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

COMPANY PETITION NO. 696 OF 2014

In the matter of Sections 433(e) and 434(1), A(a) & 434 of Companies Act, 1956;
And
In the matter of winding up of the company of M/s. Platinum Textiles Ltd., formally known as Neha Furnishing Pvt. Ltd., having their registered office situated at 97, Maker Tower, "F" Cuffee Parade, Mumbai-400 005.

M/s. V-Tex Weaving Manufacturing Mills Ltd. .. Petitioner

Mr.Santosh Saroj i/b. Ashok M. Saraogi for petitioner.

Mr.Ram Kutwal for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 25TH JANUARY, 2016

P.C.

1 The petition has been filed alleging that the respondent has neglected to pay its debt and therefore is commercially insolvent and should be wound up. The claim of the petitioner arises as under :--

The petitioner and the respondent entered into a job work agreement dated 18.09.2006. As recorded in the agreement, the petitioner gave an interest free loan of Rs.1 crore for purchase of machineries to the respondent. The petitioner would supply materials, i.e., cotton/polyester/viscose to the respondent on job work basis for conversion into yarn according to the specification and requirement of the petitioner. The agreement also provides the rate at which the petitioner would be paid conversion charges. It is also mentioned that the amount of Rs.1 crore given as interest free loan would be repaid at Rs.6,00,000/- p.m. which amount to be adjusted towards conversion charges payable. This arrangement continued upto 2012. It is the case of the petitioner that as on 31.03.2012, the respondent had to pay a sum of Rs.30,44,701/- against the interest free loan of Rs.1 crore that was advanced by the petitioner. The petitioner is relying upon the petitioner's ledger till the period 1.03.2012. According to the petitioner this ledger has been signed by Shri Ramesh Ashar, Director of the respondent-company acknowledging that a sum of Rs.30,44,701/- which was due and payable to the petitioner. As the amount was not paid, by a letter dated 20.08.2012, followed by a reminder dated 4.12.2012, the petitioner called upon the company to pay the said sum of Rs.30,44,701/-. The respondent neither paid nor replied to the said two letters. The petitioner, therefore, through their advocate caused a statutory notice dated 4.01.2013 issued to the respondent. The respondent-company replied to this notice and denied that any amount is payable. Though the company has acknowledged that it has received an interest free loan of Rs.1 crore, it is stated that the account had been closed long back between the petitioner and the company. The defence taken in the reply to the statutory notice is (a) that amount has been paid fully; (b) the company has also been supplying goods to the petitioner and receiving payments thereof; (c) the Director Mr.Ramesh Ashar who was supposed to have signed the ledger acknowledging that amount of Rs.30,44,701/- as on 31.03.2012 resigned from the company on 15.07.2011 and the company has even filed Form No.32 with the Registrar of Companies on 2.02.2012. The company, therefore, has denied that any amount is due and payable to the petitioner.

2 This is the same defence that is also taken in the affidavit in reply. In the rejoinder filed, the petitioner has stated that there were dealings with the company apart from the arrangement of giving Rs.1 crore friendly loan. In the rejoinder, it is also stated that though Shri Ramesh Ashar is supposed to have resigned, he is still involved in day-to-day activity. At the same time, there is nothing on record for making this statement. The petitioner has not filed any evidence to show that Shri Ramesh Ashar is still involved in day-to-day activities of the company.

3 It is settled law that the Company Court is not expected to hold a full trial in the matter. In this case, evidence will have to be led to the effect that all the accounts have been settled and also whether Shri Ashar had any authority to sign the ledger. Moreover, when a petition is filed for winding

up of a company, the question that arises for consideration is when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? The Court will have to to examine whether the company has a genuine dispute to the claimed debt or not. A dispute would be substantial and genuine if it is bona fide and not spurious, speculative. The Court would not go into holding a trial. If on the basis of pleadings filed, the Court finds that the dispute as to liability is something bona-fide, the Court should dismiss the petition. On the contrary, if the defence appears to be a mask invented to cover the companies' inability to pay the debts, the Court will entertain the petition. It will be useful to reproduce paragraphs 20 to 25, 31, 33 and 35 of ***IBA Health (India) Private Limited Vs. Info-Drive Systems Sdn. Bhd.***[1] which 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*

1 (2010) 10 SCC 553

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 and 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.*

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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.*
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> *34 ….*
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> *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.*

4 From the documents on record, it does appear that Shri Ramesh Ashar

resigned from the company and Form No.32 has been filed on 2.03.2012. From the ledger statement of the petitioner, which is annexed to the petition where the petitioner claims that Mr.Ramesh Ashar has signed an acknowledgement of debt is for the period upto 1st March 2012. It is not clear when this ledger was signed. Even assuming it was signed on 1.03.2012, from the documents annexed to the affidavit in reply, it appears that there was a memorandum of understanding dated 15.07.2011 between Ramesh Ashar and the present shareholders of the company based on which he agreed to transfer his shares in the company. There is also a resignation letter dated 15.07.2011 annexed to the reply. Copy of Form 32 annexed to the reply also shows that Ramesh Ashar has not been associated with the company with effect from 2.12.2012. There also appears to be claims made by the company on the petitioner in the sum of Rs.6,90,373/-. Therefore, it would not be correct to conclude the defence raised by the company is a mask to cover its inability to pay or the defence is spurious or moonshine. Therefore, as the company has raised a substantial dispute as to liability, the petition cannot be entertained.

5 The petition, therefore, stands dismissed.

(K.R. SHRIRAM, J.)