NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Company Petition No.4 of 2012

M/s Explopack, a Partnership firm, duly registered under the Indian Partnership Act, 1932 and having its office, inter alia, at B-4, MIDC MIDC HINGNA Road, Nagpur and represented by its constituted attorney Shri Uday, S/o Shri Madhukar Lehgaonkar, aged 40 years, Profession Service, R/o Plot No.93, Shivaji Colony, Behind Nasrae Mangal Karyalaya, Hudkeshwar Road, Nagpur - 34

---- Petitioner

Versus

M/s Navbharat Explosive Company Ltd., a company duly incorporated under the relevant provisions of Companies Act 1956, having its registered office at Navbharat Udyog Bhawan, Telibandha, Ring Road No.1, Raipur (Chhattisgarh)

---- Respondent

For Petitioner:	Mr. Kishore Bhaduri and Mr. Anmol Sharma, Advocates.
For Respondent:	Dr. N.K. Shukla, Senior Advocate with Mr.Chandresh Shrivastava, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C A V Order

07/09/2015

1. The petitioner Company entered into a tripartite agreement with the respondent Company on 1st of April, 2006 at Raipur and taken the factory premises of M/s. Vishal Packaging, a

sister concern of the respondent Company, on lease on monthly rent of ₹ 30,000/- for production of corrugated boxes and plastic packing material required by the respondent Company and also for the sister concern of the respondent i.e. M/s. Navbharat Fuse Company Ltd.. It was further agreed between the parties that the respondent and M/s. Navbharat Fuse Company Ltd., shall give guarantee of 35,000 boxes per month and 12 MT plastic packing material per month at mutually agreed rates on Per Tonne basis. The petitioner Company is said to have supplied corrugated boxes and cutting materials to the respondent Company from April, 2006 to October, 2010 as agreed and thereafter, the respondent Company did not make payment as per the agreement entered into and the cheques issued to the petitioner Company against the material supplied became dishonoured which is apparent from the balance sheet duly filed before the income tax authorities filed as Annexure P-1 along with the petition. When the respondent Company failed to make payment, the petitioner Company through its counsel served statutory notice to the respondent Company vide Annexure P-6 dated 27-7-2011 claiming an amount of ₹ 52,02,239-30 giving three weeks clear time to make payment of the aforesaid amount due against the supply made by the petitioner Company which was replied by the respondent vide Annexure P-7 dated 19-8-2011 denying and disputing the liability which led the petitioner Company to file present petition under Section 433(e) of the Companies Act for winding up of the present respondent Company, as the respondent Company failed to make payment of ₹ 32,16,116-90 excluding interest. It was pleaded in the company petition that the debt due is admitted and undisputed liability of the respondent Company towards the petitioner within the meaning of Section 433 (e) of the Act of 1956 and it is duly reflected in the current balance sheet and books of accounts of the respondent Company, and the said Company is unable to pay its debt, the instant petition be admitted for winding up proceeding.

2. Reply-affidavit has been filed on behalf of the respondent Company and separate preliminary objection has also been raised about maintainability of the company petition. It has been pleaded in the preliminary objection that the present company petition as framed and filed is not maintainable as no statutory notice has been issued for the debt allegedly claimed in the company petition i.e. ₹ 32,16,116-90, as the

statutory notice was issued for alleged debt of ₹ 52,02,239-30 and secondly, there is no recoverable debt from the respondent Company. In the reply filed, they have raised an objection that the instant petition has not been filed by a duly authorised person and in the cause title of the petition, name of Uday is claimed to be the constituted attorney and as such, the amount due is not ascertained sum of money which is apparent from the difference between the amount claimed in the statutory notice and the amount claimed in the company petition and, therefore, there is no amount due from the petitioner Company as per records. It is further stated that the petitioner failed to perform his part and failed to supply materials as per the order issued by the respondent by which the respondent Company suffered loss of ₹ 5 crores on account of failure on the part of the petitioner Company, as the respondent failed to achieve target to supply explosive items to Coal India Limited and thereby could not get qualified in the tender process as such, demurrage charges were levied and adjusted in accordance with the terms of the contract. It is also stated that the respondent Company is commercially solvent and it is not the case that the respondent is unable to pay its debt, if any, therefore, the company petition as framed and filed deserves to be dismised at the pre-admission stage.

3. This Court has issued notice at pre-admission stage to the respondent Company to show cause why the petition should not be admitted for winding-up of the Company. Reply to show cause has been filed by the respondent Company. This is how this company petition is before this Court at pre-admission stage for consideration on the question of admission of company petition. (See **The National Conduits (P) Ltd. v. S.S. Arora**[1].)

4. Mr. Kishore Bhaduri, learned counsel appearing on behalf of the petitioner Company, would vehemently submit that in reply to the statutory notice, the respondent Company did not deny the supply of agreed material by the petitioner Company and served a vague and evasive reply, as such, the respondent Company is unable to pay the amount due to the petitioner Company. He would further submit that the difference of amount claimed in the statutory notice and the company petition would not make any difference, as in the statutory legal notice, the amount claimed was inclusive of interest, whereas in the company petition, the amount claimed

1 AIR 1968 SC 279

is exclusive of interest which the petitioner Company is entitled. Elaborating his submission, he would also submit that existence of debt has duly been shown by the petitioner Company in their balance sheet duly audited as on 31-3-2011 in which an amount of ₹ 52,02,239-30 is mentioned towards sundry debt outstanding in favour of the petitioner Company and against the respondent Company. The cheques issued by the respondent Company against the supply made had dishonoured is also mentioned in Annexure P-3 filed along with the company petition. Therefore, there is no *bona fide* dispute based on the substantial ground as such, there is no dispute regarding quality and quantity of material supplied and, therefore, ground raised in the reply filed in the company petition is only an afterthought and lack characteristics of the *bona fide* dispute by the respondent Company. He would lastly submit that demurrage charges of ₹ 33 lakhs have been shown to be recovered from the petitioner Company without there being any agreement between the parties, which has been shown to avoid payment of the amount in dispute to the petitioner Company. Therefore, it is a fit case where this Company petition can be admitted to the file for initiating winding up of the respondent Company.

5. Dr. N.K. Shukla, learned Senior Counsel appearing on behalf of the respondent Company, while countering the submissions made on behalf of the petitioner on admission of the company petition would submit as under: -

   5.1) That, the alleged debt is not ascertained, definite and admitted sum, as the petitioner itself has claimed ₹ 52,02,239-30 in the statutory notice served under Section 434 (1) (a) of the Act of 1956, whereas in the company petition filed under Section 433 (e) of the Act of 1956, the petitioner has claimed only a sum of ₹ 32,16,116-90 and it is also barred by limitation and no such amount is due as such, the respondent Company has valid and *bona fide* defence based on substantial ground, therefore, there is no neglect to pay the due within the meaning of Section 434 (1) (a) of the Act of 1956.

   5.2) That, this company petition has been filed only in order to make recovery of the alleged debt due, whereas the petitioner Company is a solvent, running and flourishing Company and is able to meet its current demands and it is a commercially solvent

Company, as such, it cannot be held that the respondent Company is unable to pay its debt.

5.3) That, the company petition as framed and filed is not maintainable in law and liable to be rejected for non-compliance of the Act of 1956 as well as the Companies (Court) Rules, 1959 (for short 'the Rules of 1959').

6. I have heard learned counsel for the parties on the question of admission of the company petition, given thoughtful consideration to the submissions made and perused the record available with utmost circumspection.

7. Upon consideration of rival submissions of the parties and perusal of records, following questions would emerge for decision making: -

    1. Whether the petitioner creditor is a creditor to whom the respondent Company owes an ascertained sum of money or debt, which is within the period of limitation and whether such a Company has valid or bona fide defence and as such, there is no neglect to pay the sum within the meaning of Section 434 (1) (a) of the Act of 1956?

2. Whether from the material on record, a presumption that the respondent Company is unable to pay its debt, arises, as contemplated in Section 434 (1) (a) of the Act of 1956?

3. Whether the respondent Company is commercially insolvent as contemplated under Section 434 (1) (c) of the Act of 1956.

4. Whether the company petition as framed and filed is lilable to be rejected for non-compliance of the provisions enumerated in Section 434 (1) (c) of the Act of 1956 and the Rules of 1959 made under the Act of 1956?

Answer to question No.1: -

8. It is well settled law that the Company Court must be slow in ordering winding-up, even if it is shown that the company failed to pay debts within three weeks after receipt of registered notice demanding payment, or even if the company having received notice, does not respond. It is also well settled that petition for winding-up is not a substitute for accepted mode of recovering debt by way of suit. Proceedings under Section 433 (e) of the Act of 1956 cannot

be used for arm-twisting to compel company to pay debts even if there are serious disputes regarding liability. But whenever the company disputes debt, same does not preclude the Court from ordering winding-up if it is shown that dispute raised by company regarding debt is not *bona fide*. If the dispute or defence raised by company has no substance or the dispute or defence is raised as an after-thought before Court, company can be ordered to be wound-up. Further, in its discretion, Court may refuse the order of winding-up, if it is of opinion that such winding-up would not be in the interest of members, employees, workmen and creditors of company. A perusal of Section 443 of the Act of 1956 would show that absolute discretion is vested in the Court to make an order for winding-up the company. The Company Court can refuse to make an order of winding-up, if it is of opinion that the person is acting unreasonably in seeking to have the company wound-up instead of pursuing with other remedy.

9. Way back in the year 1983, in the matter of **Cotton Corporation of India Limited v. United Industrial Bank Limited and others**[2], Their Lordships of the Supreme Court have clearly held that winding-up petition is not a recognized

2 (1983) 4 SCC 625

mode for recovery of debt and if the company is shown to be solvent and the debt is *bona fide* disputed, the Court should not admit the petition, and held as under: -

> "It is undoubtedly true that winding-up petition is not a recognized mode for recovery of debt and if the company is shown to be solvent and the debt is bona fide disputed, the court generally is reluctant to admit the petition. Therefore, the power is conferred on the Judge before whom the petition comes-up for admission to issue pre-admission notice to the company so that the company is not taken unawares and may appear and point out to the Judge that the petitioner is actuated by an ulterior motive and presentation of the petition is a device to pressurize the company to submit to an unjust claim. This is a sufficient safeguard against mala fide action and the company would not suffer any consequences as apprehended, and the company can as well appear and ask for stay of further proceeding till the petitioner-creditor proves his debt by a regular suit."

10. Likewise, Their Lordships of the Supreme Court in the case of **IBA Health (India) Private Limited v. Info-Drive Systems SDN. BHD.**[3] while considering earlier decisions of the

3 (2010) 10 SCC 553

Supreme Court held that when there is a substantial dispute as to the liability, creditor cannot prefer an application for winding-up for discharge of that liability, but dispute must be substantial and genuine. Paragraphs 20 to 23 and 31 of the report state as under:-

> "**<u>Substantial dispute – As to liability</u>**
>
> 20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? 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. The grounds of dispute, of course, 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. 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.

21. In this connection, reference may be made to the judgment of this Court in Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami[4] in which this Court held that: (Comp Cas p.463)

> "It is well-settled that 'a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court.....'"

22. The above mentioned decision was later followed by this Court in Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd[5]. The principles laid down in the above mentioned judgment have again been reiterated by this Court in Mediquip

4 (1965) 35 Comp. Cas 456(SC)
5 (1971) 3 SCC 632

Systems (P) Ltd. v. Proxima Medical Systems GmbH[6] wherein this Court held that the defence raised by the appellant-company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The above mentioned judgments were later followed by this Court in Vijay Industries v. NATL Technologies Ltd[7].

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. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

31. Where the company has a bona fide dispute, the petitioner cannot be regarded as a creditor of the company for the purposes of winding up. "Bona fide dispute" implies the existence of a substantial ground for the

6 (2005) 7 SCC 42
7 (2009) 3 SCC 527

> dispute raised. Where the Company Court is satisfied that a debt upon which a petition is founded is a hotly contested debt and also doubtful, the Company Court should not entertain such a petition. The Company Court is expected to go into the causes of refusal by the company to pay before coming to that conclusion. The Company Court is expected to ascertain that the company's refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated by a trial in a civil court."

11. Thus, Their Lordships of the Supreme Court in aforesaid cases have held in no uncertain terms that if the debt is *bona fidely* disputed, there cannot be neglect to pay within the meaning of Section 434 (1) (a) of the Act of 1956 so as to incur liability under Section 434 (e) read with Section 434 (1) (a) of the Act of 1956.

12. Having examined the legal position with regard to scope of admission of company petition for winding-up, turning back to the factual score of the case, question for consideration would be, whether it is proved that debt claimed against the respondent is ascertained, definite and undisputed and it is within the period of limitation to which the respondent Company has failed to pay. In this context, it would be

appropriate to look into the statutory notice dated 27-7-2011 (Annexure P-6) issued under Section 434 (1) (a) of the Act of 1956 in which the petitioner Company claimed ₹ 52,02,239-30 as amount due, which was duly replied by the respondent Company and when the company petition was filed on 29-11-2011, the petitioner Company claimed that the due amount from the respondent is ₹ 32,16,116-90 with interest at the rate of 18% per annum. Thus, the petitioner Company itself is not certain as to what exactly the amount is due from the respondent Company. There has been a vast and much discrepancy between the claim made by the petitioner Company in the statutory notice served under the Act of 1956 and in the company petition filed before this Court for winding-up. No valid and acceptable reason is forthcoming by the petitioner Company for reducing the said amount in the company petition, thereby making the alleged debt / amount due to be unascertained sum of money.

13. A great stress has been laid by the learned counsel for the petitioner that the books of accounts and balance-sheet maintained by the petitioner Company i.e. (Annexure P-1) would show that the respondent Company owes a debt of ₹

32,16,116-90 and, therefore, the respondent Company is liable to make payment of the said amount.

14. The question for consideration would be whether mere showing by the petitioner Company a debt due in their balance-sheet would amount to acknowledgment in terms of Section 18 of the Indian Limitation Act.

15. At this stage, it would be appropriate to notice Section 18(1) of the Indian Limitation Act, 1963 which provides as under:-

> "**18. Effect of acknowledgment in writing.-**
> (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

Thus, the above-stated provision requires-

(i) an admission or acknowledgement,

(ii) that such acknowledgment must be in respect of a liability in respect of property or right,

(iii) that it must be made before the expiry of the period of limitation, and

(iv) that it should be in writing and signed by the party against whom such property or right is claimed.

16. Way back in the year 1961, in the matter of **Khan Bahadur Shapur Freedom Mazda v. Durga Prasad**[8], Their Lordships of the Supreme Court while examining the contents and scope of Section 19 of the Limitation Act, 1908 which is corresponding to Section 18 of the Act of 1963 have held that the statement on which plea of acknowledgment is based must relate to subsisting liability. The words used in the acknowledgment must indicate the jural relationship between the parties and it must appear that such a statement is made with the intention of admitting that jural relationship.

17. The test laid down in **Khan Bahadur Mazdas case** (supra) has been followed by Their Lordships of the Supreme Court in the matter of **Tilak Ram and others v. Nathu and others**[9] in which it has been held that the statement to fall within acknowledgment must show that it was made with the intention of admitting such jural relationship subsisting at the time when it was made. Similarly, in the matter of **Valimma v.**

8 AIR 1961 SC 1236
9 AIR 1967 SC 935

<u>Shivathanu</u>[10] it has been held by Their Lordships of the Supreme Court as under:-

> "Under S.18, Limitation Act (S.10 of the Travancore Limitation Act) one of the essential requirements for a valid 'Acknowledgment' is that the writing concerned must contain an admission of a subsisting liability. A mere admission of a past liability is not sufficient to constitute such an 'acknowledgment'."

18. Thus, it is well settled law that to constitute acknowledgment of liability, there must be acknowledgment of liability made in writing signed by the party and that too must be before the expiry of the prescribed period and only if there is acknowledgment of liability signed by the party against whom such property or right is claimed, a fresh period of limitation starts from the time of acknowledgment of liability. Annexure P-1 balance-sheet of the petitioner Company as on 31st March, 2011 under the head of Sundry Debtors in Schedule I, reflecting amount due is ₹ 55,82,108-70 which does not fulfill / constitute acknowledgment of liability, it is a pure and simple mention in the balance-sheet of the petitioner Company the amount to be payable by the respondent Company and by no strentch of imagination it can be said to

10 AIR 1979 SC 1937

be acknowledgment of liability signed by the respondent Company in light of tests laid down in **Khan Bahadur Mazdas case** (supra) so as to invoke Section 18 of the Act of 1963.

19. In the matter of **Walnut Packaging Private Limited v. The Sirpur Paper Mills Limited & another**[11], the Division Bench of the Andhra Pradesh High Court has clearly held that mere mention of amount to be payable in balance sheet cannot be termed as acknowledgment under Section 18 of the Indian Limitation Act. Similarly, the Division Bench of the Madras High Court in the case of **Narsey Brothers, Mumbai v. Nithyalakshmi Textiles Mills Pvt. Ltd., Coimbatore**[12] has also held that mere fact that balance sheet of the respondent Company showed disputed amount as liability, it cannot be held that the amount is admitted. Thus it cannot be held that merely because balance-sheet of the petitioner Company reflects the disputed amount payable by the respondent Company, the respondent Company owes an ascertained sum of money to the petitioner Company.

20. Aforesaid determination that the amount / debt due is not ascertained sum of money and liability of the respondent Company is not admitted and disputed, brings me to the next

11 2009 CLC 477 (Andhra Pradesh High Court)
12 2008 CLC 1399 (Madras High Court)

question whether the defence / dispute raised on behalf of the respondent Company is *bona fide* based on substantial ground or it is only a moonshine. It is case of the petitioner that pursuant to the agreement dated 1-4-2006 executed between the petitioner Company, M/s. Vishal Packaging, M/s. Navbharat Explosive Company Limited and M/s. Navbharat Fuse Company Limited, for manufacturing of corrugated boxes and plastic packing material by the petitioner, the petitioner Company took on lease the factory of M/s. Vishal Packaging at Urla, Raipur, on monthly rent for production of corrugated boxes and plastic packing material and supplied to the full requirement of aforesaid two companies. It is further case of the petitioner Company that as per the said agreement, business transaction started among the parties and continued till September, 2010, and it is claimed that they supplied corrugated boxes and other items to the petitioner by raising bills and in return, payment was made, but still there is outstanding dues of ₹ 32,16,116-90 as shown in the head of Sundry Debtors in Schedule I of balance-sheet of the petitioner Company as on 31-3-2011 for which stautory notice has been served. Whereas it is the case of the respondent Company that no payment is outstanding and the petitioner had delayed in supplying corrugated boxes and polythene tubes from 1-4-2010 to 30-9-2010 by which the petitioner Company could not achieve target to supply explosive items to Coal India Limited and because of non-achieving the said target supply, the petitioner Company could not qualify in the tender process of Coal India Limited for the year 2011-12 and they suffered huge loss of ₹ 5 crores and, therefore, they have adjusted / charged demurrage cost of ₹ 30,54,511/- duly mentioned in their books of account. Taking into consideration the nature of claim made and the nature of dispute raised by the respondent Company with regard to alleged liability and the adjustment already made towards loss by the respondent Company, the defence put forth by the respondent Company appears to be *bona fide* dispute and it cannot be said that the defence put forth by the respondent Company has no substance and it is *mala fide*, as such, such a claim of amount due to the petitioner Company has to be established in a duly constituted proceeding by leading appropriate legal evidence that the debt is due aganst the respondent Company. It is well-settled that once the claim is *bona fide* disputed, there is no neglect to pay within the meaning of Section 434 (1) (a) of the Act of 1956. Question No.1 is answered accordingly.

<u>Answer to question Nos.2 and 3</u>: -

21. In order to answer the aforesaid questions it would be appropriate to notice the decision rendered by Their Lordships of the Supreme Court in the matter of **<u>Pradeshiya Industrial and Investment Corporation of U.P. v. North India Petro Chemical Limited and another</u>**[13] in which the Supreme Court has in detail laid down the requirement to be established even *prima facie* before getting a petition under Section 433(e) admitted and advertised and if from the material on record it could not be made out that the Company is commercially insolvent, then the petition could be dismissed even before issuing notice regarding admission.

22. Similarly, Division Bench of the High Court of Karnataka in the matter of **<u>Airwings Private Limited v. Viktoria Air Cargo Gmbh Langer Kornweg</u>**[14] laid down the test for admission of petition for winding-up by holding as under: -

> "I. When a winding-up petition is filed seeking winding-up of a Company under S. 433(e) of the Act if, from the material available on record

13 (1994) 3 SCC 348
14 AIR 1995 Kant 69

as reflected by the petition and/or by any further evidence supplied by 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 tenative findings 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 doll-drums 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 winding-up of the Company under S. 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-manufacturing activities are not

> suspended or are only temporarily suspended and it is employing number of workmen, then before admitting and advertising the petition, the following procedure is required to be adopted by the Court:"

23. Thus, in light of aforesaid position of law the petitioner Company has to place *prima facie* evidence that the Company is commercially insolvent, that its existing assets, probable assets are insufficient to meet the existing / current liability, that the Company is heavily indebted to various creditors, its assets being in mortgage or in pledge and that there is no possible chance of profit being made or its business being carried out. If the facts of the case are examined in light of the principle laid down in the above-stated decisions, it would appear that the petitioner Company in its petition stated that the respondent Company is involved in manufacturing of explosives and its authorized share is ₹ 1,00,00,000/- and paid up share capital is ₹ 63,26,100/- and the respondent Company is indebted to different banks, financial institutions and private creditors, and in order to defeat and delay the recovery of the said huge amount, the respondent has started secretly disposing off their assets so that their numerous creditors may be left to reap the fruits of a

barren success even after resorting to recovery proceedings in normal civil courts. But the petitioner Company did not give any details about the present existing liability of the respondent Company nor given the assets of the respondent Company to make out a case that the respondent Company is unable to pay its debts within the meaning of Section 434(1)(c) of Act of 1956. As mere existence of debt is not sufficieint for ordering winding up ex-facie, when the petitioner is unable to substantiate as to whether the respondent Company is debtor to any other secured or unsecured creditor. Inability to pay as envisaged under Section 433 (e) of the Act of 1956 is akin to commercial insolvency. A mere inability to pay is therefore not sufficient unless the petitioner Company is able to establish commercial insolvency of the respondent Company. The legal position in this regard is very well settled. In the matter of **Mediquip Systems (P) Ltd.** (supra), Their Lordships of the Supreme Court have considered the aforesaid aspect in paragraph 18 of the Report as under: -

> "18. This Court in a catena of decisions has held that an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under

> this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression "unable to pay its debts" in Seciton 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a company."

24. Thus, details as to insolvency are wanting and the petitioner has failed to establish that liabilities of the respondent Company are disproportionate to its assets and as such, commercial insolvency of the respondent Company has not been established by the petitioner Company. Question Nos.2 & 3 are answered accordingly.

<u>Answer to question No.4</u>: -

25. In order to judge the submission raised at the Bar in this regard, it would be appropriate to notice the relevant provisions contained in the Act of 1956 with regard to winding-up of a company.

26. Section 433 (e) of the Act of 1956 states as under: -

> "**433. Circumstances in which company may be wound up by Tribunal**—A company may be wound up by the Tribunal,—

****** ***

(e) if the company is unable to pay its debts;

****** ***"

27. Section 433 of the Act of 1956 provides that a company may be wound up by the Court if the company is unable to pay the debts which means, there must be a debt which the company must be unable to pay the same. It is well settled law that an order under Section 433 (e) of the Act of 1956 is discretionary in nature and the debt must be a determined or a definite sum of money payable immediately or at a future debt.

28. Section 434 of the Act of 1956 provides, when a company shall be deemed to be unable to pay its debts. Clauses (a) and (c) of sub-section (1) of Section 434 of the Act of 1956 provide as under: -

> "**434. Company when deemed unable to pay its debts**—(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 one lakh 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;

(c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company."

29. In exercise of the powers conferred by sub-sections (1) and (2) of Section 643 of the Act of 1956, the Supreme Court of India, after consulting the High Courts, has made the rules known as the Companies (Court) Rules, 1959 which are in force with effect from 1st of October, 1959. By virtue of Rules 3 and 4 read with Rule 6 of the Rules of 1959, all applications and petitions filed under the Act as far as possible must comply with the Rules and must be in the prescribed form prescribed therein. Part III of the Rules of 1959 contains Rule 95 to Rule 338 to regulate winding up proceedings from the stage of filing of petitions. Rule 95 of the Rules of 1959 lays down that a petition for winding-up of a company shall be in Form No.45, 46 or 47, as the case may be. Form No.46 is a Petition for Creditor which is relevant to the present case, which is as follows: -

FORM NO. 46

[See rule 95]

[HEADING AS IN FORM NO.1]

Company Petition No .... of …...
.... Petitioner

Petition by Creditor

The petition of [insert full name, description, occupation and address of petitioner] showeth as follows:-

(Paras I to 5 as in Form No. 45)

6. The company is indebted to the petitioner in the sum of Rs ……..... for [state consideration for the debt, with particulars, showing that the debt claimed is due].•

7. The petitioner applied to the company for the payment of his debt by his notice of demand signed and dated …....... served on the company at its registered office on …..........by registered post [or, set out the manner of service, if it was otherwise than by registered post], but the company has failed and neglected to pay the same or any part thereof.
[If the ground of the petition is that execution or other process issued on a decree or order of any Court in favour of the petitioning creditor was returned unsatisfied in whole or in part, set out the particulars relating to the decree and the execution or other process which has been returned unsatisfied in whole or in part.]

8. The company is [insolvent and] unable to pay its debts.
[Where the company is being already wound-up voluntarily or subject to the supervision of the Court, set out the facts showing that the voluntary winding. up or winding-up subject to the supervision of the Court cannot be

continued with due regard to the interests of the creditors.]

9.The petitioner, therefore, prays as follows:-
(1) That the ..... Co., [Ltd.] may be wound-up by the Court under the provisions of the Companies Act, 1956, and
(2) Such other order may be made in the premises as shall be just.

Advocate for the petitioner. Petitioner

•Where the petitioner is an assignee of a debt due by the company, say so, and set out the particulars of the debt, the date of the assignment, whether notice of the assignment was given to the company and if so, the date of such notice."

30. A combined and meaningful reading of the aforesaid Rules would show that when a petition is presented by the Creditor under Section 433 (e) of the Act of 1956, the petition must contain essential pleadings stating the consideration for the debt with particulars showing that debt claimed is due as well as it is ascertained sum of money and the respondent Company has failed and neglected to pay the debt due to the petitioner even after receipt of notice of statutory demand in writing as contemplated under Section 434 (1) (a) of the Act of 1956, and the said company is insolvent and closed Company and unable to pay its debt which appears to be necessary in view of the provision contained in Section 434 (1) (c) of the

Act, which provides that company shall be deemed to be unable to pay its debts if it is proved to be so. When there is no proper pleading as required in Form No.46, question of proof under Section 434 (1) (c) of the Act of 1956 does not arise. Therefore, the pleadings as provided in Rule 95 of the Rules of 1959 are imperative to succeed in a winding-up petition.

31. In the matter of **Kanchanaganga Chemical Industries v. Mysore Chipboards Ltd.**[15] it has been held by the Karnataka High Court that non-compliance with Rule 95 of the Rules of 1959 is fatal to the petition for winding-up and the petition must disclose the assets of the company and whether they are insufficient to meet the liabilities including contingent and prospective liabilities, by observing as below: -

> "Machinery for winding-up will not be allowed to be utilised merely as a means for realising debts due from a company. It is also well settled that a winding-up petition is not a legitimate means of seeking to enforce payment of debt. An order will not be made if a sufficient case is not stated in the petition even if such a case is proved in evidence. The petition must disclose the assets of the

15 (1998) 91 Comp. Cases 646 (Kar)

> company and whether they are insufficient to meet the liabilities including contingent and prospective liabilities, and further it must disclose the position of fixed assets as well as valuation of plant and machinery of the company. The question is not whether at given time the company can pay all its debts whether presently due or only in future and still to continue to function but the question is whether it is able to meet current demands."

32. In light of the above-stated Rules, the question for consideration would be whether the petitioner Company has averred the essential pleadings laid down in Rule 95 of the Rules of 1959 in the company petition in order to make an order for admission of the company petition. A careful perusal of the petition would show that the company petition does not contain the essential pleadings with regard to the consideration of debts with particulars and even the company petition does not make any whisper that the respondent has become insolvent or is insolvent, except that the respondent Company is heavily indebted to various banks and financial institutions, disposing off their assets and as such unable to pay its debt without giving the details of such alleged debts. Thus, it must be held that the petitioner Company has failed to

comply with the requirements of law, particularly the requirement contemplated in Rule 95 of the Rules of 1959 in the shape of Form No.46 under the said Rules. Thus, question No.4 is answered accordingly against the petitioner.

33. In sum and substance, the petitioner Company has failed to establish that the respondent Company owes an ascertained sum of money which is within the period of limitation and on the other hand, defence of the respondent is valid and *bona fide* based on substantial ground and further, the petitioner Company has failed to establish that the respondent Company is commercially insolvent as contemplated under Section 434 (1) (c) of the Act of 1956. In addition to this, the company petition is even not property constituted in accordance with the Rules and, therefore, the company petition as framed and filed does not deserve to be admitted on merits as well as for want of compliance of imperative rules.

34. As a fallout and consequence of the aforesaid discussion, the company petition does not deserve to be admitted and notice issued to the respondent company to show cause at pre-admission stage is hereby discharged. Concludingly, the

company petition is hereby dismissed leaving the parties to bear their own costs.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma