

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.08.2011

+ **CO. APP. 61/2005**

M/S NEHRU PLACE HOTELS LIMITED ... Appellant

Versus

M/S BHUSHAN LIMITED ... Respondent

WITH

+ **CO. APP. 62/2005**

M/S NEHRU PLACE HOTELS LIMITED ... Appellant

Versus

M/S BHUSHAN STEEL & STRIPS LIMITED ... Respondent

Advocates who appeared in this case:

For the Appellants : Mr Akhil Sibal with Ms Vidhi Goel and
Mr Deepak Khurana

For the Respondents : Mr N.K. Kaul, Sr Advocate with Mr Anil Airi and
Mr Ravi Krishan Chandan, Ms Sadhna Sharma and
Ms Srishti Jaisingh

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to
see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J

1. These appeals arise out of a common judgment dated 09.05.2005 delivered by the learned Company Judge in C.P. Nos.40/2004 and 41/2004, whereby the appellants' petitions seeking winding up of the respondents (Bhushan Limited in C.P. No.40/2004 and Bhushan Steel and Stripes Limited in C.P. No.41/2004) on the ground that the respondent companies were unable to pay their debts, were dismissed. The company petitions were founded on the basis of a compromise decree dated 19.12.1997 passed by a learned single Judge of this court, whereunder the respondents had agreed to make payments of recurring charges which included maintenance charges in respect of the common areas and common facilities. The plea of the appellant was that since the charges specified in the decree were not being paid by the respondents, it was apparent that they were unable or had neglected to pay their debts.

2. On the other hand, the respondents had taken the plea that though they had initially made payments of recurring charges in terms of the compromise decree, they had stopped making the payments at the rates demanded by the appellant inasmuch as the maintenance charges

were contrary to the provisions of the Delhi Apartment Ownership Act, 1986 as well as against public policy. It was claimed by the respondent companies that the compromise decree was a nullity and could not be enforced and, therefore, the non-payment of any amount thereunder could not be regarded as a debt payable by the respondent companies.

3. The learned Company Judge dismissed the winding up petitions after concluding that the respondent companies had raised a *bona fide* dispute with regard to the so-called debt, particularly in view of the mandatory provisions of the Delhi Apartment Ownership Act, 1986. The learned Company Judge has also taken the view that even though there was a compromise decree, the company court was entitled to go into the question as to whether there was or was not a *bona fide* dispute with regard to the debt which had allegedly remained unpaid. The learned Company Judge, thus, held that these were not cases where discretionary jurisdiction of winding up ought to be exercised. However, at the same time, it was observed that:-

“... to balance the equities it would be proper to give certain directions to the company inasmuch the company cannot be allowed to create a situation where it does not pay any maintenance charges at all. No doubt the petitioner is to render the accounts as well.”

Consequently, the learned Company Judge disposed of the company petitions as under:-

“42. These petitions are, therefore, disposed of with the following directions:

- (i) The company shall pay maintenance charges at *the rate* of Rs.29.03 per sq.ft. which were the charges agreed to in July, 1997. I am conscious of the fact that the company even thereafter paid increased maintenance charges after adding 8% / 9% every year till 2003, still I am restricting the payments, for time being, at Rs.29.03 per sq.ft. as the company claims *that it* has already paid huge amount in excess and the accounts are to be rendered by the petitioner.
- (ii) The petitioner, if rendition of accounts, is able to show that amount payable is more than Rs.29.03 per sq.ft.it would be entitled to make claim of further maintenance charges for the period in question.
- (iii) Both the parties would be at liberty to seek their civil remedies, namely, the petitioner for claiming the maintenance charges at enhanced rate, if justified on actual basis and the company for claiming rendition of accounts.”

4. The questions which arise for consideration in these appeals are:-

- a) Whether the company court can go behind a compromise decree in order to ascertain as to

whether a debt based on the same is legally enforceable or not and whether a *bona fide* dispute in respect of the debt can be raised notwithstanding the existence of a compromise decree ?

- b) Whether the recurring maintenance charges agreed to be paid by the respondent companies to the appellant in terms of the compromise decree are contrary to the provisions of the Delhi Apartment Ownership Act, 1986 ?
- c) Whether the impugned judgment of the learned Company Judge, particularly with regard to the nature of the debt and also the compromise decree, is binding on the civil court in the suits pending between the parties ?

5. Before we examine these questions, it would be appropriate to set out the necessary facts. The appellant is in the hotel business and one of its hotels is located at Nehru Place, New Delhi adjacent to which the appellant has also built up an International Trade Tower which houses several commercial establishments. The space has been sold to such establishments by the appellant. The respondent companies also entered

into 'lease' agreements dated 16.04.1993 and dated 17.04.1993, whereby the appellants were to eventually sell, transfer and convey the title of Flat Nos.109, 110, 111 and 112 altogether measuring 4000 sq. ft, situated in Block-F of the First Floor of the said Trade Tower to the respondent (Bhushan Limited). A similar arrangement was made with Bhushan Steel and Strips Limited in respect of Flat Nos.101, 102, 103, 104, 105, 106, 107 and 108 altogether measuring 8000 sq. ft., including the super built-up area situated in Block-F, First Floor of the said International Trade Tower, Nehru Place, New Delhi. The respondent companies had raised some disputes in 1994 and had instituted a suit against the appellant being CS(OS) No.1639/1994. The appellant had also filed a suit against the respondents being CS(OS) 1513/1995. Both the suits were compromised in terms of a compromise deed dated 17.12.1997. On 17.12.1997, the appellant entered into space buyer agreements with the respondent companies in respect of the said flats mentioned above, whereby the respondent companies purchased their respective flats and also acquired an irrevocable right to use certain parking spaces in terms of the said agreements.

6. By virtue of the space buyers agreements, the respondent companies were to make payments of the total sale price as also the

recurring charges, such as car parking, insurance, sinking fund, ground rent, electricity and water charges, etc. The space buyers agreements required the respondent companies to pay recurring charges. The recurring charge was defined in clause 2(c) as follows:-

"2(c) Recurring Charge shall mean those amounts which are agreed to be paid and borne by the Space Buyer in future, that is, after the date of handing over possession and shall include:

- (v) consideration for any common area, common facility, amenity or advantage not herein specified but subsequently agreed in writing to be made available to the Space Buyer by the Company to which the Space Buyer may be found to be entitled or may become entitled under any law, rule, judgment or decree of any court;
- (vi) further agreed maintenance charges and contribution to sinking / capital replacement fund;
- (vii) further agreed maintenance charges for running & maintenance of the Air-conditioning plant and contribution to sinking / capital replacement fund. (this would be applicable for such spaces where the air-conditioning facility is also agreed to be provided).
- (viii) amount due from Space in lieu of Ground Rent as specified in this Agreement from the date of execution of this Agreement."

7. Clause 14 of the said agreement sets out all the payments which are to be made by the respondent companies in the following terms:-

“Clause 14 (a). From the date of this Agreement, the Space Buyer would be liable to pay regularly maintenance and service charges for common areas and for the consumption of electricity and water in the common area.

(b) in respect the spaces which are air-conditioned, the Space Buyer would be liable to pay the Company all charges such as for the consumption of electric and water and other consumables for the running of air-conditioning, plant, as well as for its repairs, maintenance, administrative expenses *and management* charges of the Company which are included in the Maintenance charges stipulated in Annexure.

(c) The Space Buyer would be liable to pay annually the sinking fund for the replacement of capital goods like air-conditioning plant, generators, machinery, electrical equipments, cables ducting, transformers, pumping-sets, fire fighting equipment, water-mains, toilets, ventilation equipments, lifts, escalators, etc.etc., the rates of sinking fund as payable would be worked out separately for air-conditioned areas and non air-conditioned areas.

(d) That the raids (sic) of general Maintenance charges for common services, insurance and sinking fund for replacement of capital goods for the calendar year 1997 have been fixed on the basis of Living Index Points as issued by Delhi Administration in December, 1996. The above charges will be subject to annual increase in proportion to the rate of inflation to cover the increased cost of maintenance / materials expenses etc. The annual inflation / increase will be assessed on

the basis of the increase in points of Living Index as regularly issued by the Delhi Administration from time to time. The percentage of increase will be the same as the percentage of increase in the points of Living Index. Minimum increase annually would be 9 percent on the last paid charges. The charges will be revised in the month of July every year on the basis of Living Index as issued by Delhi Administration 31st December of previous year and would normally be applicable for one year.

(e) The payments towards the sinking fund would be payable annually in advance and charges for maintenance of the common services and for Air conditioning plant (wherever applicable) would be payable within six months in advance.

(0) The company at no point of time has to render any account to the Space Buyer for the actual expenses incurred by the Company."

8. In the compromise deed, which formed the basis of the compromise decree, the following clauses with regard to recurring charges / maintenance charges were incorporated:-

"7. At the time of recording of this Compromise Agreement in Court BIL shall pay to NPHL a sum of Rs.22,47,302/- (Rupees twenty two lakhs fourty seven thousand three hundred and two only) in full and final settlement of NPHL's claim, for maintenance charges, car parking charges, electricity and water charges in respect of the Apartments for the period prior to 30.6.97 and advance for the period 1.7.97 to 31.12.97.

8. With effect from 1st July, 1997 BIL shall be liable to pay to NPHL maintenance charges for the Apartments at the rate of Rs.29.03 (Rupees Twenty Nine and paise Three only) per square foot i.e.

Rs.1,16,120/- (Rupees one lac sixteen thousand one hundred twenty only) per month.

9. On every 1st July commencing 1st July, 1998 the rate of Rs.29.03 per square foot shall be revised upwards according to the living index as on that date subject, however, to a minimum increase of 9% each year.

10. With effect from the date of recording of this Compromise Agreement in Court, NPHL shall be bound and obliged to supply back-up power (one kilowatt per one hundred square feet) to 131L. 131L shall be liable to pay to NPHL @ Rs.8 (rupees Eight only) per unit. The reading of units supplied by NPHL and consumed by BIL will be recorded in sub-meter which will be installed by NPHL at the Apartments for that purpose.

11. On every 1st July commencing 1st July, 1998 the rate of Rs.8 per unit shall be revised upwards according to the living index as on that date subject, however, to a minimum increase of 9% each year.”

9. On a joint application under Order 23 Rule 3 read with Section 151 of the Code of Civil Procedure, 1908, and after the statements of the learned counsel for the parties were recorded, the order recording the compromise on 19.12.1997, was passed by the learned single Judge in the following manner:-

“7. In view of the above statement made by the learned counsel for the parties and the contents of the documents (Ex. C-1, C-11, C-11.1), compromise arrived at between the parties, which is lawful, is hereby accepted. The present suit filed by the plaintiff

is decreed in terms of compromise arrived at *between* the parties and as reflected in documents (Ex.0-t, C-11 and C-111) that form pan of the decree sheet. Decree sheet be drawn up accordingly.”

10. It is relevant to note that after the said compromise decree, the respondent companies made payments in accordance therewith towards maintenance charges for car parking till 31.12.2002 and the recurring charges till 30.06.2003. Thereafter, the respondent companies had stopped making payments. According to the appellant, the payments were due to it under the compromise deed and the compromise decree and an outstanding amount of Rs 30,78,371/-, including interest upto 10.11.2003, was shown to be due from the respondent companies. Since the said amount was not paid by the respondent companies in spite of the statutory notice of demand dated 18.11.2003 served upon the respondents under Sections 433 and 434 of the Companies Act, 1956, the said company petitions were filed seeking winding up of the companies on the ground that it be deemed that the respondent companies were unable to pay their admitted debts. However, the respondent companies had replied to the statutory notice rejecting the claim of the appellant and disputing the factum of the respondents’ liabilities to pay the said amount on the ground that the same was against the provisions of Delhi Apartment Ownership Act, 1986, which, according to them, was

applicable on multi-storey buildings in Delhi, including the flats in question. A reference was made to Section 24 of the said Act, which specifically stipulated that *“the provisions of the Delhi Apartment Ownership Act would have effect notwithstanding anything inconsistent therewith in any other law for the time being in force or in any contract, undertaking or other instruments and all apartment owners, tenants of owners, employees of owners and tenants, or any other person, who may, in any manner, use the property or any part thereof to which the said Act applied, would be subject to the provisions of the said Act and the bye-laws and the rules made thereunder”*. As noted in the impugned judgment, according to the respondents, the demand raised by the appellant is illegal and contrary to the provisions of the said Act and it was submitted that the company petitions were filed to coerce the respondent companies to pay staggering amounts which would not otherwise be the liabilities of the respondents in terms of the said Act. In fact, the respondents had paid to the appellant, between 1997 and 2003, an amount of more than Rs 2.25 crores towards maintenance charges and it was claimed that despite this, the appellant was not rendering true account of maintenance and it was alleged that the appellant would not have spent more than Rs 40 lakhs towards maintenance during this period while it had charged Rs 2.25 crores from the respondents. The

plea taken by the respondents was that the appellant could clear the maintenance charges on actual basis and could not claim such charges by adding undue profits.

11. The learned Company Judge, after examining the rival contentions of the parties, came to the conclusion that although there was a compromise decree, it was still founded on an agreement between the parties which was evidenced by the compromise deed. He also took the view that Section 24 of the said Act gave primacy to the provisions of the same over, *inter alia*, any contract which may have been entered into between the parties and, therefore, the statutory provisions of the said Act would override the agreement between the parties. Consequently, according to the learned Company Judge, the appellant was only entitled to what was permitted by the said Act and not what they had agreed upon. The learned Company Judge also held that notwithstanding the existence of a court decree (albeit a compromise decree), the Company court was entitled to examine the question as to whether, in reality, a debt existed and in doing so, the company court was entitled to go behind the decree. Consequently, the learned Company Judge came to the conclusion that the stand adopted by the respondent companies in their refusal to pay the maintenance charges in terms of the compromise

decree could be regarded as a *bona fide* dispute with regard to the payment of debt. The result would be that a winding up petition would not be permissible in these circumstances. Consequently, the winding up petitions filed by the appellant were dismissed. However, as noticed above, in an attempt to balance the equities, the learned Company Judge made certain directions with regard to payment of maintenance charges.

12. We may also point out that after the filing of the company petitions, the respondents filed a suit being CS(OS) 211/2005 entitled Bhushan Steel and Strips Limited and Another v. Nehru Place Hotels Limited, *inter alia*, for a declaration against the appellant stating that the appellant was not entitled to claim maintenance charges as fixed by the appellant and could only charge actual maintenance charges and also prayed for a decree for rendition of true and fair accounts of all the maintenance and other charges collected by the appellant with effect from December 1997. A learned single Judge by an *ex parte* order dated 18.02.2005, injuncted the appellant from disturbing the facilities provided to the respondent companies. On 18.02.2005, the learned single Judge passed an order in the said suit, wherein it was recorded that the appellant would not cause any disturbance to the facilities provided. The respondents would pay for maintenance and other facilities at the

rate of Rs 29.03 per sq. ft. Thereafter, the appellant filed a clarification application being IA No.5031/2005, wherein the appellant sought a clarification of an earlier order and prayed that the respondents be directed to pay the arrears of maintenance with effect from 01.01.2003 till 30.04.2005 and further sought a clarification that the rate of Rs 29.03 per sq. ft. did not include in it other charges, such as car parking and back-up charges. By an order dated 19.03.2007, the learned single Judge directed the respondents to pay the arrears of maintenance with effect from 01.01.2003 till 30.04.2005 totalling to a sum of Rs 97,54,080/-, but dismissed the application on other aspects relating to car parking, sinking fund and ground rent. That part of the order is subject matter of FAO (OS) No.256/2007, which is pending before a Division Bench of this court.

Question (a):

Whether the company court can go behind a compromise decree in order to ascertain as to whether a debt based on the same is legally enforceable or not and whether a bona fide dispute in respect of the debt can be raised notwithstanding the existence of a compromise decree ?

13. It was submitted on behalf of the appellant that a decree passed by a competent court can only be set aside in competent proceedings and cannot be attacked in collateral proceedings. Reliance

was placed on the decision of the Supreme Court in the case of **Rafique Bibi (D) by Lrs. v. Sayed Waliuddin (D) by Lrs. and Ors: 2004 (1) SCC 287**. It was contended that the compromise decree dated 19.12.1997, in the present case, had not been challenged by the respondents and had, therefore, attained finality. It was also contended that the decree was binding between the parties and could not be challenged in collateral proceedings, including winding up proceedings before a Company Court. The decision in the case of **Balvant N. Viswamitra and Ors v. Yadav Sadashiv Mule (dead) through Lrs. and Ors: 2004 (8) SCC 706** was also referred to by the learned counsel for the appellant to contend that even an erroneous and illegal decision, which is not void, cannot be objected to in execution or collateral proceedings. It was also contended on the strength of the Supreme Court decision in the case of **Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and Ors: 1970 (1) SCC 670** that an executing court cannot go behind the decree between the parties or representatives and must take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or on facts. It was further contended that unless and until a decree is set aside by appropriate proceedings in appeal or revision, a decree, even if it be erroneous, was still binding between the parties. It was contended

on behalf of the appellant that the learned Company Judge had failed to consider that the obligation of one party under the compromise decree could not be invalidated without setting aside the advantage derived by that party under the said decree. It was contended that it is only under the said decree that the appellant had provided maintenance and it could not now be said that the agreement between the parties was bad in law and, that too, in a winding up petition, which, according to the learned counsel for the appellant, was not the competent court to deal with the said issue. It was also contended that the learned Single Judge at the time of passing of the compromise decree had specifically noted that he was satisfied that the agreement between the parties was lawful. Thus, it was not open to the company court to re-examine that issue, particularly, when the parties were represented by their counsel and their statements had also been recorded and, therefore, ignorance of law could not be pleaded as an excuse.

14. The learned counsel for the appellant also submitted that with regard to the amendment in Rule 3A of Order 23, which came into effect from 01.02.1997, no suit could be filed to set aside the compromise decree on the ground that it was unlawful. This also lent support to the contention of the appellant that the compromise decree could not be

permitted to be overlooked. Reference was also made to the Supreme Court decision in the case of **Banwari Lal v. Smt. Chando Devi (through L.R.) and Another**: 1993 (1) SCC 581, wherein on the plea that a challenge to a compromise decree could only be made with regard to the factum of compromise. It was also contended that sanctity must be accorded to court orders and that even a consent decree has the same value as a decree upon adjudication. Reliance was placed on **Rama Narang v. Ramesh Narang and Anr**: 2006 (11) SCC 114. It was also contended that the learned Company Judge had misinterpreted the ratio of the decision of the Supreme Court in the case of **Dhurandhar Prasad Singh v. Jai Prakash University and Ors**: 2001 (6) SCC 534 while observing that “in the case of **Dhurandhar Prasad Singh** (supra), the Supreme Court had gone to the extent of holding that if a decree is passed in ignorance of the provisions of law, such a decree would be inexecutable”. With reference to paragraph 24 of the Supreme Court decision, the learned counsel for the appellant submitted that the Supreme Court decision specifically talked of “in ignorance of **such** a provision of law” referring to a provision which made a decree incapable of execution under law. He contended that this observation of the Supreme Court cannot be generalized to mean that any decree passed in

ignorance of the provisions of law would be inexecutable. It was contended that the Supreme Court used the expression specifically in connection with the law relating to capability of execution and not as a general proposition. In any event, it was contended by the learned counsel for the appellant that the decision in the case of ***Dhurandhar Prasad Singh*** (*supra*) was in connection of a decree having become inexecutable due to change in law and did not relate to a question where the validity of the decree itself was in issue.

15. The learned counsel for the appellant also submitted that the reliance placed by the learned Company Judge on the Supreme Court decision in the cases of ***Kaushalya Devi and Ors v. Shri K.L. Bansal***: **1969 (1) SCC 59** was also misplaced as that case was clearly distinguishable. In the case before the Supreme Court, the satisfaction of the court had not been recorded at the time of the making of the compromise decree. But, in the present case, the order dated 19.12.1997 specifically records the satisfaction with regard to the compromise being in accordance with law.

16. On the other hand, Mr Neeraj Kaul, the learned senior advocate appearing on behalf of the respondents, submitted that a

company court examining the question of winding up can always go behind the decree to ascertain whether in reality there is a debt or not. He submitted that it does not follow as a matter of routine that the company court is to act upon a decree treating it as a debt. Reliance was placed on the decision of the Calcutta High Court in the case of **Bajrangbali Engineering Co. Ltd. v. Amar Nath Sircar and Ors**: 1995

(83) Comp Cas 435 (Cal), wherein it was observed as under:-

“It is an undeniable proposition of law which emerges from these cases that the civil court granting the decree does not thereby bind either a court in bankruptcy or a winding-up court. The rationale is that a debt, which succeeds in the causing of a declaration of bankruptcy, or in the causing of initiation of the process of winding-up of a company, enures to the benefit or prejudice of not only the creditor in question, but of all other creditors and contributories, as the case might be, and at the same time causes civil death of the individual bankrupt or the wound up company, again, as the case might be, third parties are involved. Thus, the winding up court goes behind the decree wherever serious questions are raised about the decree having been obtained by fraud or collusion, or where there is a serious allegation about the lack of jurisdiction of the court passing the decree, or where a serious miscarriage of justice might, according to the winding-up court, occur, if the decretal debts were permitted to be used as a tool for winding up.”

It was further held in the Calcutta High Court decision that:-

“The position at law well settled both in England and in India, therefore, is that a winding-up court on its own goes behind the decree in the aforesaid serious

circumstances, and if it is itself dissatisfied, then it does not permit a winding-up application to proceed, leaving the parties to work out their rights in execution proceedings in the ordinary civil courts. ...”

17. On the strength of the aforesaid observations, Mr Kaul submitted that the compromise deed was entered into by the parties in ignorance of the provisions of the said Act which had an overriding effect. The compromise decree was also passed in these circumstances. According to Mr Kaul, the learned Company Judge has taken a plausible view in coming to a conclusion that the respondents have a *bona fide* dispute with regard to the debt and, in thereby not proceeding further with the winding up petitions.

18. Reliance was also placed on the decision of the Supreme Court in the case of **The State of Punjab v. S. Rattan Singh: AIR 1964 SC 1223**, wherein the Supreme Court, with regard to insolvency proceedings, observed that “*it is the duty of the Insolvency Court therefore to determine itself the alleged debts owed by the debtor irrespective of whether those debts are based on a contract or under a decree of court*”. The learned counsel referred to **Harshad Shantilal Mehta v. Custodian & Ors: 1998 (5) SCC 1**, wherein the Supreme Court observed as under:-

“30. It is on behalf of all these creditors that the Insolvency Court or the Official Receiver scrutinises the debts, whether claimed under a decree or otherwise. The same is the position of a company in winding up because the rules of insolvency apply to winding up proceedings as well. ...”

19. The learned counsel also placed reliance on the decision of the Supreme Court in the case of **Official Receiver, Kanpur and Another v. Abdul Shakur and Others: AIR 1965 SC 920**, wherein the Supreme Court, again, in connection with insolvency proceedings, observed as under:-

“... The Insolvency Court has, it must be remembered, to ascertain whether a debt is due by the insolvent, whether the debt is provable in insolvency, and the quantum of the debt due at the material date. In making this enquiry in its three aspects even the judgment of a court against the debtor may not be regarded as binding upon the Court. ...”

The Supreme Court further observed that:-

“13. A debt to be entered in the schedule must therefore be a real debt. A judgment against a debtor which is sought to be relied upon in proving a debt does not necessarily establish the existence of a real debt for the judgment may have gone by default it may have gone by consent or it may have been procured for any other reason. In a proceeding relating to proof of debts, the question which arises being not one between the insolvent and the proving creditor alone, the rights of other creditors of the insolvent have of necessity to be considered. Even if for some reason, the debtor himself

is estopped from denying the debt, there will be no estoppel against the Insolvency Court.”

20. It is, thus, apparent that, on the one hand, the learned counsel for the appellant contended that a decree of the court, which includes a consent decree, cannot be overlooked by an executing court and cannot be questioned in collateral proceedings, including winding up proceedings. On the other hand, the learned counsel for the respondents submitted that, while the normal rule is that an executing court or any other court, in collateral proceedings, cannot go behind a court decree, this general rule is not applicable to the special cases of insolvency and winding up proceedings.

21. We agree with the view taken by the learned Company Judge that the company court in the course of the winding up proceedings is not bound by a decree of the court when it has to determine as to whether there exists a real debt or not. We also agree with the submissions made by Mr Kaul that the general rule does not apply to insolvency proceedings or to winding up proceedings before a company court. The logic of this is quite clear and has been amply brought out by the Calcutta High Court in the case of ***Bajrangbali Engineering Co. Ltd.(supra)***. While a decree of a civil court binds the parties to the

decree and to that extent neither of them can wriggle out of it unless they are able to show that it was obtained because of fraud or collusion etc., in a winding up proceeding, it is not only an issue between a creditor and the company, but also involves the larger question of survival of the company itself which effects the rights and obligations of several other parties. Thus, while the debtor company may be estopped from resiling from its commitments under the compromise decree, it may not enable the creditor to seek winding up of the company on this ground alone.

22. In a recent decision of the Supreme Court in the case of **IBA Health (I) Pvt. Ltd v. Info-Drive Systems Sdn. Bhd**: 2010 (10) SCC 553, it was observed that it is the duty of the company court to examine whether the company, whose winding up has been sought, has a genuine dispute to a claimed debt. The Supreme Court observed that a dispute would be substantial and genuine if it is *bona fide* and not spurious, speculative, illusory or misconceived. The company court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial and the grounds of dispute, on the part of the company, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. The supreme Court observed that:-

“It is settled law that if the creditor's debt is *bona fide* disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a *bona fide* disputed debt.”

23. The Supreme Court had placed reliance on its earlier decision on the cases of **Amalgamated Commercial Traders (P) Ltd v. A.C.K. Krishnaswami and Anr:** (1965) 35 CC 456 (SC), **Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd:** 1971 (3) SCC 632, and **Mediquip Systems (P) Ltd v. Proxima Medical Systems (GMBH):** 2005 (7) SCC 42, wherein the Supreme Court held that whether the defence raised by the company, whose winding up was sought, was a substantial one and not a mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum”.

The Supreme Court further observed that:-

“23. The principles laid down in the above mentioned cases indicate that if the debt is *bona fide* disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956.”

This takes us to the discussion of the next question.

Question (b):

Whether the recurring maintenance charges agreed to be paid by the respondent companies to the appellant in terms of the compromise decree are contrary to the provisions of the Delhi Apartment Ownership Act, 1986 ?

24. We do not have to give a definitive answer to this question because the same cannot be gone into in winding up proceedings. That is a matter of full-fledged trial before an appropriate forum. The question whether the respondents are right in contending that in view of the provisions of the Delhi Apartment Ownership Act, 1986, they are not liable to pay the amount agreed upon by them and recorded in the compromise decree, cannot be decisively gone into by a company court in ascertaining as to whether the respondents were unable to pay their debts. All that the company court is required to do, as observed by the Supreme Court in *IBA Health (supra)*, is that whether the dispute raised by the respondents was substantial and genuine or in other words, whether it was *bona fide* and not spurious, speculative, illusory or misconceived. We note that the learned company Judge has examined the provisions of the Delhi Apartment Ownership Act, 1986 in great detail and has then come to the conclusions, which according to him also, are only tentative. All that the company court is required to do is to examine as to whether there is a *bona fide* dispute with regard to the

debt, which is sought to be enforced. Once the company court comes to the conclusion that the dispute is substantial and genuine, meaning thereby that it is *bona fide* and not illusory or misconceived, then the only course open to the company court, is that it should dismiss the petition for winding up and leave the creditor to his civil remedies. The Supreme Court has cautioned that winding up proceedings should not become a substitute for recovery proceedings.

25. On going through the arguments advanced by the learned counsel for the parties before us, as also the impugned judgment in great detail, we are of the view that the learned company Judge was correct in holding that there was a *bona fide* dispute with regard to the debt in the backdrop of the arguments based on the Delhi Apartment Ownership Act, 1986. We are making it clear that this does not mean that what the respondents contended on the basis of the said Act is correct or established in law, but only that their defence is *bona fide* and is not illusory or misconceived. Whether they are right in law or not, would be decided before some other appropriate forum and is not to be decided by the company court in winding up proceedings.

26. Thus, we make it clear that neither this court nor the company court was required to give any definitive finding as to whether the agreement between the parties was contrary to the provisions of the Delhi Apartment Ownership Act, 1986 or not. The respondents have only been able to establish that the dispute raised by them with regard to maintenance charges is not illusory or misconceived.

Question (c)

Whether the impugned judgment of the learned Company Judge, particularly with regard to the nature of the debt and also the compromise decree, is binding on the civil court in the suits pending between the parties ?

27. The answer to this question follows from the discussion above and, that is, that the decision of the learned company Judge with regard to the debt in the backdrop of the Delhi Apartment Ownership Act, 1986 is not binding on the civil court in the pending suits. It is clear that the winding up jurisdiction of a company court is a discretionary jurisdiction and does not, in fact, adjudicate the civil rights between a debtor and a creditor. Thus, any observations made by the learned Company Judge in the impugned order with regard to the compromise decree or the compromise deed entered into between the appellant and the respondents being contrary to or inconsistent with the provisions of the Delhi Apartment Ownership Act, 1986 would not be binding on the civil court

which is hearing the pending suits between the parties. This fact has also been brought out by the learned Company Judge in the impugned judgment where he has stated: *“I may hasten to add that these are tentative observations. What is highlighted is that questioning by the respondent of such maintenance charges claimed by the petitioner cannot be treated as arbitrary or without basis.”*

28. What the company court has decided is only that the winding up petitions cannot be proceeded with further in view of the fact that the respondent companies have been able to demonstrate that their defence is not a moonshine defence and that there is a *bona fide* dispute with regard to the debt. This does not mean that what is submitted on behalf of the respondent companies with regard to the compromise decree and the compromise deed being contrary to the provisions of the Delhi Apartment Ownership Act, 1986, has been accepted by the company court. That is not the case and, even if it were an impression which the parties may have obtained, we dispel the same.

29. We, however, are not in agreement with the directions (i) and (ii) in paragraph 42 of the impugned judgment. Similar directions have already been given by the learned single Judge in the pending suit between the parties. In any event, as the winding up petition itself was

being dismissed, we feel that it would not be appropriate if the said directions given by the company Judge are retained. Consequently, the appeals are dismissed, but the said directions with regard to payment are treated as having been deleted from the impugned judgment in view of the fact that similar directions are already in existence in the civil suit, being CS(OS) 211/2005, pending between the parties.

30. The appeals stand disposed of accordingly. There shall be no order as to costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

August 09, 2011

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