

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CO.PET. 316/2006 & CO. APPL. 1478/2006**

M/S. ADVANCE TELEVISION NETWORK LTD. Petitioner
Through: Mr. R.C. Beri, Advocate with
Mr. S.K. Beri, Advocate.

Versus

THE REGISTRAR OF COMPANIES Respondent
Through: Mr. Darpan Wadhwa, Advocate
with Ms. Sheena Iype, Advocate
for ROC.
Mr. Chandan Sharma, Advocate
for Mr. Rajeev Sharma,
Advocate for Prasar Bharti.

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Reserved on: 09th May, 2011
Date of Decision: 04th July, 2011

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, J

1. Present petition has been filed under Section 433(a) read with Section 439 of the Companies Act, 1956 (for short 'Act') for voluntary winding up of the petitioner company.

2. Mr. Beri submits that the petitioner-company has not done any business since 2001-2002 and thus, it has not earned any income for the last ten years. He states there is no hope or prospect of the petitioner-company doing any further business as stated in its Memorandum of Association. He submits that keeping in view the long duration in which the petitioner company had not done any business, it would be just and equitable to wind up the petitioner company. In this context, he relies upon judgments in *Surendra Kumar Pareek Vs. Shree Guru Nanak Oils Pvt. Ltd., (1995) 82 CC 642 (Raj.)*, *A. Sreedharan Nair Vs. Union Hardwares (Private) Ltd., (1997) 89 CC 37 (Kerala)* and *Registrar of Companies, Bihar Vs. Shreepalpur Cold Storage Private Ltd., (1974) 44 CC 479 (Patna)*.

3. Mr. Beri candidly admits that a dispute in relation to business done with Prasar Bharti in 1998-1999, is pending adjudication before learned Arbitrator, Mr. Justice (Retd.) V.N. Khare.

4. Mr. Beri submits that in view of the abovestated facts, the shareholders of petitioner-company have passed a special resolution in an extraordinary general meeting held on 9th October, 2006

resolving to wind up the petitioner-company by the Court. In this context, he relies upon a Division Bench judgment of Bombay High Court in ***Bombay Metropolitan Transport Corporation Ltd. Vs. Employees of Bombay Metropolitan Transport Corporation Ltd. (CIDCO) and Ors., (1991) 71 CC 473 (Bom.)*** wherein the Court has held, *"That the company is unable to pay its debts is not, as it cannot be, disputed. It is not relevant that the company got into its present straitened financial position due to its own misdoings or mismanagement, nor is the motive behind the filing of the winding-up petition relevant. This Court said in Bachharaj Factories Ltd. v. Hirjee Mills Ltd. (1995) 25 Comp. Cas 227, 251: "If the petitioners have made out a case for the winding up of the company, if they have placed materials before the Court which satisfy the Court that the company is insolvent, if they have placed materials before the Court which satisfy the court that the substratum of the company is gone, it is difficult to understand what the motive of the petitioners has got to do with the question whether an order of winding up should be made or not." Where the company is not in a position to pay its debts and finds that its substratum has gone it is entitled to resort to winding up proceedings after a resolution as provided by*

Section 433(1)(a) and it is difficult to see how such proceedings can be an abuse of process of Court. Where the company is unable to pay its debts, winding up ought generally to follow in public interest, so that the public do not unwarily deal with the company and jeopardise its interests.....The company has satisfied us that it has passed a special resolution that it be wound up by the Court, that it unable to pay its debts and that its substratum has gone so that it is just and equitable that it should be wound up.....”

5. On the other hand, Mr. Darpan Wadhwa, learned counsel for Registrar of Companies (in short ‘ROC’) opposes the present petition. He submits that winding up under Section 433 of the Act is a discretionary act of the Court and while exercising discretion under Section 433(a) of the Act, the Court must consider relevant factors like company’s solvency, ability to pay its debts and interest of creditors amongst other things and the Court should not exercise its discretion to wind up unless there are compelling reasons to do so.

6. Mr. Chandan Sharma, learned counsel for Prasar Bharti joins the counsel for ROC in opposing the present petition. He submits that the petitioner-company is seeking winding up only to render

infructuous the arbitration award to be passed against it in a proceeding initiated by Prasar Bharti, which is pending adjudication. He also states that the petitioner-company has not disclosed to the Court that that the petitioner-company has filed a counter-claim of Rs.11,21,63,605/- against Prasar Bharti's claim of Rs.4,54,74,256.25.

7. Having heard the learned counsel for parties and having perused the papers, I am of the opinion that it would be appropriate to first enunciate the settled principle of law with regard to winding up.

8. While Chapter II of the Act deals with 'Winding up by Court', Chapter III deals with 'Voluntary Winding up'. Any Company, which wishes to wind itself up, has either option. However, it may be noted that Chapter III, winding up which is without reference to the Court, requires that the Company has the ability to discharge its liability in full within one year—which ability the petitioner admittedly does not possess.

9. The petitioner in its petition has not specifically averred which

particular sub-sections it has invoked. However, during the course of arguments, the petitioner has relied upon sub-sections (a) and (c) of Section 433. But the process of winding up under Section 433 is discretionary. The language of Section 433 itself states that a “company may be wound up by the Court” in the circumstances listed in (a) and (f).

10. In the opinion of this Court, the exercise of power under Section 433 (a), which has the effect of causing death of a company, should be exercised cautiously. It should be the endeavour of the Court to attempt to revive the company though at that moment the company may be making losses. It is the duty of the Court to welcome revival rather than affirm death of a company and it is for this purpose the Legislature has conferred discretionary power on the Court. It has been held in various judgments that mere suspension of business by itself is not a ground to wind up a company. Financial health of a company is of paramount importance and while evaluating this, the Court has not only to just take the present financial position of the company into consideration, but also its future financial prospects. In fact, in *New Swadeshi Mills of*

Ahmedabad Ltd. Vs. Dye-Chem Corporation (1986) 59 Com Cases

183 (DB-Guj), the Court held, “*It may be that despite the inability to pay its debts, a company has still prospects of coming back to life and if the court is told of any specific proposal, which in the opinion of the court is likely to materialize, the court will be inclined to give a chance to resurrect the company. It should be the policy of the court to attempt to revive though at the moment the company may not be solvent and may not be able to meet its obligations to its creditors. But this should be only if it is shown that there is reasonable prospect for resurrection and survival. It may be easy for a court when once it is shown that the company is unable to pay its debts to bury it deep and distribute whatever is available as distributable surplus. But it is the duty of the court to welcome revival rather than affirm the death of a company and for that purpose the court is called upon to make a discreet exercise.*”

11. In the present case, this Court finds that the petitioner company has filed counter claim of Rs.11,21,63,605/- against Prasar Bharti in arbitration proceedings which is still pending adjudication. In the event, the counter-claim of the petitioner-company is allowed, the

possibility of revival of petitioner-company cannot be denied. Accordingly this Court in view of the pendency of petitioner company's counter-claim against Prasar Bharti cannot reach the conclusion that the substratum of the company has disappeared and there is no possibility of resumption of business by the petitioner company. Also, keeping in view the background of the arbitration proceedings between the petitioner company and Prasar Bharti, it seems to this Court that the present petition has been filed with an intent to render the arbitration proceedings infructuous and to place the Official liquidator in the shoes of the petitioner company to contest the pending litigation - which in the opinion of this Court cannot be permitted.

12. Even in the cases relied upon by the petitioner in particular the case of ***Bombay Metropolitan Transport Corporation Ltd. Vs. Employees of Bombay Metropolitan Transport Corporation Ltd. (CIDCO) and Ors.*** (supra), the High Courts have held that it is only when the company is not in a position to pay its debt and finds its substratum gone, it is entitled to resort to winding up proceeding as provided by Section 433(a) of the Act.

13. In view of the aforesaid, I am of the opinion that in the present case, no justifiable ground for winding up is made out.

14. Accordingly, the present petition and application are dismissed, but with no order as to costs.

MANMOHAN, J

JULY 04, 2011

ms/rn/js