IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 546 OF 2014

In the matter of :
The Companies Act, 1956;
And
In the matter of :

Section 433 and 434 of the Companies Act, 1956;

And
In the matter of :

M/s. SKK STEEL ENTERPRISES PVT. LTD.

India Steel Work Limited .. Petitioner

Vs.

M/s. SKK STEEL ENTERPRISES PVT. LTD. .. Respondent

Mr.Jayaram Chandnani with Mr.Chirag Balsara and Ms.Sonali Salaskar i/b Lexim Associates for petitioner.

Mr.Mayur Khandeparkar with Mr.Girish B. Kedia for respondent.

CORAM : K.R.SHRIRAM, J.
RESERVED ON : 17TH NOVEMBER, 2015
PRONOUNCED ON : 20TH NOVEMBER 2015

P.C.

1 It is stated in the petition that the respondent-Company owed the petitioner a sum of Rs.22,28,740/- towards differential excise duty and

unpaid charges for the job work done by the petitioner, the company has admitted its liability, the company has failed and neglected to pay to the petitioner the outstanding amounts which are admittedly owed by the Company to the petitioner and hence the petitioner is unable to or is deemed to be unable to pay its debt; the Company is commercially insolvent and as the amount is in excess of Rs.500/- it is a fit case for the company to be wound up under the directions of this Court.

2 According to the petitioner, this amount became payable to the petitioner by the company pursuant to a conversion contract entered into between the petitioner and the respondent on 23.03.2010. As per the contract, the petitioner was to do for the company certain job work of conversion/rolling of steel bars of different sizes. The petitioner was to be paid for the job work at rates mentioned in the contract and also reimbursed the differential in excise duty payable. According to the petitioner, as on 31.03.2012, the company was to pay to the petitioner a sum of Rs.31,72,792/- towards the differential excise duty, i.e., the amount paid by the petitioner towards the excise duty over and above the credit for excise duty received by the petitioner for goods provided by the company for conversion. Thereafter, the company has paid Rs.10 lakhs leaving an outstanding amount of Rs.21,72,792/-. The petitioner, therefore, sent an

email dated 28.11.2008 to the respondent that it had debited the account of the company with Rs.31,72,792/- (Rs.10 lakhs was paid later) on account of differential excise duty and called upon the company to make the payment. The company did not raise any objection but by an email dated 21.02.2013, sent to the petitioner a statement of reconciliation dated 11.01.2013 for the period F.Y.2010-2011 and F.Y.2011-2012. According to the petitioner, the company has, by the said reconciliation, admitted that as on 11.01.2013, the differential excise payable to the petitioner was Rs.30,43,307/- and not 31,72,792/- and also explained the differential of Rs.1,29,485/-. According to the petitioner,the petitioner has given credit of Rs.1,05,591/- against Rs.1,29,485/- and after adjusting Rs.10 lakhs received the balance amount payable by the company to the petitioner is Rs.20,67,201/-. In addition to that, the petitioner is also claiming a sum of Rs.1,61,539/- towards the job work done by the petitioner for the company. It is pertinent to note that in the reconciliation statement relied upon by the petitioner, the respondent has denied that an amount of Rs.31,72,792/- as claimed by the petitioner was payable.

3 The company has strongly opposed the petition. The stand of the company is that the transactions between the petitioner and the company started sometime in the year 2006. The company, while forwarding the

material, always prepared the sale bills and the petitioner after conversion being done, used to raise the excise sale bill upon the company. The company would always make on account payment to be appropriated towards the processing/conversion charges. According to the company, this arrangement has been going on since January 2006 till 31.03.2012 and a sum of Rs.15,01,970.47 was payable to the company by the petitioner on the conversion account.

4 As regards, the excise duty is concerned, the petitioner always raised debit note and the company made the payment. However, the amount of excise due claim of Rs.31,72,792/- (Rs.10 lakhs was later paid) was excess and as per the ledger maintained by the company only an amount of Rs.30,43,282.12 was payable. In addition thereto, the defence of the company is that under the conversion contract, the petitioner was to supply the material as agreed after claiming the set-off towards the burning loss and the petitioner is holding excess stock to the tune of 11.740 MT supplied by the company to the petitioner amounting to Rs.3,92,160.53. According to the respondent, after taking into account the amount of Rs.15,01,970.47 + Rs.3,92,160.53 and excess amount of Rs.1,29,510/- claimed towards excise duty differential, if at all any amount is payable to the petitioner, it will be only Rs.2,15,099/- which the company is ready and willing to pay subject to

reconciliation of accounts. The company has also submitted that without reconciling the accounts, the petitioner has filed this petition claiming excessive amounts which is not payable. The respondent has also stated that the defence raised by them is bona-fide and hence, the petition is liable to be dismissed.

5 It is well-settled that a winding up petition should not be allowed to be taken recourse of as a means to recover debts from a company. It is not a legitimate way to enforce payment of debts which are bona fide disputed by a company and cannot be used as a weapon to pressurize and coerce the company to make payments. When the payment is bona fide disputed by the company, winding up petitions are not intended to be exploited as a normal alternative to the ordinary mode of debt realization. Further the claim should not be a running claim but one which is crystallized. The counsel appearing for the opposing parties, relied on the following judgments :

(1) ***Rishi Pal Gupta Vs. S.J. Knitting and Finishing Mills (P) Ltd.[1];***

(2) ***Rathi Bars Ltd. Vs. Deepak Casting Ltd.[2];***

(3) ***I.T.C. Ltd. Vs. Fomento Resorts & Hotels Ltd.[3];***

(4) ***Parimahal Holdings (P) Limited[4];***

1 (1994) 1 Comp. L.J. 343 (Delhi)
2 (2007) 141 Comp. Cases.94 Delhi
3 1991Comp. Cases (Bom.) 459
4 2003(2) Bom. C.R. 795

(5) ***M/s. Videocon International Ltd. Vs. M/s. City Palace Electronics Pvt. Ltd.***[5]

to submit that where there was a running account maintained between the parties, a petition for winding up is not maintainable except where it is followed by a confirmation thereof acknowledging the said debt by the company whereby the debt gets crystallized. Therefore, what we need to see is whether the debt as claimed by the company is crystallized or not.

6 Though the counsel for the respondent stated that there was a running account and the counsel appearing for the petitioner denied that there was a running account after the contract at Exh.'C' to the petition was entered into on 23.03.2010, I am not going into that point because we need not. I am dismissing this petition even otherwise for reasons that will appear from what I have stated hereinbelow.

7 The petitioner's claim is in two parts, viz., towards differential excise duty paid of Rs.20,67,201/- plus towards job work bills of Rs.1,61,539/-. Taking the second part of the claim first, viz. job work, there is no document or evidence whatsoever in the petition for claiming this amount, save and except statements by the petitioner.

5 Indiakanoon.org/doc/7285562

8 As regards the differential of excise duty is concerned, the petitioner has claimed on the basis of Rs.31,72,792/- which as per its records was payable whereas the company has disputed this amount. According to the company only Rs. Rs.30,43,307/- was payable towards this component. According to the company, the petitioner was charging an excess of Rs.1,29,485/-. The petitioner claims it has given credit, as averred in the petition, in the sum of Rs.1,05,591 against the differential amount of Rs.1,29,485/- but that still leaves a balance of Rs.23,894/- for which there are no explanations. Therefore, the amount as claimed in this head also is not crystallized.

9 Moreover, the company has stated that a sum of Rs.3,82,160.53 was payable by the petitioner to the company towards the unreturned stock. The counsel for the petitioner stated that this point has been raised for the first time in the affidavit in reply. The counsel for the company pointed out that they have arrived at this figure of Rs.2,15,099.53 in the reply to the statutory notice itself and they have arrived at this figure only after adjusting this amount of Rs.3,92,160.53. The company gave a statement as to how they arrived at this figure of Rs.2,15,099/-. The same reads as under :

<u>Claim as per the Petitioner</u>

Being the amount towards Excise Duty Amount due towards accepted bill	Rs.20,67,201/-
Amount due towards accepted bill	Rs. 1,61,539/-
Total	**Rs.22,28,740/-**

<u>Statement of account as per Respondent Company</u>

Credit amount of company lying with the petitioner **(Exhibit 1)**	Rs.15,01,970.47
Excess amount of Excise Duty claimed by the petitioner **(Exhibit 2)**	Rs.1,29,510.00
Stocks belonging to the company lying with the petitioner **(Exhibit 3)**	<u>Rs.3,82,160.53</u>
Total	**Rs. 20,13,641.00**
Balance payment due and payable by the company	<u>Rs.2,15,099/-</u>
<u>Grand Total</u>	**<u>Rs.22,28,740/-</u>**

10 The company also stated that the petitioner had a sum of Rs.18,26,730.10 of the company, as could be seen from the ledger filed by the petitioner and the petitioner has adjusted that amount towards the recovery to be made from a third party. The counsel for the petitioner concurred but stated that this amount was adjusted based on instructions/discussions with the company and they started with a clean slate on 1.04.2010 after the contract dated 23.03.2010 was entered into. However, I do not find any instructions or documents to say that the company asked

the petitioner to adjust this amount.

11 It is settled law that when the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The principles on which the court acts are :(1) the defence of the company has to be in good faith and one of substance ; (2) the defence should be likely to succeed in point of law ; and (3) the company should adduce prima facie proof of the facts on which the defence depends. It is also settled that when the defence is that the debt is disputed, the Court has to see first whether the dispute on the fact of it is genuine or merely a cloak to cover the company's real inability to pay the debts.

12 The Apex Court in ***IBA Health (India) Private Limited Vs. Info-Drive Systems Sdn.Bhd.***[6] has held that the dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court while hearing an application for winding up, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The Apex Court held 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

6 (2010) 10 SCC 553

in an action, lest there is danger of abuse of winding up procedure. The Court also held that 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. The Court also held that if the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand even if it is commercial solvent. It will be useful to reproduce paragraphs 20 to 25, 30, 31, 33, 34 and 35 of the said judgment. The same read as under :

> *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 & Another (1965) 35 Company Cases 456 (SC), in which this Court held that

> *"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. (1971) 3 SCC 632. The principles laid down in the above mentioned judgment have again been reiterated by this Court in Mediquip Systems (P) Ltd. V. Proxima Medical Systems (GMBH) (2005) 7 SCC 42, 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. (2009) 3 SCC 527.

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.

COMMERCIALLY SOLVENT

24 Appellant company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434 (1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay it debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.

25 An examination of the company's solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the company's liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as *relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterized as a stand alone ground. …*

26 ….

27 ….

28 ….

29 ….

30 A company petition cannot be pursued in respect of contingent debt unless the contingency has happened and it has become actually due. In the absence of any evidence, it is not possible to conclude that M/s. Solutions Protocol Sdn. Bhd. had in fact paid any amount to the appellant company towards commission charges due to the respondent company before the cut off date. A legal notice prior to the institution of the company petition could be served on the company only in respect of a debt (then due) and a company could be wound up only if it was unable to pay its debts. In this case, there is a bona fide dispute as to whether the amount claimed is presently due and if, at all, it is due, whether the appellant company is liable to pay the sum unless they have received the same from M/s. Solutions Protocol Sdn. Bhd.

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 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.

32 ….

33 We may notice, so far as this case is concerned, there has been an attempt by the respondent company to force the payment of a debt which the respondent company knows to be in substantial dispute. A party to the dispute should not be allowed to use the threat of winding up petition as a means of enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced as a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt. Of late, we have seen several instances, where the jurisdiction of the Company Court is being abused by filing winding up petitions to pressurize the companies to pay the debts which are substantially disputed and the Courts are very casual in issuing notices and ordering publication in the newspapers which may attract adverse publicity. Remember, an action may lie in appropriate Court in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company and later dismissed when a proper defence is made out on substantial grounds. A creditor's winding up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public.

PUBLIC POLICY CONSIDERATIONS

34 A creditor's winding up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the Newspaper of the filing of winding up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was *when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of public at large.*

35 We have referred to the above aspects at some length to impress upon the Company Courts to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed. A Company Court, therefore, should be guarded from such vexatious abuse of the process and cannot function as a Debt Collecting Agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere.

(emphasis supplied)

13 First of all, I am satisfied that the amount claimed is not crystallized in view of the disputes raised in the reconciliation statement. This is so far as the differential excise duty is concerned. On the conversion claim, no document is annexed to the petition. The company has raised prima-facie and plausible points on unreturned materials amounting to Rs.3,82,160.53, credit amount of Rs.15,01,970.47, excess excise differential claimed and Rs.18,26,730.10 of the company adjusted for dues to the petitioner by a third party. It is difficult of me to hold that the defence raised is frivolous or taken up for the mere purpose of avoiding payment. I cannot also conclude that the defence is merely a cloak to cover the companies' real inability to

pay the debts because the company has offered to pay the amounts which according to the company, is payable to the petitioner after reconciliation.

14 In these circumstances, the petition stands dismissed.

(K.R. SHRIRAM, J.)