisement of the company petition, when such findings on the aforesaid two questions are reached, prima facie, the company judge will have to hear not only the petitioning creditor but also the company who has received the notice prior to admission and advertisement. These findings prima facie are in the nature of findings reached by the civil court about a prima facie case and the balance of convenience at the stage of granting of interim injunction in a suit and such prima facie findings can be reconsidered at the stage of trial on proper evidence being led by both the parties. Similarly, in the company petition also, the same situation would emerge. Mr. Jayaram, however, submitted agreeing with Mr. Holla for the appellant-company in O.S.A. No. 19 of 1993 that if it is a defunct company which has closed its shutters there will be no harm in admitting the petition and even advertising it prior to the issuance of notice to the company and in such a case even such preliminary summary enquiry after hearing the company may not be necessary. But, in all the other cases, he agreed that at the pre-admission advertisement stage, an enquiry of summary nature has to be held of course subject to the limit of enquiry, which he canvassed for. All learned advocates have agreed to one aspect that whatever findings are reached by the learned company judge prior to admission and advertisement, on the relevant issues, which are required to be considered at this stage, they must at least briefly indicate the reasons which weighed with the learned company judge and the reasons must follow the appreciation of evidence placed by both the contesting parties at this stage. But it cannot be a non-speaking order as the orders of admission and advertisement are appealable under the provisions of the Companies Act, that, therefore, parties must be in a position to know what weighed with the learned judge while passing the order of admission and advertisement. But even that apart, the appellate court would like to know the same. It is, therefore, submitted by learned counsel putting forward their respective contentions and placing reliance on a number of decisions of the Supreme Court and other courts including this court, that the referred questions may be answered accordingly and in the light of the answers given to the referred questions, O.S.A. No. 19 of 1993 may be decided. 7. Having given our anxious consideration to the aforesaid rival contentions we have reached the conclusion that there is a need to hold a summary enquiry after issuing notice to the company which is a going concern, before ordering admission and advertisement of the petition. What will be the scope and ambit

of such enquiry of summary nature will be indicated hereinafter. 8. Before we deal with the rival contentions on this aspect, it is necessary to have a bird's-eye view of the relevant statutory provisions holding the field. Statutory settings : 9. As we have already indicated hereinabove, all these petitions are moved by the petitioning creditors under section 433(e) of the Act. We are, therefore, concerned with a limited question whether in such company petitions, before admitting and advertising the same, the learned company judge has to follow any procedure of enquiry of summary nature or not. All that we will say hereinafter will be confined to this question and no part of it will apply to the procedure to be followed in winding-up petitions invoking the other provisions of the Act, as that question has not arisen before us. Part VII of the Act deals with winding-up of companies. Section 425(1) of the Act found in Chapter I of Part VII deals with modes of winding-up. Sub-section (1)(a) of the said section deals with winding-up of a company by the court. We are concerned with that mode of winding-up Chapter II deals with winding-up by the court. The first section therein is section 433 which deals with cases in which a company may be wound up by the court. It states, a company may be wound up by the court as per clause (e) if the company is unable to pay its debts. Then follows section 434(1) which deals with situations where the company will be deemed to be unable to pay its debts. Therefore, there is a direct linkage of section 434(1)(a) to (c) with the company petition for the winding up of a company by the court on the ground mentioned in section 433(e), i.e., that the company is unable to pay its debts. The deeming fiction regarding inability of the company to pay its debts is said to arise under the three circumstances mentioned in section 434(1)(a), (b) and (c). As this section is relevant for our purpose, it will be useful to extract it in extenso at this stage. It reads as under : "434.(1) A company shall be deemed to be unable to pay its debts - (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; (b) if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company." 10. A mere look at section 434(1) shows that in cases covered by clauses (a) and (b) if the petitioning creditor who files the petition shows to the court even prima facie that his case is covered by the aforesaid provisions, then, of course, the deeming fiction would arise for the court's consideration and in proper cases the court can act upon this presumption and can proceed further with the company petition. However, when we come to clause (c), the court has to be satisfied that the company is unable to pay its debts and that satisfaction will depend upon the proof submitted before the court and to undertake that exercise the

court has to take into account the contingent and prospective liabilities of the company also apart from its liability for the debt due to the petitioning creditor, but for which the company petition would not lie at his instance under section 433(e) of the Act. Section 439 deals with the provisions as to application for winding up. So far as the creditors-petitioners are concerned, they are dealt with in section 439(1) which states an application to the court for the winding up of a company shall be by petition presented subject to the provisions of this section, (b) by any creditor or creditors including any contingent or prospective creditor or creditors. Sub-section (8) of section 439 which is heavily pressed for our consideration by Sri Jayaram and other learned counsel for the petitioning creditors reads as under : "439. (8) Before a petition for winding up a company presented by a contingent or prospective creditor is admitted, the leave of the court shall be obtained for the admission of the petition and such leave shall not be granted - (a) unless, in the opinion of the court, there is a prima facie case for winding-up the company; and (b) until such security for costs has been given as the court thinks reasonable." 11. We will deal with this provision at the appropriate time, when we shall consider the effect of this provision on the pre-admission and advertisement procedure sought to be advocated by the respective parties for being followed by the winding up court, especially in the light of the question whether in this summary enquiry, there should be prima facie findings or final findings. Section 443 is the next section which is relevant for our present purpose. It deals with the powers of the court on hearing the petitions. Section 443(1) deals with the powers of the court at the stage of hearing of winding-up petitions as it lays down that the court may (a) dismiss, (b) adjourn the hearing conditionally or unconditionally, or (c) make any interim order that it thinks fit, or (d) make an order for winding up the company with or without costs, or any other order that it thinks fit. Then follows a proviso which provides that the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets. 12. The next relevant section is section 643 which gives power to the Supreme Court after consulting the High Court to make rules providing for all matters relating to the winding up of companies which by this Act are required to be prescribed. In exercise of this power, the Supreme Court has framed rules named and styled as the Companies (Court) Rules, 1959, hereinafter referred to as "the Rules". Part III of the Rules deals with winding up. It starts with rule 95 which deals with petitions for winding up. This part has the caption winding up by the court - winding up petition and its hearing. Rule 95 provides that petitions for winding up shall be in Form Nos. 45, 46 or 47, as the case may be, with such variations as the circumstances may require and shall be presented in duplicate. The Registrar shall note on the petition the date of its presentation. Then comes rule 96, which is very material for our present purpose. It reads as under : "96. Admission of petition and directions as to advertisement. - Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any,

upon whom copies of the petition are to be served. The judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition." 13. It was submitted that as per rule 96, for admitting the petition, it is not necessary to hear the company sought to be wound up. But only before issuing advertisement of the petition, the company court is given a discretion to give notice to the company. Then follows rule 97 which deals with petitions by contingent or prospective creditors. It provides that a petition for winding up a company presented by a contingent or prospective creditor shall be accompanied by an application under section 439(8) for the leave of the court for the admission of the petition. No advertisement of the petition shall be made unless the leave has been granted, or, where the leave has been granted subject to any conditions precedent to the admission of the petition, unless such conditions have been satisfied. On a conjoint reading of section 438 and rule 97 it was submitted that a petition by a contingent and prospective creditor will require prior to its admission and advertisement an enquiry into the prima facie case for winding up the company and that by contrast such being not the requirement of rule 96, it must be held that no such enquiry is contemplated prior to the admission and advertisement of petition by a creditor as such. Rule 99 deals with advertisement of the petition. Such petition shall be advertised within the time and in the manner provided by rule 24 of the Rules. The advertisement shall be made in Form No. 48. Rule 24 of the Rules deals with the mode of advertisement and provides that where a petition is required to be advertised, it shall unless the judge otherwise orders, or these Rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the judge. Form No. 48 provides that in the heading the company petition number and the petitioner's name have to be mentioned and then in the advertisement it is to be stated that a petition for the winding up of the company by the High Court at the place and on the date mentioned was presented to the said court by the said company or is presented by any other person whose name and address must be mentioned and the date of hearing also has to be mentioned in the advertisement. Any creditor, contributory or other person desirous of supporting or opposing the making of an order on the same petition is to be called upon to send to the petitioner notice of his intention to do so. Rule 100 lays down that a petition for winding-up shall not be withdrawn after presentation without the leave of the court. An application for withdrawal of the petition which has been advertised in accordance with rule 99 shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition and then follows rule 101 which provides that in a case where a person moving the petition is not found to be entitled to present the petition or fails to advertise his petition within the time given by the court or such extended time that may be given by the court or he wants to withdraw the petition may be allowed to do so, and any creditor or contributor who, in the opinion of the court has

a right to present the petition and who is desirous of prosecuting the petition may be substituted as the petitioning creditor. Rule 102 deals with procedure on substitution. Rule 103 deals with affidavit in opposition, rule 104 deals with affidavit in reply to the affidavit in opposition. Rule 106 deals with appointment of a provisional liquidator which lays down that after the admission of a petition for the winding-up of a company by the court, upon the application of a creditor, or a contributory, or of the company, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, the court, if it thinks fit and upon such terms as in the opinion of the court shall be just and necessary, may appoint the official liquidator to be a provisional liquidator of the company pending final orders on the winding up petition. Where the company is not the applicant, notice of the application for appointment of a provisional liquidator shall be given to the company unless the court, for special reasons to be recorded in writing, dispenses with the notice. That shows that after a winding-up petition is filed the question of appointment of a provisional liquidator would arise after a formal order on admission is passed. Such an order normally would not be passed without hearing the company. Relying on this provision, it was submitted by learned counsel for the petitioning creditors that wherever the company is to be heard before making any order an express provision is found in the Act and the Rules. But at the stage of admission of a company petition, no such express provisions are made. To that extent, they are right. However, as we will presently see, by a series of decisions of the Supreme Court, the Act and the Rules have been so read as to imply in appropriate cases a notice and hearing to the company even prior to the admission and advertisement of the petition. Section 446 provides that where a winding up order has been made or the official liquidator has been appointed provisional liquidator, no suit or other legal proceedings shall be commenced or if pending at the date of the winding up order, shall be proceeded with, against the company, except by the leave of the court and subject to such terms as the court may impose. This in short is the scheme of the relevant provisions of the Act and the Rules having a bearing on the questions posed for our consideration. 14. In the light of the aforesaid statutory scheme and the rival contentions canvassed by learned counsel for the respective parties, we now proceed to deal with the twin questions placed before us for decision. 1. Nature of enquiry or hearing, if any, by the company court, prior to admission and advertisement of the company petition for the winding up of company under section 433(e) of the Act. 15. So far as this question is concerned, as we have seen above, the Act and the Rules are silent about any such enquiry after issuing notice to the company. However, examining this scheme of the Act and the Rules, the Supreme Court has held in various decisions that if such orders are likely to affect the commercial prestige of the company sought to be wound up and are likely to have a disastrous effect on its existence in the commercial world, then an enquiry after hearing the company on certain relevant aspects will be necessary. In fact Mr. Jayaram, learned counsel appearing for the petitioning creditor in O.S.A. No. 19 of 1993 fairly stated that in view of the judicial interpretation of the scheme of the Act and the Rules by the Supreme Court such a conclusion must necessarily follow. We

will, therefore, now turn to the consideration of these judgments of the Supreme Court having a bearing on this aspect. 16. In the case of National Conduits (P.) Ltd. v. S. S. Arora , the Supreme Court was concerned with a private limited company which was a going concern manufacturing electric conduit pipes. The respondent who was a director of the company presented a petition to the High Court of Delhi under sections 433 and 439 of the Companies Act for compulsory winding-up of the company. In that case, the petition was moved mainly under section 433(f) of the Act on the ground that it was just and equitable to wind up the company. Thus, strictly speaking, the Supreme Court was not concerned with the winding up of a company under section 433(e). However, it examined the scheme of the Act and the Rules in connection with the procedure about hearing the company before admitting and advertising the petition. In that case, the learned single judge of the company court had issued notice to the company. But it was not clear whether the notice was to show cause why the petition should not be admitted or by the order on the petition it was admitted and then notice was issued prior to advertisement. However, the fact remained that the company showed cause and requested the court to take the petition off the file and dismiss the same. The petition in the meantime was not advertised. After hearing the company, the learned single judge took the view that it was not a fit case for advertising the petition and dismissed the petition. In appeal against the said order, a Division Bench of the High Court held that once a petition is admitted, the court is bound to advertise the petition. It is that order which was challenged before the Supreme Court. In the light of the provisions of the Act and the Rules, the Supreme Court, speaking through Shah J., made the following pertinent observations (at page 788 of 37 Comp Cas) : "When a petition is filed before the High Court for winding up of a company under the order of the court, the High Court (i) may issue notice to the company to show cause why the petition should not be admitted; (ii) may admit the petition and fix a date for hearing, and issue a notice to the company before giving directions about advertisement of the petition; or (iii) may admit the petition, fix the date of hearing of the petition, and order that the petition be advertised and direct that the petition be served upon persons specified in the order. A petition for winding up cannot be placed for hearing before the court, unless the petition is advertised. That is clear from the terms of rule 24(2). But that is not to say that as soon as the petition is admitted, it must be advertised. In answer, to a notice to show cause why a petition for winding up be not admitted, the company may show cause and contend that the filing of the petition amounts to an abuse of the process of the court. If the petition is admitted, it is still open to the company to move the court that in the interest of justice or to prevent an abuse of the process of a court, the petition be not advertised. Such an application may be made where the court has issued notice under the last clause of rule 96, and even when there is an unconditional admission of the petition for winding up. The power to entertain such an application of the company is inherent in the court, and rule 9 of the Companies (Court) Rules, 1959, which reads : '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 to prevent abuse of the process of the court." 17. Ultimately, the Supreme Court held that in that case, the High Court was in error in holding that a petition for winding up must be advertised even before the application filed by true company for staying the proceeding for the ends of justice or to prevent an abuse of the process of the court is heard. The view taken by the High Court that the court as soon as the petition is admitted, must advertise the petition is contrary to the plain terms of rule 96. Such a view, if accepted, would make the court an instrument, in possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the company is bound to suffer serious loss and injury. 18. The aforesaid decision, therefore, squarely lays down three types of procedures which the company court can follow when a winding up petition is moved under section 433 of the Act : (i) before even admitting the petition, a show-cause notice can be issued to the company; (ii) may admit the petition, fix the date for hearing and issue notice to the company before giving direction about advertisement; and (iii) petition may be admitted, date of hearing may be fixed and also petition may be directed to be advertised and all these exercises can be undertaken without issuing notice to the company. 19. It becomes at once clear, therefore, that though nowhere in the rules or the Act it is provided that notice of show cause to the company can be issued prior to admission and advertisement, the Supreme Court by judicial interpretation of the relevant schemes of the Act and the Rules, has taken the aforesaid view which has held the field throughout till date. But the moot question is under what circumstances, the last course can be adopted by the company court, namely, after hearing the petitioning creditor, the company court can order admission and advertisement without hearing the respondent-company. In our view, such a course can be adopted safely in a case where after hearing the petitioner and assessing the material produced by the petitioning creditor before the company court, the company court finds that the respondent-company is a defunct company, it has closed its shutters, it has discharged its labour force and its commercial-cum-manufacturing activities have come to a grinding halt since a long time and it is not a temporary suspension thereof. In such a case on the principle that there will be no occasion to slay the slain, the petition can be admitted and advertised without issuing notice to the company. The reason is obvious. By such admission and advertisement of the petition, the respondent-company is not going to suffer a greater damage in the commercial world or its business is not going to suffer any more than what has already been suffered prior to the filing of such company petition. However, even in such a case, it cannot be disputed that before setting the law in motion, the court would require the petitioning creditor to show at least prima facie that there is a case for compulsory winding up of a company on the ground that it is unable to pay its debts and is commercially insolvent. For that purpose, the petitioning creditor has to show that there is a debt due by the company to the petitioning creditor, it is of an ascertained or substantially ascertained sum of money, it is within limitation and it has not been paid by the company to the petitioning creditor. He can also show whether the presumption under section 434(1)(a) or (1)(b) arises in the case. But even if such a presumption

that the company is unable to pay its debts does not arise, such presumption can also be raised under section 434(1)(c) of the Act on the facts available on record about the financial doldrums in which the company is situated as it is a case of a defunct company. Therefore, as per this exercise, after hearing the petitioning creditor alone the court, if satisfied on these aspects can admit the petition and straightaway direct advertisement of the company petition even without issuing notice to the respondent-company. But this procedure, as seen earlier would be confined only to the peculiar facts and circumstances of the case as indicated above. If such a course is adopted, neither such a defunct company would suffer any more nor the petitioning creditor will be put to extra burden as the gamut of advertisement has to be undertaken by him in all cases where he wants final relief from the court about compulsory winding-up of the company. This procedure will get expedited in such circumstances. 20. We are then left with the other two types of situation contemplated by the aforesaid decision of the Supreme Court wherein the court can admit the petition and then, before advertising the petition, may hear the company or may defer admission and advertisement till the company is heard on notice. In our view, such a situation will arise for consideration where, on a reading of the company petition and looking at the materials supplied by the petitioning creditor or any further material that the court requires and which is supplied by the petitioning creditor, the court finds that the respondent company which is sought to be wound up under section 433(e) is running its business and commercial manufacturing activities, it has employed number of workmen or that it might have temporary reverses or set-backs by way of temporary suspension of such a business activity, but otherwise it is a going concern, and has not closed its shutters for all times to come. In such cases, before even admitting the petition and ordering advertisement, it would be just and proper to issue notice to the company and give it a hearing because, as held by the Supreme Court, advertisement may have a pernicious adverse effect on the business of the company leaving aside the advertisement of such a company petition which would represent to the world at large that the company is in financial difficulties and it is sought to be wound up. 21. In this connection, it will be profitable to refer to a later decision of the Supreme Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Private Limited, . Therein the Supreme Court was concerned with the case in which the learned company judge had dismissed the company petition seeking winding up of the company under section 433(e) and (f) of the Act. The said petition was moved by the directors of the company, who had sold their shares and had gone out of the management of the company. They were parties to the proposed sale of certain machinery. Just when the sale of the machinery was going to be effected, they presented the petition for winding up. It was held by the Supreme Court on these facts that the petition was presented with an improper motive. However, dealing with the scope and ambit of petitions under section 433(e), the Supreme Court in para 21 of the report has made the following pertinent observation (at page 131 of 42 Comp Cas) : “Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not

to pay that particular debt (see A Company, In re [1894] 94 SJ 369; [1894] 2 Ch 349 (Ch D). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (see Tweeds Garages Ltd., In re [1962] Ch 406; [1962] 32 Comp Cas 795 (Ch D). 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." 22. In para 22 of the report, the Supreme Court observed that under section 557 of the Act in all matters relating to the winding up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered though perhaps the court may attach greater weight to the views of the creditors. In para 23, it is observed, that the claims of the appellants were disputed in fact and in law. The company had given prima facie evidence that the appellants are not entitled to any claim for erection work, as there was no transaction between the company and the appellants or those persons in whose names the appellants claimed the amounts. The company had raised the defence of lack of privity. The company had raised the defence of limitation. Under those circumstances, the High Court was correct in refusing the order of winding up. Now, it is true that the aforesaid decision was not dealing with the procedure to be followed even prior to admission or advertisement of the petition. But the fact remains that, even at the stage of trial of the petition, if the company has prima facie shown that its defence was a valid one, a winding up order can be refused. If that is so, even prior to the admission and advertisement, if the company is to show that it has a good defence it would necessarily be a finding in the realm of prima facie finding and not a final finding as Mr. Holla would like to have it. In fact this very decision has been pressed in service by a Division Bench of this court consisting of K. Shivashankar Bhat and M. M. Mirdhe JJ., while deciding the Original Side Appeal No. 12 of 1992, on February 3 and 4, 1993 (Karnataka Leasing and Commercial Corporation Ltd. v. Smt. Lalitha Holla [1995] 83 Comp Cas 127 (Kar)). In that case, the order of the learned company judge issuing advertisement of the company petition was in challenge before the appellate court. On the facts on record, at that stage, it was found by the Division Bench that the order of advertising of the petition was justified. For coming to that conclusion, the nature of the enquiry at that stage was highlighted in paragraph 10 of the judgment as under (at page 132) : "The appeal is against the order directing advertisement of the petition. At this stage an in-depth examination of the merits of the case is not called for. If a prima facie case for winding up is made, normally, a creditor is entitled to an order of winding up under section 433(e) of the Companies Act, subject to other considerations governing the exercise of the discretion. But those considerations are relevant at the time of considering the making of the final order." 23. Even there, the test applied by the Supreme Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd. [1972] 42 Comp Cas 125, especially in paragraphs 21 and 22 was kept in view. 24. The Division

Bench then observed that when a prima facie case is made out, to attract the principles governing the winding up under section 433(e), refusal of such an order would be denying the statutory remedy provided to the creditors of the company. The undisputed facts of that case prima facie led to the conclusion that the company was not commercially capable of solving its indebtedness. It was then observed that, may be, after advertisement and after hearing all concerned, different considerations may weigh with the court not to order winding up; but it is too premature for the court to hold that the facts relevant to such considerations exist in favour of the company. We respectfully concur with the aforesaid reasoning adopted by the Division Bench about the procedure to be followed by the company court before ordering advertisement and the nature of the findings which the court should reach before advertising such company petitions under section 433(e) of the Act. 25. We may now refer to a later decision of the Supreme Court in Hind Overseas Private Ltd. v. Raghunath Prasad Jhunjhunwalla . In that case, a company petition for winding up of the company under section 433(f) of the Act was moved before the Calcutta High Court. At the admission stage, it appeared that notice was issued to the company as in para 12 of the report; it is observed there were allegations in the winding up petition which came up for admission before the learned company judge. There was a counter-affidavit filed by V.D.J. in opposing the prayers. After considering the defence of the company, the learned judge, instead of admitting the same, dismissed the petition. The Division Bench in appeal reversed the decision. It is that order of the Division Bench which was carried in appeal before the Supreme Court. While allowing the appeal by holding that on the material on record, which obviously was supplied by the counsel for the petitioning creditor and also by the contesting company on notice, the petitioning creditor was not entitled to claim winding up of the company under the just and equitable clause, the Supreme Court, speaking through Alagiriswami J., in para 34 of the report, laid down the procedure to be followed and the nature of the enquiry to be made at the stage of admission and advertisement of the petition as that was the stage with which the Supreme Court was concerned in that case. These observations are as under (at page 105 of 46 Comp Cas) : “In an application of this type, allegations in the petition are of primary importance. A prima facie case has to be made out before the court can take any action in the matter. Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the application has to be dismissed. The interest of the applicant alone is not of predominant consideration. The interests of the shareholders of the company as a whole apart from those of other interests have to be kept in mind at the time of consideration as to whether the application should be admitted on the allegations mentioned in the petition.” 26. Even when these observations are made in connection with winding up petitions under section 433(f), they would equally apply to a winding up petition under section 433(e). It has been clearly ruled by the Supreme Court in the aforesaid paragraph that even admission of a company petition which will lead to advertisement is likely to cause immense injury to the company if ultimately the application has to be

dismissed. Therefore, in view of the decision of the Supreme Court, enquiry has to be made at that stage whether a prima facie case is made out by the petitioning creditor before the court can take any action in the matter. Any action in the matter would cover also an action by way of admission and advertisement of the petition. Consequently, these observations of the Supreme Court imply a direction to the company judge that, before a petition is admitted and advertised, in appropriate cases, an enquiry has to be held, of course, in a summary manner, for finding out whether there is a prima facie case made out by the petitioning creditor for enabling the court to take any action by way of admission and advertisement of the petition. And that has to be done after hearing the company, as in the case before the Supreme Court as noted earlier, the company was present before the company court at the admission stage pursuant to the notice issued and it is the company's defence which ultimately weighed with the Supreme Court in dismissing the company petition instead of admitting and advertising it. 27. The latest judgment of the Supreme Court to which our attention was invited by learned counsel for the parties is rendered in the case of Pradeshiya Industrial and Investment Corporation of U. P. v. North India Petro Chemical Ltd. . In that case, the Supreme Court was concerned with a winding up petition under section 433(e). In that case, the first respondent before the Supreme Court had issued notice under section 434 to the appellant-company. Under a promoters' agreement, a sum of Rs. 72.50 lakhs was payable by the company to the promoter, the petitioning creditor. On that ground it was alleged that the appellant-company was indebted in a sum of Rs. 72.50 lakhs as on November 30, 1991, and as it was not paid, a petition was moved before the Allahabad High Court. The learned company judge issued a show-cause notice to the company before admitting the petition. After considering the evidence led by the company, the learned judge took the view that the petition deserves to be admitted as a prima facie case was made out for admission. However, advertisement was suspended till further orders. Against such an order of admission, the company preferred an appeal to the Division Bench, which was dismissed. It is thereafter that the appellant-company preferred an appeal by special leave before the Supreme Court. Examining the material on record at that stage, it was held by the Supreme Court that it was not a case for admission or advertisement of the petition and on the contrary, as the basic requirements of the relevant provisions of the Act for supporting the petition under section 433(e) were absent, the petition was liable to be dismissed. That is how, even at the admission stage of the petition, the Supreme Court interfered and dismissed the petition. While doing so, the Supreme Court, in paragraphs 26 to 33, went into the question as to what was the requirement to be established even prima facie before getting a petition under section 433(e) admitted and advertised. In para 26, it was observed that defence of the appellant-company in relation to non-payment was a bona fide one. After referring to section 433(e), it was observed that in such a petition, there must be a debt and the company must be unable to pay the same. In para 29 it was observed that the debt under this section is a definite amount payable immediately or at a future date. Then the court considered, at para 30, the scope and ambit of the words"unable to pay

its dues" (sick debts). Taking a clue from European Life Assurance Society, In re [1869] LR 9 Eq 122 and other decisions, it was observed that for being plainly and commercially insolvent, it has to be shown that the assets of the company are such and make it reasonably certain, and from which the court feels satisfied that the existing and probable assets would be insufficient to meet the existing liabilities. Reliance was then placed on the observations of the Supreme Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd., and then the following pertinent observations were made in paragraph 32, "it is beyond dispute that the machinery for winding-up will not be allowed to be utilised merely as a means for realising its debts due from a company." In para 33 reasons are given by the Supreme Court for not approving the order of the High Court admitting the petition. It was noted by the Supreme Court that the petitioning creditor was not a creditor. The appellant was not a debtor because it was a financial institution for an amount which is agreed to be subscribed. Neither the learned single judge nor the Division Bench had decided this important question whether there is a debt and the company has either neglected or was unable to pay. It was also observed that there was no definiteness of the debt as the matter was pending adjudication in arbitration. In view of all these, there was prima facie dispute as to the debt and then followed the observations in sub-para (S) of para 33 as under (at page 845 of 79 Comp Cas) : "The defence raised is a substantial one and not mere moonshine. We find it difficult to appreciate the reasoning of the learned single judge when he holds that there are arguable issues and, therefore, the winding up petition has to be admitted. On this aspect the courts below failed to note that the admission of the winding up petition is fraught with serious consequences as far as the appellant is concerned." 28. This latest decision of the Supreme Court puts the controversy beyond the pale of doubt that, in the case of a company which is a going concern and which is actually functioning, even an order of admission of a company petition under section 433(e) may prove disastrous, even leaving aside the advertisement order which would be still more pernicious, for, even at that stage after hearing the company, it has to be decided whether the petitioning creditor is a creditor of the company, whether any definite amount of debt is due to him from the company, whether the defence of the company in this connection is valid and not mere moonshine and whether it is prima facie shown that the company is plainly commercially insolvent or in other words its existing and probable assets would be insufficient to meet the existing liability. It is not possible to agree with the contention of Sri Raghavan and Sri Jayaram that the aforesaid decision of the Supreme Court has not laid down the ratio that even at the stage of admission of such petition under section 433(e), a prima facie finding has to be reached in connection with the alleged commercial insolvency of the company. If that were so, there would have been no occasion for the Supreme Court to dilate on this aspect in para 30 of the report. In fact, in para 34 of the report, the Supreme Court went into this question on the basis of the material on record and took the view that the company was a profit-making financial corporation and it was paying dividend as seen from the balance-sheet for the year 1991-92. The assets of the appellant-corporation and the reserves

are so much, there was no justification whatsoever for admitting the winding up petition. Meaning thereby this exercise about the prima facie finding on the financial condition of the company and for prima facie concluding whether the company was commercially solvent or not has to be undertaken even prior to the admission of such winding-up petition under section 433(e) of the Act. That very exercise was undertaken by the Supreme Court on the material on record and it was found that as the company was not in such financial doldrums, it was not a fit case for admission of the winding up petition against such a company under section 433(e) of the Act. It must, therefore, be held that such consideration at the admission stage of the petition is not only not foreign to the scope of such enquiry but also, it is a part and parcel of such enquiry as authoritatively ruled by the Supreme Court in this decision. 29. Now it is time for us to refer to certain decisions of this court which were pressed in service by learned counsel for contesting parties. 30. In the case of Hegde and Golay Ltd. v. State Bank of India , the Division Bench of this court was concerned with the question whether the order for winding-up of the company on the ground that the company was unable to pay its debts under section 433(e) was justified or not and even otherwise it was just and equitable that the company be wound up. While deciding that question, it was observed by the Division Bench that pendency of a civil suit is not a bar to the maintainability of such winding-up petition. The said Division Bench was not concerned with the situation with which we are concerned. That decision is, therefore, not helpful to either side. 31. In the case of Divya Export Enterprises v. Producin Private Ltd. , the learned single judge of this court, Shivashankar Bhat J., was concerned with the merits of the petition moved for winding up under section 433(e) of the Act. It appears that in the said case, notice was issued to the company. It is not clear whether the notice was issued prior to admission or after admission. However, in para 8 of the report, the learned judge has considered the question of maintainability of the petition under section 433 of the Act, the nature of the petition and the relationship between the parties. If, on the proved facts and circumstances, it is found that the validity of the petitioner's claim is genuinely disputed by the respondent on substantial grounds, the court would not proceed further in the exercise of its jurisdiction under section 433 of the Act. It has been further observed that when the respondent comes forward and sets forth its defence, this court has to examine the nature of the respective cases pleaded by the parties and if a prima facie case is made but by the petitioner, the respondent should shoulder the onus of disproving it, by showing that its defence is in good faith and one of substance and it is likely to succeed in point of law. For guidance to find out whether the defence is bona fide and one of substance, reference to the principles enunciated under Order 37, rule 3 of the Civil Procedure Code, is not irrelevant. A plea which is frivolous, mere moonshine and, which, on the face of it, cannot be accepted or is clearly an afterthought, cannot be termed as raising a bona fide dispute. For this purpose, the court has to examine all the disclosed circumstances. Having said so, the learned judge has dismissed the petition by agreeing with the company that the defence is a bona fide one. The aforesaid reasoning of the learned single judge falls in line

with the authoritative pronouncement of the Supreme Court in its latest decision supra. 32. Mr. Jayaram, learned counsel, had also invited our attention to a Division Bench decision of this court in A. V. Krishna v. Karnataka Leasing and Commercial Corporation Ltd., , wherein the same learned judge, speaking for the Division Bench, held in connection with the connotation of the phrase "commercial insolvency and inability to pay its debts" (at pp. 767 and 769 of 83 Comp Cas) : "When a company is sought to be wound up because the company is unable to pay its debts, the cause of action arises as and when the company's commercial insolvency is disclosed or it is realised that the company is commercially insolvent or it is unable to pay its debts. This cause of action can be taken advantage of by any one of the creditors or the entire body of creditors. The Act itself recognises the right of any creditor or creditors to invoke the jurisdiction of the court seeking the winding up of a company by a single petition ... A company petition is more in the nature of a class interest litigation and not in the nature of a litigation between an individual and the company." There is no doubt on this settled legal position. However, the question before us is which type of findings on vital issues, when a company petition under section 433(e) is moved, can be adopted for admission and advertisement of the petition and for answering these questions, in our view, there is enough guidance emanating from the aforesaid decision of the Supreme Court. 33. We may now briefly examine the rival contentions of learned counsel for the parties in support of their respective cases. 34. Mr. Holla submitted placing reliance on the Supreme Court decision in Pradeshiya Industrial and Investment Corporation of U. P. v. North India Petro Chemical Ltd. [1994] 79 Comp Cas 835 the clear findings be reached by the company court after hearing the petitioning creditor and the company, as the case may be, which is sought to be wound up that there is a debt due and payable by the company to the petitioning creditor that is an ascertained or substantially ascertained amount, that it is not barred by limitation, that the defence of the company is not moonshine or invalid and that the presumption arises that the company is unable to pay its debts as per section 434(1)(a), (b) or (c), as the case may be, that only after finings on these aspects are reached will the company court have jurisdiction to proceed further with the company petition. In short, according to Sri Holla, learned counsel, these are the jurisdictional points and decision thereon after hearing the petitioning creditor and the company would remain binding on both the sides in subsequent stages of the petition if the court thinks it fit to take further action and sets down the petition for trial after admitting and advertising the same. On the other hand, Sri Raghavan and Sri Jayaram, learned counsel for the petitioning creditors, agreeing with Sri Holla partially, submitted that a finding which is in the nature of a prima facie finding will be reached on the question whether there is a debt due from the company to the petitioning creditor. That a debt is an ascertained or substantially ascertained sum and it is within limitation and that the company has no valid defence against its non-payment or in other words, the defence is moonshine. That after these prima facie findings are reached by way of summary enquiry, the petition can be admitted and advertised and that at that stage, it is not necessary to go into the question whether the company

is shown prima facie to be commercially insolvent as that finding requires the presence of all the creditors pursuant to the public advertisement, who can put forward their respective cases. That stage is not reached prior to admitting and advertising of the petition. They also do not support the contention of Sri Holla that such findings at the pre-admission and advertisement stage would be binding for all times to come at the subsequent stages of trial on the petitioning creditor as well as the company. They submit that such finding would be like findings on a prima facie case under Order 39, rules 1 and 2 of the Civil Procedure Code, and about the balance of convenience to be rendered at the interim relief stage in a suit. We find considerable substance in these contentions canvassed by learned counsel for the petitioning creditors. It is difficult to accept the extreme contention of Sri Holla to the effect that if any finding is reached in a summary enquiry prior to admission and advertisement of the petition after hearing the petitioning creditor on the one side and the company on notice on the other hand, the finding reached will be binding on both the parties for all times to come during the subsequent stages of the winding-up petition. By their very nature, those findings would be reached in a summary manner. At that stage other creditors and contributors would be absent. But even that apart, these findings are reached to find out a prima facie case for admission and advertisement. They are not reached with a view to decide whether ultimately the petition should be allowed or dismissed. That stage is yet to come. These prima facie findings will only open the door for a detailed enquiry at the stage of trial. In a way, though these findings are findings on jurisdictional points they will remain prima facie and not final and conclusive between the parties. In fact this is precisely what is ruled by the Supreme Court in the aforesaid decision, to which we have made a detailed reference earlier. It is obvious that if at the stage of admission of the petition, the court prima facie finds after hearing the company that its defence is not valid or prima facie is shown to be moonshine and that an ascertained sum of money is due from the company to the petitioning creditor and is within time of limitation, that will only result in the admission of the petition and advertisement. But after advertisement even other creditors can show or even the company itself can show at the stage of trial that despite that prima facie finding which has resulted in the admission and advertisement of the petition, there is no case for winding up of the company as the company is able to pay its debts or that the debt is not within limitation or that company's defence is a valid one and not moonshine or that there are other relevant circumstances which would entitle the court to dismiss the winding up petition at the stage of trial even after admission and advertisement, in exercise of its powers under section 443 of the Act. If Mr. Holla's contention is accepted, then between the petitioning creditor and the company, an order of admission would almost amount to an order of winding up on the ground that the company is unable to pay its debts due to the petitioning creditor and others. Such is not the scope and ambit of an order of admission and advertisement of the petition. An order of admission and advertisement which throws open a debate in the presence of all concerned cannot be held to foreclose the very same debate between the main contesting parties, namely, the petitioning

creditor and the respondent-company. As is well settled these proceedings are not in the nature of proceedings to prove the company's dues to the petitioning creditor and to get a decree thereon. But they are representative in nature and they are a type of class litigation. Any finding reached prima facie for taking further action in such class litigation cannot be held to be binding to such an extent on the main contestants as would foreclose them at the stage of trial of such class litigation from putting forward their respective cases finally on all these aspects. It must, therefore, be held that at the stage of summary enquiry which the company court may hold prior to admission and advertisement of the company petition by hearing the petitioner and the respondent-company at the notice stage, the court is called upon to satisfy itself that it is a case for admission and advertisement and nothing more. For arriving at that conclusion the court necessarily will have to prima facie find out whether any fixed amount of debt or ascertained amount of debt is due by the company to the petitioning creditor, whether the debt is within limitation and whether the defence put forward by the company for not paying the debt to the petitioning creditor is a valid one or is mere moonshine and also to find out whether the company appears to be commercially insolvent. Meaning thereby, it is unable to pay all its debts and not necessarily the debts of the petitioning creditor alone. So far as this last aspect is concerned, Mr. Jayaram and Mr. Raghavan submitted that this consideration is foreign to the scope of this summary enquiry at the stage prior to admission and advertisement of the petition. It is not possible to agree. It must be kept in view that the company petition, being a class litigation when moved by the petitioning creditor, has to allege that the company is unable to pay its debts as required by section 433(e). At the final hearing stage, if the petitioning creditor so establishes his case, then the court will pass final orders of winding up. At an earlier stage, prior to admission and advertisement of necessity, the petitioning creditor has to show that prima facie the company sought to be wound up is unable to pay its debts meaning thereby it is commercially insolvent. It is easy to Visualise that under section 434(1)(a) and (b) if the petitioning creditor can show that he has given a statutory notice for recovering a sum of Rs. 500 and more and the company has failed to comply with the notice during the statutory period indicated therein, a rebuttable presumption will arise in favour of the petitioning creditor namely, that the company is unable to pay its debts. In a case arising under section 434(1)(b) if the decree obtained by the creditor is crystallised and if the company has not satisfied wholly or partly the said decree, then a similar presumption would arise. But in a case where no such presumption is available under section 434(1)(a) or (b) as no such evidence is before the court, then of necessity, the court has to consider any such presumption under section 434(1)(c) and at that stage, if the court is satisfied, of course, prima facie, that the company is unable to pay its debts because its assets are not shown to be sufficient to meet all its liabilities, actual and contingent, then a presumption would arise which can be rebutted at the stage of trial by the company, even when the company is not able to prima facie rebut such presumption. Therefore, this question also can fall within the scope of enquiry by the company court at the pre-admission

and advertisement stage. In fact this aspect is squarely covered by the latest decision of the Supreme Court in Pradeshiya Industrial and Investment Corporation of U.P.'s case [1994] 79 Comp Cas 835 as we have already seen earlier. 35. It must, therefore, be held that even this aspect also has to be prima facie considered by the learned company judge before deciding to admit and advertise the petition. This leaves out one contention submitted for our consideration by learned counsel for the petitioning creditors. Mr. Jayaram and the other learned counsel toeing his line, submitted that wherever a prima facie enquiry is contemplated in this connection, it is expressly provided for by the Legislature as found in section 439, sub-section (8) read with rule 97 of the Rules, that in the case of a petition moved by a contingent creditor of the company for winding-up of the company, the court has to consider whether leave should be granted for admission of the petition which would necessarily imply pre-advertisement consideration and the court has to consider whether there is a prima facie case for winding up the company. It is also true that neither under section 433 nor under rule 96 is there a similar provision in the case of winding-up petitions moved by petitioning creditors who allege to be existing creditors. But in our view, that would make no difference as in the case of contingent creditor, he could not even maintain the petition, if leave is not granted by the court and at that time, he must show that there is a prima facie case to admit the petition for the scrutiny of the court. But in a case where the petitioning creditor claims that he is an existing creditor, there is no question of obtaining leave of the court. It is also to be kept in view that in the case of a contingent or prospective creditor, his petition will not be registered till leave is granted. Such is not the case for a petition by an alleged confirmed creditor. Thus, both these types of creditors form separate classes and hence procedural provisions for granting leave under section 439(8) would stand entirely on a separate footing. Even otherwise, this aspect pales into insignificance on account of the judicial interpretation of the scheme of the Act and the Rules as authoritatively made by the Supreme Court in the aforesaid catena of decisions. It must be held that even in the case of a petition by an alleged confirmed creditor, an enquiry about the prima facie case, namely, that the petitioning creditor is competent to maintain the petition and that a prima facie case is made out for winding-up, has to be gone into, even prior to admitting and advertising the petition, especially in the case of companies which are going concerns. It is also to be appreciated that if any different view has to be taken on the scheme of the Act and the Rules in the case of a petition under section 433(e) moved by the existing creditors as contradistinguished from petitions moved by contingent and prospective creditors as per section 439(8), such a distinction cannot be countenanced in the light of the authoritative pronouncement of the Supreme Court in Pradeshiya Industrial and Investment Corporation of U.P. [1994] 79 Comp Cas 835. It is true that this aspect of the matter was not pressed in service before the Supreme Court in that case. But that will have no effect on the binding nature of the ratio laid down by the Supreme Court, in that case, wherein it has been clearly indicated that a company court before admitting and advertising the petition has to undergo the gamut of exercise for finding out a prima facie case on the

relevant issues, for admission and advertisement of the petition. Consequently, our answer to the first question is to the effect that before admitting and advertising the winding-up petition under section 433(e) of the Companies Act against a company which is a going concern, the company court, in a summary enquiry after hearing the petitioning creditor and the company on notice, will have to arrive at prima facie findings on the following aspects : (i) Whether the petitioning creditor is a creditor to whom the company owes an ascertained sum of money or substantially ascertained sum of money. (ii) Whether the said debt is within limitation. (iii) Whether the defence of the company is valid or bona fide or whether it is a mere moonshine. The aforesaid three points will have a direct bearing on the competence of the petitioning-creditor to maintain such a petition. (iv) Whether from the material on record at this stage, a presumption arises that the company is unable to pay its debts as contemplated under section 434(1)(a) or (b), as the case may be; or (v) Whether from the material on record the court is prima facie satisfied that the company is commercially insolvent as contemplated under section 434(1)(c). 36. In this connection, we may note one submission of Mr. Jayaram for the petitioning creditor. He submitted that if the latter aspect is to be kept in view and gone into at the initial stage prior to admission or advertisement, it will be almost impossible for the company to demonstrate to the court as to how it is not commercially insolvent or whether its total assets are not insufficient to meet all its liability, actual and contingent, as the other creditors will not be in the picture still and they will come into the picture only after advertisement. We fail to appreciate how this difficulty can at all be held insurmountable. The company court, in this connection, will consider the materials supplied by the petitioning creditor and further evidence if any, which the company court wants the petitioning creditor to supply. Similarly, the company court will examine the evidence led by the respondent-company at the notice stage. The balance-sheet also will be one of the materials which can be kept in view and on assessment of the evidence led by the petitioning creditor and the contesting company if the company court comes to a finding that the company prima facie appears to be commercially insolvent, a rebuttable presumption would arise under section 434(1)(c) that the company is unable to pay its debts. Then admission and advertisement can follow. Of course, at the trial stage the company can still show or other creditors or contributors can show that such a presumption has got to be rebutted by the evidence then existing on record and, therefore, it is not a case for winding-up of the company. Therefore, this argument of despair on the part of learned counsel for the petitioning creditor cannot be accepted. However, so far as this preliminary enquiry is concerned, we may add a rider that in the case of companies which are defunct companies and they are found to be such by the evidence led by the petitioning creditor at the time of filing of the petition or subsequently before an order of admission and advertisement is passed, this preliminary enquiry of summary nature will be confined only to the evidence supplied by the petitioning creditor with a view to finding out whether any ascertained amount is due by the company to the petitioner and whether it is within time and that it is not paid despite their having no valid excuse, but on account of the fact

that the company is in financial doldrums. Then a presumption under section 434(1)(c) would arise to entitle the petitioning creditor to request the court to straight-away admit and issue advertisement of the company petition. Even there may be material led by the petitioning creditor from which such a presumption may arise as per section 434(1)(a) or (b), in all such cases the petition could be admitted and advertised even without issuing notice to such company. In such a case, no harm to the company will ensue because the company is already defunct as discussed in the earlier part of this judgment. Our answer to the aforesaid first question will therefore, be, as indicated hereinabove. 37. Question No. 2. - That takes us to the second question as to the nature of the order to be passed by the learned judge while admitting and advertising the company petition after holding such a summary enquiry on the relevant aspects, as detailed by us hereinabove. As the enquiry is a summary enquiry it has to be held in the case of a defunct company after hearing only the petitioning creditor and looking at his evidence and in the case of a going concern sought to be wound up after hearing the company considering its objections and the evidence offered by it at that stage and as the findings to be reached are only prima facie findings which would not finally conclude the matter one way or the other for the subsequent stages as discussed earlier, the reasoning to be adopted by the learned company judge may not be as detailed as the reasoning required while passing the final orders of winding up on all the evidence at the stage of trial. But still, the order should be sufficiently speaking to enable any one who reads it to get an idea as to what weighed with the learned company judge for arriving at those prima facie findings on the available evidence at that stage and how the learned judge had weighed the evidence for coming to his prima facie findings. It has to be appreciated that the orders of admission and advertisement are appealable orders. Therefore, when they are carried in appeal, the appellate court would also be assisted by looking at the reasons for supporting the findings reached by the learned judge on the relevant evidence on record at that stage. This can also enable the appellate court to find out whether the order suffers from any flaw or not. It is, therefore, held that an order in such a summary enquiry has to be speaking adequately if not exhaustively, in connection with the prima facie findings reached on the relevant points posed for the consideration of the court at that stage and the line of reasoning adopted by the court for appreciating the relevant evidence on these points. Question No. 2 is, therefore, answered accordingly. 38. In the light of the aforesaid discussion and our conclusions on questions Nos. 1 and 2 our final conclusions are as under : Final conclusions : 39. I. When a winding-up petition is filed seeking the winding-up of a company under section 433(e) of the Act, if, from the material available on record as reflected by the petition and/or by any further evidence supplied by the petitioning-creditor, it appears that the respondent-company is a defunct company which has closed its shutters since quite some time and its commercial manufacturing activities have come to a grinding halt, the court after hearing the petitioning creditor, may come to a tentative finding on the following aspects : (a) that there is an ascertained or substantially ascertained amount of debt due from the respondent-company to the petitioning creditor;

(b) that the said debt is not barred by time, and then on the basis of the material on record especially in the light of the situation of doldrums in which the respondent-company is found, the court may admit the petition and order advertisement of the petition even before issuance of notice to the company. II. When a winding-up petition is filed seeking the winding-up of the company under section 433(e) of the Act and from the material available from the petition and any other additional material which the court may require the petitioning creditor to furnish if it is found that the respondent-company is a going concern and its commercial-cum-manufacturing activities are not suspended or are only temporarily suspended and it is employing a number of workmen, then before admitting and advertising the petition, the following procedure is required to be adopted by the court : (a) The court may hold a summary enquiry, after issuing notice to the respondent-company, giving it an opportunity to file its objections to the proposal for winding-up, for ascertaining the following facts and for arriving at prima facie findings thereon; (i) whether any debt is due from the respondent-company to the petitioning creditor; if yes, what is the amount of such debt ? (ii) whether the said debt due to the petitioning creditor is within limitation and is payable by the company and its defence is debt valid but mere moonshine and not a substantial one; (iii) whether the company is unable to pay the said debt and all its other debts. (b) For arriving at prima facie findings on point numbers (a)(i) and (a)(ii), the court, while holding a summary enquiry, will hear the petitioning creditor and the respondent-company, and will consider whatever evidence is offered by them in support of their respective cases. Such a summary enquiry need not be a detailed enquiry like a trial but it would be an enquiry for the purpose of finding out whether a prima facie case is made out by the petitioning creditor on the aforesaid two aspects. Ordinarily, in such summary enquiry whatever documentary evidence is offered by both the sides would be sufficient. But, in exceptional cases, if the court so feels necessary even oral evidence can be permitted to be led by the contesting parties. The findings arrived at in such summary enquiry would be prima facie and tentative in nature and can be re-examined in greater detail at the stage of trial of the petition if required and found necessary. We may, however, add a rider. Even in the case of a company which is a going concern, if the court finds after hearing the petitioning creditor and the evidence led by it that there is an ascertained amount of debt which is due by the company to the petitioning creditor and such a debt is not time-barred and that presumption arises under section 434(1)(a) or (b) that the company is unable to pay its debts, then in such a case, the court may admit the petition ex parte without issuing notice to the company. However, as the company is a going concern, before ordering advertisement, a notice has to be issued to such a company for deciding whether the petition deserves to be advertised or not even after the admission order is passed ex parte against the company in the aforesaid circumstances. (c) For arriving at a prima facie finding on point No. (a)(iii) in the aforesaid summary enquiry, the court may also go into the question at least prima facie as to whether the respondent-company is deemed to be unable to pay its debts on account of facts that may emerge on the record of such summary enquiry for

bringing the company within the fold of the deeming fiction envisage by section 434(1)(a) and/or section 434(1)(b) of the Act. If such a deeming fiction is found to arise in the light of the evidence available on record during such preliminary enquiry, then in the light of the tentative findings reached by the court on issues (a)(i) and (a)(ii) and also keeping in view such a deeming fiction that may have arisen on record for arriving at a prima facie finding on point No. (a)(iii) the court may admit the petition and direct the issuance of advertisement of the company petition. (d) However, for arriving at a prima facie finding on point No. (a)(iii), if it is found to be a case where there is no evidence at the stage of such preliminary enquiry about raising of deemed fiction under section 434(1)(a) and or (b), then the court may also enquire, of course prima facie, as to whether there is scope for raising the deeming fiction as contemplated under section 434(1)(c). For that purpose the court may look into the evidence led on record by the petitioning creditor as well as by the company and try to assess in a summary way as to whether the company is prima facie shown to be commercially insolvent as contemplated under section 434(1)(c). If the court arrives at a tentative prima facie finding about commercial insolvency of the respondent-company then the respondent-company would be deemed unable to pay its debts including the debt of the petitioning creditor and then, in the light of the tentative findings on points Nos. (a)(i) and (a)(ii) and keeping in view such a deeming fiction arising under section 434(1)(c) the court may admit and advertise the petition. It is made clear that the aforesaid exercise of arriving at a prima facie finding on points Nos. (a)(i), (a)(ii) and (a)(iii) by the court at the preliminary stage before admitting and advertising the petition will be undertaken after considering the rival versions of the petitioning creditor and the company and they would be purely tentative and prima facie findings which can be re-examined if the need arises in greater detail at the stage of trial of the company petition before passing the final order of winding up, if any, after hearing the rival parties including the parties that might have appeared at the stage of trial pursuant to the advertisement. We, however, make it clear that the prima facie nature of a summary enquiry before admission or even after admission and before advertisement would be for arriving at findings on the aforesaid points in a summary manner. It is also clarified that for arriving at such prima facie findings on the aforesaid points after the summary enquiry, as indicated above, it is not necessary for the court to write a detailed order like a final judgment but the order of the court should be sufficiently speaking so as to enable anyone who reads the order to find out as to what were the reasons which weighed with the court for arriving at the said prima facie findings. Such a reasoning must at least briefly indicate the view of the learned judge on the concerned evidence led by the respective parties on these points and how the court has weighed the same. The referred questions in all the concerned company petitions will stand answered accordingly. 40. So far as O.S.A. No. 19 of 1993 is concerned, as it arises from an order of admission and advertisement of the petition, it becomes necessary for us to find out whether the order under appeal can be sustained or not. The said order dated December 22, 1993, in Company Petition No. 34 of 1993 shows that an agreement was entered into between the petitioning credi-

tor and the respondent-company for appointment of the petitioning creditor as consolidator and break bulk agent for the purpose of imports and exports of the air cargo in their respective countries on September 10, 1987. Transactions between the petitioner and the respondent took place between September 10, 1987, to the end of June, 1990, by sending air and sea freight on pre-paid basis. In paragraph 2 of the order, the learned judge has not to the allegations in the petition. In para 3, as usual notice was ordered regarding admission and advertisement. Thereafter, the respondent has filed statement of objections. Then follows para 4 which is only the material paragraph indicating reasons which weighed with the learned judge. The learned judge has perused all the said objections and correspondence and the respondent's dispute regarding the claim of the petitioner for payment as demanded long after the transaction came to an end in June, 1990. The learned judge has further observed that the matter needs investigation. It cannot be said that there is no case for admission or advertisement of the petition in the light of the decision in National Conduits (P.) Ltd. v. S. S. Arora . The objections raised by the respondent can be decided after admission and advertisement. 41. With respect, the aforesaid reasoning adopted by the learned single judge runs counter to the procedure laid down by us hereinabove in connection with winding up petitions under section 433(e) of the Act. There is no prima facie finding by the learned judge after considering the entire evidence led by the petitioning creditor and the respondent company at this stage, as to whether any debt is due from the company to the petitioning creditor, if yes, what is the amount of debt due, whether it is barred by time or not, whether the defence of the company is not bona fide or is moonshine or invalid, and whether the petitioning creditor prima facie shows that the company is unable to pay its debts. In other words, whether prima facie it is shown to be commercially insolvent. We have to keep in view that the company is a going concern. Therefore, the procedure laid down by us by way of summary enquiry in such cases for reaching findings on the relevant aspects has to be undergone before any order of admission and advertisement can be passed by the learned company judge. As this is ex facie not done, the impugned order runs counter to the procedure to be followed in such a case as laid down by us hereinabove. Only on this short ground, this O.S.A. will have to be allowed. The order passed by the learned company judge in Company Petition No. 34 of 1993 is set aside. The learned judge is requested to reconsider the question whether the company petition requires to be admitted and advertised keeping in view the observations regarding proper enquiry to be carried out in such a petition for winding up of a company which is a going concern, as detailed hereinabove. 42. There will be no order as to costs in this appeal. We make it clear that we make no observations on the merits of the controversy between the parties on these relevant issues which will have to be gone into at least prima facie by the learned single judge in the preliminary summary enquiry in the present case before deciding whether the petitions deserve to be admitted and advertised. 43. As O.S.A. No. 19 of 1993 is allowed only on this limited point of procedure, it is not necessary to consider I.A. 2 for vacating stay and I.A. 4 for production of documents as I.A. 2 would not survive as the order under appeal is set aside. I.A. 4 regarding

production of documents may be placed for consideration of the learned single judge in the ensuing summary enquiry pursuant to the present order.