lawyers had an opportunity to disclose the true facts: first when the objection was raised in the form of preliminary objections in the written statement of respondent No. 3 that no such notice was given; secondly when the same matter was mentioned by the respondent in civil miscellaneous application (C.M. 2384/67) and thirdly, when this Court had given directions by its order, dated 11th October, 1967. Final opportunity could have been availed of at the time of the hearing of the arguments on October 27 and 30, 1967. Neither any affidavit of the advocate nor of his client was filed, nor did the former make any statement at the bar. On the facts and circumstances of this case, no other conclusion is possible than that the averment, that "in accordance with rule I-A, Chapter 4-F(b) of the Rules and Orders of the High Court, Volume V, notices were duly served upon the respondents giving them 5 clear days" is not true, and that no such notice was sent to or received.

I find no extenuating or mitigating circumstance in this case. Courts are entitled to expect *uberrima fides*—most perfect good faith, from those coming to its portals seeking relief, and they include the litigants as well as the lawyers. Conduct which is in the nature of a sharp practice or fraud upon the Court is contemptuous in the extreme, and is liable to be visited with grave consequences. I have given the matter anxious consideration. I am taking a lenient view in the expectation, that making of false averments would not be repeated, and if it recurs, the persons responsible shall not go unpunished. I hope this warning will suffice. I will, therefore, content myself by striking down the writ petition. All orders made by the Naib-Tehsildar, Abohar, respondent No. 5, or changes or corrections made in the *khasra girdawaris* subsequent to the filing of the writ petition are quashed.

In the result, the writ petition is dismissed with costs.

R. N. M.

LETTERS PATENT APPEAL

Before Mehar Singh, C. J. and R. S. Narula, JJ.

THE LAKSHMIJI SUGAR MILLS COMPANY PRIVATE LIMITED,—

Appellant

versus

THE NATIONAL INDUSTRIAL CORPORATION LIMITED,—

Respondent

L.P.A. No. 282 of 1965

November 28, 1967

Companies Act—(I of 1956)—Ss. 433 (e) and 434 (1)(a)—Winding up of a company under—When to be ordered—Company—When considered to be un-

able to pay its debts—Filing of suit to recover the debt which formed basis of winding up petition—Whether good defence to winding up petition—"Liability"—Meaning of—Discretionary order declining to wind up a company—When to be interfered with in appeal.

Held, that the following are the propositions for the winding up of a company under section 433(e) read with section 434 (1)(a) of the Companies Act, 1956:—

(i) A financially solvent company which is factually in a position to pay all its debts may nevertheless incur liability to be wound up by an order of the Court under section 433 (e) of the Act if the creditor concerned is able to bring the case squarely within the four corners of clause (a) of sub-section (1) of section 434.

(ii) If a debtor-company fails or refuses to pay the amount of an admitted debt which was neither due for payment on the date of the insolvency notice nor due at any time within three weeks from the date of service of such a notice, the company cannot be held to have neglected to pay the debt within the meaning of clause (a) of sub-section (1) of section 434 as the expression "then due" in that provision has reference in point of time to the time of service of the notice referred to therein.

(iii) A debt about the liability to pay which, or about the liability to pay which at the time of the service of the insolvency notice, there is a *bona fide* dispute is not "due" within the meaning of section 434(1)(a) and non-payment of the amount of such a *bona fide* disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under section 433(e) read with section 434(1)(a) of the Act.

(iv) In a winding up petition under section 433(e) read with section 434(1)(a) of the Act, it is not by itself a sufficient defence for the debtor-company to plead that the creditor has already filed a suit in a competent civil Court for the recovery of the amount of the debt in dispute.

(v) Though a winding up petition is a perfectly proper remedy for enforcing the payment of a just debt, the remedy is an equitable one and the passing of a winding up order under section 433 of the Act is itself in the sound judicial discretion of the Court. An order under that provision cannot be claimed *ex-debito justitiae* or as of right.

Held, that the word "liability" is the genus of which "deposit" and "loan" are merely two amongst other species. Whether a particular liability partakes of

the nature of a deposit or not depends on the facts and circumstances of a given case. It is neither easily possible nor proper to lay down any conclusive tests for determination of the fact whether a particular amount due to a creditor is or is not in the hands of the debtor "a deposit". At the same time it is clear that "a loan" and "a deposit" are not nece ssarily mutually exclusive. A deposit is not confined to a bailment of specific currency to be returned in specie. Nor does a deposit necessarily involve the creation of a trust, though it may certainly involve the creation of the relationship of a debtor and a creditor. One distinction which is also noticed in the schedule to the Limitation Act is that whereas a deposit which is not for a fixed term does not impose an immediate obligation on the depositee to seek out the depositor and repay him, a legal duty is enjoined on a debtor, in the absence of a stipulation to the contrary, to seek the creditor. Whereas time under the Indian Limitation Act for instituting an action for recovery of the amount of a deposit does not normally run from any date prior to the one on which a demand for the payment is made, limitation for filing a suit for an amount which is due otherwise than as a deposit, commences from the day when the payment becomes due under the various relevant articles in the schedule to the Limitation Act.

Held, that in a statutory appeal against a discretionary order such as the one declining to wind up a company under section 433 of the Act, interference is not normally justified unless the appellate Court is satisfied that the Court below has not exercised its discretion according to sound judicial principles.

Letters Patent Appeal under Clause 10 *of the Letters Patent of the Punjab High Court, read with Section* 483 *of the Companies Act,* 1956, *against the order of the Hon'ble Mr. Justice Harbans Singh, dated 2nd August,* 1965, *in C.O.* 8/1964.

Bhagirath Das and Hirajee, Advocates, for the Appellants.

B. R. Tuli, Senior Advocate with S. S. Mahajan, Advocate, for the Respondent.

JUDGMENT

Narula, J.—This is an appeal under clause 10 of the letters Patent against the judgment of a learned Single Judge of this Court whereby the prayer of the appellant for winding up the respondent-company under section 433(e) read with section 434(1)(a) of the Companies Act (1 of 1956) (hereinafter called the Act) was declined on the ground that there was a *bona fide* dispute about the liability of the respondent-company to pay the amount

of the debt on the date of service of the insolvency notice. The brief facts which have led to the filing of this appeal may first be surveyed.

The appellant was incorporated as a private limited company in Delhi. The promotors of the company included Ram Rattan, Ramji Das and Parshotam Pershad. The company now owns two sugar mills, one in Maholi, district Sitapur and the other in Bilari district Moradabad. The respondent-company was incorporated in 1942. Its promotors included Ram Rattan and Ramji Dass. Still another company, Seth Brothers, Private Limited, had come into existence Ram Rattan and Parshotam Pershad abovenamed were the Directors of the company. Seth Brothers, Private Limited were appointed as Managing Agents of the respondent-company. The managing agency agreement, which has not been placed before us, entitled the Managing Agents to certain remuneration. Most of the Directors of the three companies were either common or related to each other.

The amount of remuneration and certain amount on account of the value of the redeemed shares due from the respondent-company to the Managing Agent company had not been drawn by the latter, but were placed to the credit of the Managing Agent company in the books of the respondent-company. The interest accrued due on the said amounts was also credited to the Managing Agent company's account with the respondent-company from time to time. In the books of the respondent-company as on April 30, 1963, a sum of more than Rs. 2,17,000 was shown as to the credit of the Managing Agent company as arrears of remuneration, etc. The Managing Agent company was in turn indebted to the appellant-company for a sum of over Rs. 8,00,000. On April, 30, 1963, the Managing Agent company transferred to the appellant-company in part-payment of the Managing Agent company's debts a credit of Rs. 216,122.37 out of the amount due to it from the respondent-company,—*vide* voucher Exhibit P. 25 of the respondent-company. In the books of the respondent-company the aforesaid amount was debited to the Managing Agent company and credited to the account of the appellant-company. The assignment of this debt was accepted by the appellant-company's resolution Exhibit P. 6, dated July 13, 1963, in the meeting of the Board of Directors of the appellant-company in which Ramji Dass, who is leading the contesting group, was himself present. It was noted in the resolution, Exhibit P. 6

that the sum of Rs. 2,16,122.37 P., had been received from Seth Brothers, Private Limited in the abovesaid manner. It is not disputed that this transaction took place at the time when disputes had arisen between the various Directors of the companies and that one group was led at that time by Ram Rattan and Kishori Lal and the other by Ramji Dass, though control of the appellant-company as well as of the respondent-company was in the hands of the group of Ram Rattan at that time.

On October 15, 1963, the appellant-company gave notice Exhibit P. 7 through the appellant's advocate demanding a sum of Rs. 2,38,458.82 P., due from the respondent-company as on September 20, 1963, including the debt of the respondent-company transferred to the appellant-company by Seth Brothers, Private Limited. The notice was specifically stated to be under section 434 of the Act and required the respondent-company to pay the sum due within a period of three weeks of the receipt of the letter failing which proceedings under section 433 of the Act were threatened. The respondent-company admittedly received the notice and even sent a reply, dated October 17, 1963. No copy of the reply has been placed on the record of this case by either of the parties. On receipt of the reply; the matter was put up before the Board of Directors of the appellant-company in its meeting held on October 18, 1963. Seth Ramji Dass himself was present in the meeting. A copy of the resolution passed by the Board of Directors of the appellant-company on that day (Exhibit P. 8) shows that the Board confirmed the insolvency notice, Exhibit P. 7 and noted the reply of the respondent-company, dated October 17, 1963, and also made note of the fact that Seth Ramji Dass opposed the action contemplated under section 434 and suggested that a period of two years be given to the respondent-company, but that the Board did not agree to this suggestion and it was resolved that an application as stated in the notice be moved in the High Court. Admittedly, no part of the amount demanded in the notice was paid by the respondent-company to the appellant-company.

It was in the above circumstances that the appellant on March 10, 1964, filed a petition for winding up of the respondent-company under section 433(e) of the Act on the ground that the respondent-company was unable to pay its debts. The petition was contested by a group of shareholders led by Ramji Dass. During the pendency of the petition a general meeting of the respondent-company was held under supervision of the Court in December,

1964. In the election of the Board of Directors by the respondent-company held on that occasion, Ramji Dass got into power and control of the respondent-company. In the balance-sheet of the respondent-company as on March 31, 1964, passed in the said meeting, a sum of Rs. 2,80,978.51 P. (which admittedly included the amount of debt transferred to the appellant-company by Seth Brothers, Private Limited) was shown to be payable to the appellant-company which was described in the balance-sheet as "an associate of Managing Agent". After the general meeting held in December, 1964, the respnodent-company itself also came into the field and contested the petition for winding up. On behalf of the respondent-company it was not denied that a sum of Rs. 2,16,122 odd which had been purported to be transferred by the Managing Agents from their credit account in the respondent-company to the appellant-company was in fact due to the Managing Agents. The position of the respondent-company was that under a certain agreement to which all the Directors of the Managing-Agent company were parties, the Managing Agents could not claim the amount in question from the respondent-company till 1967, and that, therefore, the alleged transfer of the amount by the Managing Agents to the appellant-company was *mala fide* and collusive. It was further alleged that the appellant-company being an associate of the Managing Agents (as admitted in balance-sheet, Exhibit R. 1/3 of the respondent-company) got this transfer with the full knowledge that the Managing Agents could not have recovered the amount of the debt at that time, The case of the respondent-company was and continues to be that the respondent-company had taken a loan of Rs. 4,50,000 from the Uttar Pradesh Financial Corporation which was repayable in instalments, the last being due in 1967, and that clause 22 of the agreement entered into between the Finance Corporation and the respondent-company provided as follows :—

> "The company (respondent) shall not during the currency of loan (loan taken from the Finance Corporation) repay or allow to be withdrawn any amounts now deposited, or hereafter to be deposited with it by the Directors, Managing Agents, or Selling Agents in their own names or in the names of their family members, by any other persons or parties so as to reduce the total amount of such deposits to less than Rs. 4,50,000."

By his judgment, dated August 2, 1965, the learned Liquidation Judge has proceeded to dismiss the petition for winding up on the

ground that there was *bona fide* dispute as to the liability of the respondent-company to pay the amount mentioned in the insolvency notice on the date of the receipt of the notice, and that in the presence of a *bona fide* dispute it could not be held that the respondent-company had neglected to pay the amount claimed in the notice, within the meaning of clause (a) of sub-section (1) of section 434 of the Act. Not satisfied with the judgment of the learned Single Judge, the appellant-company has come up in appeal.

Mr. Bhagirath Dass, the learned counsel for the appellant-company, has fairly and frankly conceded that his clients' case under clause (e) of section 433 is confined to the allegations relevant to clause (a) of sub-section (1) of section 434, and that it is not his case that the respondent-company is otherwise unable to pay its debts as referred to in clause (c) of sub-section (1) of section 434. He has also conceded that the debt for the non-payment of which the claim for winding up is being pressed is confined to the amount which was the subject-matter of transfer by the Managing Agents to the appellant-company. The learned counsel for the appellant-company has also not questioned the proposition that if there is in fact a *bona fide* dispute about the liability of the debtor-company to pay the amount claimed in the insolvency notice on the date when the said notice is served, no order for winding up can be passed on the ground covered by section 434(1)(a) as the company cannot in those circumstances be held to have neglected to make payment. The only question pressed by the learned counsel for the appellant-company in the above circumstances was that the finding of the learned Single Judge to the effect that the debt in question was *bona fide* disputed is not correct.

Mr. Bhagirath Dass submitted by placing reliance on a Division Bench judgment of the Calcutta High Court in *Bengal Silk Mills Co.* v. *Ismail Golam Hossain Ariff* (1), that since the balance-sheet Exhibit R.W. 1/3 of the respondent-company which was passed in the general meeting of the respondent-company held in December, 1964 (during the pendency of the winding up petition) showed the amount in dispute as a debt owed by the respondent-company to the appellant-company, it amounted to a conscious and voluntary

(1) A.I.R. 1962 Cal. 115.

admission of the respondent-company about the liability in question. There is no quarrel with the proposition of law laid down by the Calcutta High Court, though what was being considered in the case of *Bengal Silk Mills Co.* (supra) was whether such an admission contained in the balance-sheet of a company amounted to an acknowledgement within the meaning of section 19 of the Limitation Act, 1908, or not. Even at the hearing of the winding up petition before the learned Single Judge the respondent-company did not deny its liability to pay the amount shown to be due from it to the appellant-company in the respondent-company's balance-sheet. The only dispute raised in this respect at the trial of the petition from which the present appeal has arisen was that the amount in question was not due and recoverable on October 15, 1963, when the insolvency notice, Exhibit P. 7 was issued by the appellant-company. Clause (a) of sub-section (1) of section 434 of the Act applies only to a case where the company neglects to pay the sum which is due from it to the creditor who serves the notice in question on the company on the date of service of the notice. This is apparent from the words "then due" qualifying the phrase "the company is indebted in a sum exceeding Rs. 500". If the sum exceeding Rs. 500 is not due at the time of the service of the insolvency notice and the company neglects to pay the same or to secure or compound the debt, the case does not fall within the mischief of section 434(1))(a). In order to invoke the provisions of that clause, the creditor has to show, amongst other things that the appropriate debt in question was due at the time of the service of the notice. The acknowledgement said to be contained in the balance-sheet Exhibit R.W. 1/3 does not, in my opinion, amount to an admission to the effect that the amount in question was recoverable on October 15, 1963. Even if the entry in the balance-sheet can possibly be construed as showing that the amount was recoverable on the date when the balance-sheet was passed (a proposition to which I am not prepared to subscribe without further deliberation) it cannot possibly be construed to convey that the amount was due about fourteen months before the passing of the balance-sheet, i.e., on October 15, 1963. There is another aspect of looking at this matter. If clause 22 of the agreement executed between the respondent-company and the Finance Corporation (to which agreement the Managing Agents were admittedly a party) stood in the way of the Managing Agents' claiming the amount in question before 1967, the infirmity which is attached to the debt due by the respondent-company to the Managing Agents would continue to be

attached to the debt even after its transfer in favour of the appellant-company and the Managing Agents could not possibly have conveyed to the appellant-company better rights than those possessed by themselves.

These circumstances take us straight to the consideration of the crucial question involved in this case, i.e., whether the debt in question owed by the respondent-company to the Managing Agent company was a "deposit" within the meaning of clause 22 of the agreement in question or not. Mr. Bhagirath Dass tried to urge that in addition to the fact that the amount in question in the hands of the respondent-company was not in the nature of a deposit, the debt would also not be covered by clause 22 because there was nothing to show that by payment thereof the liability of the respondent-company to the Managing Agents, etc., would be reduced below Rs. 4,50,000 which was the second condition precedent for taking shelter behind clause 22. Mr. B. R. Tuli, took serious objection to the second part of the argument being allowed to be raised on the ground that no such question was argued before the learned Single Judge. When, however, the attention of the learned counsel for the appellant was drawn to the following passage in the judgment of the learned Single Judge, counsel realised that the second argument sought to be advanced was not available to him :—

> "It is further not disputed that at no time the deposits in the hands of respondent-company exceeded Rs. 4,50,000."

In this situation the counsel for the appellant-company confined his argument to the question whether the arrears of remuneration due from the respondent-company to its Managing Agents which were left in the hands of the respondent-company placed to the credit of the Managing Agents in the books of the respondent-company can be said to partake of the character of "any amounts-deposited"..... Mr. Bhagirath Dass argued that the amount in question in the hands of the respondent-company was a liability or a loan and not a deposit. *Prima facie* it does not appear to be possible to agree with this contention. "Liability" is the genus of which at least two species are (i) loan and (ii) deposit. The respondent-company has not disputed that the payment of the amount in question is liability on it. It is not correct for the appellant-company to submit

that the liability in question could be classed as a loan. A loan necessarily implies the subject-matter of something which has been lent by the creditor to the debtor, something which has been received from the lender. It is nobody's case that the respondent took the amount in question from the Managing Agent company as a loan. At the same time the mere fact that the liability in question is not for payment of a loan, would not automatically mean that the amount in question in the hands of the respondent-company is necessarily of the nature of a deposit. "Deposit" is not a word of art. Mr. Bhagirath Dass submitted that "deposit" necessarily implies money in question being given by the depositor to the depositee We do not think that this is a conclusive test. A person may give the money for safe custody or for earning interest to a banker. It would be his deposit. If the amount is deposited for earning interest and the bank credits the amount of interest to the depositor's account, the amount so credited as interest would also be a part of the deposit though that particular amount had never been handed over by the depositor to the bank. If there was an arrangement between the respondent-company and Seth Brothers Private Limited that the remuneration payable from the former to the latter should not be paid out but should remain in deposit with the respondent-company to earn interest for the Managing Agents, the amount would necessarily partake of the nature of a deposit. The managing agency agreement has not been placed before the Court. Nor is there any evidence before us, one day or the other, to show the circumstances in which the amount of remuneration due to the Managing Agents remained in deposit with the respondent-company and continued to earn interest, but was not paid out.

Fry, L.J. in *Howe* v. *Smith* (2), at page 101 observed that "money paid as a deposit must, I conceive, be paid on some terms implied or expressed". It was further observed in that case that the terms most naturally to be implied in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer, it shall remain the property of the payee. In *(Nawab Major Sir) Mohammad Akbar Khan* v. *Attar Singh and others* (3), it was observed while distinguishing a loan from a deposit that it should be remembered that the two terms are

(2) L.R. 27 Ch. D. 89.
(3) A.I.R. 1936 P.C. 171.

not mutually exclusive and a deposit of money is not confined to a bailment of specific currency to be returned in specie. It was further held by Lord Atkin in the aforesaid case that a deposit did not necessarily involve creation of a trust, but may involve in it the creation of the relationship of a debtor and creditor. The most obvious distinction to which the Privy Council referred in this connection was that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. The depositee is to keep the money till asked for. The demand by the depositor would, therefore, seem to be a normal condition of the obligation of the depositee to repay in the absence of any other terms of agreement between the depositor and depositee. Keeping in view the object of clause 22 of the agreement between the respondent-company and the Finance Corporation, i.e., not to allow Directors or Managing Agents of the respondent-company to draw the moneys due to them till the amount of the Finance Corporation is paid out and also keeping in view the fact that the management of the respondent-company was itself in the hands of Messrs Seth Brothers, Private Limited, who could normally, if they wanted, draw out the remuneration due to them from time to time, and further that the amount in the hands of the respondent-company was earning interest in favour of the Managing Agents, it does appear that the argument of the respondent-company that the debt in question was in the nature of a deposit is not frivolous. We are not called upon to finally pronounce on this aspect of the case. All that we are concerned with is to answer the question whether the dispute regarding the debt not being payable on October 15, 1963, is of such a frivolous nature as cannot be called *bona fide* or if the debt in question can be treated as "*bona fide*" disputed one because of the abovesaid controversy. For the reasons already assigned we are inclined to think that there was in fact a *bona fide* dispute as to the fact whether the amount in question was payable by the respondent-company to the Managing Agents on the date of the insolvency notice, i.e., on October 15, 1963, or not; and that the learned Single Judge was correct in observing that this was a matter which must be got settled between the parties by filing proper proceedings for the recovery of the debt and that winding up proceedings could not be utilised to achieve that purpose. It may be noticed here that the learned counsel for the appellant-company did not keep back from us the fact that the appellant-company has since filed a suit against the respondent-company for the recovery of the amount in

question which is pending in a competent Civil Court. We may not be understood to indicate from these observations that the filing of the suit has any legal effect on these proceedings. If in order to save the claim from getting barred by time or for any other reason the appellant-company has filed a suit for the recovery of the amount, that has no effect on the winding up petition, the fate of which rests on all the conditions of the statutory requirements of clause (a) of sub-section (1) of section 134 of the Act being satisfied.

Mr. Bhagirath Dass referred to the judgment of their Lordships of the Supreme Court in *Harinagar Sugar Mills Co. Ltd., Bombay* v. *M. W. Pradhan (now G. V. Dalvi) Court Receiver, High Court, Bombay* (4), to press the proposition that a winding up petition is a perfectly proper remedy for enforcing the payment of a just debt, and that it is a mode of execution which the Court gives to a creditor against a company unable to pay its debts. It is needless to go further into this matter as Mr. B. R. Tuli did not at all argue that the winding up petition was not maintainable as it was a mere device to recover the amount by a coercive process without having resort to the normal procedure of a civil suit. Subba Rao, J., (as he then was), did not in the case of *Harinagar Sugar Mills Co.* (supra) overrule or dispute the dictim of the Allahabad High Court in *W. T. Henley's Telegraph Works Co. Ltd., Calcutta* v. *Gorakhpur Electric Supply Co. Ltd., Allahabad* (5), to the effect that service of notice of demand of debt by a creditor on a solvent company did not entitle the creditor to a winding up order if the company *bona fide* disputed the existence of a debt. The learned Judge after referring to the judgment of the Allahabad High Court proceeded to hold that in the case before the Supreme Court there was no *bona fide* dispute as to the existence of the debt. The ratio of the judgment of the Supreme Court does not at all help in solving the controversy involved in the present case. It is settled law that in the case of existence of a *bona fide* dispute regarding the liability of the company in question to pay the debt on the date of the notice, non-payment of the same by the company does not amount to "neglect" to pay the amount within the meaning of clause (a) of sub-section (1) of section 434 of the Act. The basic case on which

(4) A.I.R. 1966 S.C. 1707.
(5) A.I.R. 1936 All. 840.

this branch of law is founded is *In re London and Paris Banking Corporation* (6).

Mr. Bhagirath Dass took exception to the observations in the judgment of the learned Single Judge to the effect that the transfer in quesion had been effected merely in order to bring pressure on the Ramji Dass group in connection with the dispute between the two groups. In the view we have taken of the dispute raised by the respondent-company about the liability to pay the amount of debt in question being *bona fide*, it is wholly unnecessary to travel into this controversy. For the reasons already recorded we entirely agree with the learned Single Judge that this is not a case where winding up can possibly be ordered under section 433(e) read with section 434 (1)(a) of the Act. Moreover, the learned Single Judge having exercised his discretion in refusing to pass a winding up order under section 433(e) which provision confers a discretionary jurisdiction, we cannot interfere with that order unless it could be shown to us that the discretion has not been exercised in accordance with sound judicial principles. Nothing of that kind has been shown in the present case.

It is, therefore, held that—

(i) a financially solvent company which is factually in a position to pay all its debts may nevertheless incur liability to be wound up by an order of the Court under section 433(e) of the Act if the creditor concerned is able to bring the case squarely within the four corners of clause (a) of sub-section (1) of section 434;

(ii) if a debtor-company fails or refuses to pay the amount of an admitted debt which was neither due for payment on the date of the insolvency notice nor due at any time within three weeks from the date of service of such a notice, the company cannot be held to have neglected to pay the debt within the meaning of clause (a) of sub-section (1) of section 434 as the expression "then due" in that provision has reference in point of time to time of service of the notice referred to therein;

(6) 19(1874) Equity cases 444.

(iii) a debt about the liability to pay which, or about the liability to pay which at the time of the service of the insolvency notice, there is a *bona fide* dispute is not "due" within the meaning of section 434(1)(a) and non-payment of the amount of such a *bona fide* disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under section 433(e) read with section 434(1)(a) of the Act;

(iv) the word "liability" is the genus of which "deposit" and "loan" are merely two amongst other species. Whether a particular liability partakes of the nature of a deposit or not depends on the facts and circumstaces of a given case. It is neither easily possible nor proper to lay down any conclusive tests for determination of the fact whether a particular amount due to a creditor is or is not in the hands of the debtor "a deposit". At the same time it is clear that "a loan" and "a deposit" are not necessarily mutually exclusive. A deposit is not confined to a bailment of specific currency to be returned in specie. Nor does a deposit necessarily involve the creation of a trust, though it may certainly involve the creation of the relationship of a debtor and a creditor. One distinction which is also noticed in the schedule to the Limitation Act is that whereas a deposit which is not for a fixed term does not impose an immediate obligation on the depositee to seek out the depositor and repay him, a legal duty is enjoined on a debtor, in the absence of a stipulation to the contrary, to seek the creditor. Whereas time under the Indian Limitation Act for instituting an action for recovery of the amount of a deposit does not normally run from any date prior to the one on which a demand for the payment is made, limitation for filing a suit for an amount which is due otherwise than as a deposit, commences from the day when the payment becomes due under the various relevant articles in the schedule to the Limitation Act;

(v) in a winding up petition under section 433(e) read with section 434(1)(a) of the Act, it is not by itself a sufficient defence for the debtor-company to plead that the creditor has already filed a suit in a competent civil Court for the recovery of the amount of the debt in dispute;

(vi) though a winding up petition is a perfectly proper remedy for enforcing the payment of a just debt as held by the Supreme Court in the case of *Harinagar Sugar Mills Co., Ltd.* (supra), the remedy is an equitable one and the passing of a winding up order under section 433 of the Act is itself in the sound judicial discretion of the Court. An order under the provision cannot be claimed *ex debito justitiae* or as of right;

(vii) in a statutory appeal against a discretionary order such as the one declining to wind up a company under section 433 of the Act, interference is not normally justified unless the appellate Court is satisfied that the Court below has not exercised its discretion according to sound judicial principles; and

(viii) on the facts of this case the debt is *bona fide* disputed.

No other point was argued before us in this case. The appeal accordingly fails and is dismissed though without any order as to costs.

MEHAR SINGH, C. J.—I agree.

K. S. K.

APPELLATE CIVIL

Before Tek Chand, J.

DALIP SINGH,—*Appellant*

versus

MST. KISHNO AND OTHERS,—*Respondents*

Regular Sesond Appeal No. 734 of 1965

November 29, 1967

Custom—Widow's estate—Surrender of—Principles governing the same stated—Widow retaining right of taking back land surrendered in case the reversioner fails to deliver stipulated quantity of grain for her maintenance—Whether amounts to surrender—Words and phrases—Surrender, Abandonment and Merger—Meaning of as distinguished from each other.