HON'BLE SRI JUSTICE CHALLA KODANDA RAM

COMPANY PETITION No.25 OF 2015

ORDER:

The petitioner invoking the provisions of Sections 433, 434 and 439(1)(b) of the Companies Act, 1956 (in short "the Act") seeks winding up of the respondent-M/s. Ashritha Paper Mill Pvt. Ltd., a company registered under the Act, on the ground the respondent is unable to pay its debts.

It is the case of the petitioner that respondent had borrowed a sum of Rs.15,00,000/- on 20.05.2012, Rs.16,00,000/- on 22.05.2012 and Rs.10,00,000/- on 23.05.2012, in all a total sum of Rs.41,00,000/-, and evidencing the same had executed an acknowledgment on 27.07.2012 (Annexure–B). It is also the case of the petitioner that the respondent company also had issued cheques bearing Nos.442923 and 442926 for Rs.15,00,000/- dated 20.05.2012, cheques bearing Nos. 442927, 442928, 442424 for Rs.16,00,000/- dated 22.05.2012 and cheques bearing Nos.442948, 442949 for Rs.10,00,000/- dated 23.05.2012, in all a total of Rs.41,00,000/-, drawn on State Bank of India, Vijayawada Branch. The petitioner issued a demand notice under Sections 433 and 434 of the Act on 24.10.2014 demanding repayment of Rs.41,00,000/- with interest at the rate of 12% per annum. A reply notice, dated 26.11.2014 was sent by the respondent denying there being any borrowal from the petitioner and any financial transactions between the petitioner and the respondent company and further the alleged transaction is not supported by any authorisation and Board resolution of the respondent company. As the demand of the petitioner was not acceded to, invoking the provisions of the Act the petitioner filed the present Company Petition.

A counter affidavit has been filed by the respondent company, for which a reply affidavit is filed by the petitioner.

Sri Tarun G. Reddy, learned counsel appearing for the petitioner, by drawing attention of the Court to the Annexure-B and also the Xerox copies of the cheques referred to submits that the factum of borrowal of the money by the respondent company is clear from the acknowledgment (Annexure-B) received from the respondent company on its letter head signed by the then Managing Director viz., Sunkara Venkata Subbarao. The two cheques, bearing Nos. 442948 and 442949 dated 09.10.2014 and 11.10.2014 receptively, when presented were returned with endorsement "Funds Insufficient". Learned counsel also by pointing out the Annual Report for the year 2013-2014 submits that Sunkara Venkata Subba Rao, who signed for the company on the cheques and the letter head acknowledging the receipt of money, was the Managing Director at relevant point of time. Learned counsel also by drawing attention to the Balance Sheet for the year ending 31.03.2014 contends that the Company has incurred a loss of Rs.65,31,382/- for the financial year ending 31.03.2014 and the same has increased to Rs.2,16,61,966/- for the year ending 31.03.2014. The respondent company has a total accumulated loss of Rs.3,65,53,296/-. All these aspects are proof positive that the respondent company is not in good financial health coupled with the fact respondent company had not met to the demand made by the petitioner by discharging the debt due is proof positive that the company is unable to pay its debts and thus the company is required to be winding up in public interest. Learned counsel for the petitioner had relied on a judgment of Allahabad High Court in **Lakshmi Ratan Cotton Mills Co. Ltd., Kanpur Vs., J.K. Jute Mills Co. Ltd., Kanpur**[1] and **MRF Limited Vs Manohar Parrikar and others**[2] to support a proposition that a creditor shall be entitled to presume that necessary authorization in favour of a person, who is acting as a Managing Director, to do certain acts in normal course of his responsibilities, and not having a Board resolution etc., are all with respect to internal management that by itself disentitle a creditor for the monies which have been lent.

On the other hand, Sri Y. Rama Rao learned counsel for the respondent company contends that at the earliest point of time in response to the demand made by the petitioner through legal notice dated 24.10.2014, the respondent company issued reply notice dated 26.11.2014 denying there being any liability on the part of the respondent company, and further contended that the notice issued to the respondent company represented by one N. Jainath, who is no way connected with the respondent company. While admitting that Mr. Sunkara Venkata Subba Rao was the Managing Director at relevant point of time contends that the said Subba Rao was never authorised to borrow monies from any one, much less the petitioner and further the undated acknowledgment issued does not bind the company as the monies were never received in the Company, that too a sum of Rs.41,00,000/-. To a query, the company having come to know about the misdeeds of the then Managing Director viz., Sunkara Venkata Subba Rao, had

[1] 1956 SCC Online All 370 : AIR 1957 ALL 311
[2] (2010) 11 Supreme Court Cases 373

taken immediate steps to relieve him from the responsibilities of the Company and further the alleged borrowal of the company was never reflected in the company's audited account and balance sheet. On the other hand, Sri Y. Rama Rao relied on the judgment in **M/s. Goutham Enterprises, Hyderabad Vs M/s. ICATCH Communications India Ltd., Hyderabad[3].**

It is not necessary for this Court to set out the settled principles of law, particularly a winding up petition cannot be used for recovery of monies by a creditor when the date of which being seriously disputed. Even at the admission stage, the company Court is to be vigilant and to be cautious in exercise of its jurisdiction on account of serious ill-consequences that may result to a company, on admission of a company petition, on the ground of said company is unable to pay its debts. It is also settled law that the Company petition for winding up is akin to a summary suit under Order XXXVII of Code of Civil Procedure that there is a triable issue with respect to the debt if the facts borne out of record *prima facie* indicated that the respondent company is entitled to granting of leave to defend, in such cases the company petition does not deserve to be entertained. These well settled principles have been repeatedly captured in various judgments of the Supreme Court and also this Court. A reference made to the judgment of the Supreme Court in **Airwings Private Ltd., Vs. Viktoria Air Cargo Gmbh[4],** before admitting and advertising winding up petition under Section 433 of the Act, the Company Court is required to conduct a summary enquiry on the following aspects:

---

[3] C.P.No.147 of 2016
[4] 1995 82 CompCas 447 Kar

> (i) Whether the petitioning creditor is a creditor to whom the company owes an ascertained sum of money or substantially ascertained sum of money.
>
> (ii) Whether the said debt is within limitation.
>
> (iii) Whether the defence of the company is valid or bona fide or whether it is a mere moonshine.
>
> The aforesaid three points will have a direct bearing on the competence of the petitioning-creditor to maintain such a petition.
>
> (iv) Whether from the material on record at this stage, a presumption arises that the company is unable to pay its debts as contemplated under section 434(1)(a) or (b), as the case may be; or
>
> (v) Whether from the material on record the court is prima facie satisfied that the company is commercially insolvent as contemplated under section 434(1)(c).

These settled principles were followed by this Court in **Indiabulls Housing Finance Limited Vs. South Asian Agro Industries Ltd.,[5].** Applying the said principles to the present case, it may be noted that there is no documentary evidence evidencing a huge sum of Rs.41,00,000/- having been received by the respondent company. In this context, Section 269SS of the Income Tax Act, borrowal of any amount of cash above Rs.20,000/- is an offence and in fact no individual person can keep a sum of more than a particular amount of cash. Further, Annexure-B, which has been produced by the petitioner evidencing borrowal of the money by the respondent company, categorically states that the cheques were issued only as a security, and they shall be taken back after repaying the amounts. In other words, *prima facie,* the cheques were in fact were not issued to discharge the loan amount.

[5] (2014) 187 CompCas 205 (AP)

The copies of cheques which have been placed before this Court are blank cheques and undated, while in Annexure-B receipt specific dates have been mentioned. It is also the case of the respondent counsel that the petitioner had in fact filed O.S.No.74 of 2013 against Sunkara Venkata Subba Rao S/o Vasudeva Hari Prasada Rao, the person who had issued the receipt for a sum of Rs.45,00,000/-, which suit came to be decreed on 26.11.2015. It may be noticed from the said judgment and decree that petitioner alleged to have lent a sum of Rs.45,00,000/- on a pronote dated 05.11.2012, for recovery of which the suit came to be filed on 2803.2013. The alleged loan transaction in the present case is in the month of May, 2012.

So far as the contention of the petitioner that the respondent company had become insolvent, *prima facie*, cannot be accepted as what all has been stated in the balance sheet for the year 2013-2014 that the accumulated losses were Rs.3,65,53,296/- and there was no cash loss for the financial year 2013-2014. It is well settled in the Income Tax Act that depreciation of loss is also considered as loss for the purpose of computation of income and the same is only a notional loss. At any rate, the said aspect is not required to be gone into at this stage, except to come to a *prima facie* conclusion that the respondent company cannot be able to meet its current liabilities. In the case of on hand, there being a doubt with respect to the very liability of the respondent company the other aspects enumerated in **Airwings Private Ltd., Case** (3 supra) is not required to be examined. In the facts of the present case, this court is not satisfied that this is a fit case for admission, especially on account of the factors mentioned above. In that view of the matter, it is also not necessary for this court to deal with the judgments cited by the learned counsel for the petitioner with respect to the implied authority of the Managing Director to borrow money and issue receipts especially considering the alleged cash payments, which supposed to have been made.

Therefore, in the facts of the present case based on the material placed before this Court, this Court is not satisfied that the petitioner is likely to succeed in law or the defences which have been pleaded by the respondent company is a moon shine or a make belief.

Accordingly, this Company Petition is dismissed. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall also stand closed.

CHALLA KODANDA RAM, J

Dated: 12.09.2016
Ssv