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

Decided on : 02.03.2016

+ **CO. APPL.41/2014, C.M. APPL.13617/2014**

MR. JAMBO CHEMICAL AND ALLIED INDUSTRIES PVT. LTD.

.....Appellant

Through: Sh. P.V. Kapur, Sr. Advocate with Sh.
Dinkar Singh and Ms. Divya Kapur, Advocates.

Versus

M/S. ARJUN INDUSTRIES LTD.Respondent

Through: Sh. Virender Ganda, Sr. Advocate with
Sh. S.K. Giri, Advocate and Ms. Mausumi
Bhattacharjee, MD of the respondent company.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This is an appeal under Section 483 of the Companies Act, 1956 ("the Act") that questions an order of the Company Judge whereby its petition under Section 433(e) and (f) as well as Section 434/439 was dismissed. The appellant/petitioner is the transferee/assignee of a debt by the Kotak Mahindra Bank, which in turn was the assignee of the respondent company's original creditor/Industrial Development Bank of India (IDBI).

2. The brief facts are that the IDBI had entered into a Rupee term loan agreement on 07.10.1996 with the respondent (hereafter referred to as "the company") for a sum of ₹367 lakhs and disbursed substantial amounts. On 06.11.1996, the company also entered into a foreign currency loan

agreement for the equivalent of ₹181 lakhs. Here again, substantial amounts were disbursed by the IDBI. On 10.06.1998, the IDBI called upon the company to pay amounts, which were overdue with interest. It invoked the guarantee clause. Eventually, it preferred recovery proceedings, being O.A. No.445/1998 before the Debts Recovery Tribunal (DRT), Delhi, claiming the sum of ₹6,19,93,815/- together with interest and liquidated damages. On 28.05.1999, the DRT issued a Recovery Certificate (RC), which was challenged before this Court in writ proceedings. On 01.05.2000, the Court remitted the matter to DRT for fresh consideration. In this background, in March 2006, the company had approached IDBI with a One-time settlement (OTS) offer of ₹225 lakhs as full and final settlement. The IDBI's Committee decided to accept the offer if it was ₹250 lakhs. However, there was failure to communicate acceptance of such offer by the IDBI's committee. On 31.03.2006, the IDBI assigned the debt to Kotak Mahindra Bank, which was substituted in the proceedings before the DRT on 12.12.2006. The Kotak Mahindra Bank assigned the debt to the present appellant on 16.04.2008. The company thereafter filed W.P.(C) 6557/2008 seeking an order restraining IDBI from assigning its debt to any other party. This writ petition was dismissed eventually on 02.02.2011. The Division Bench on 19.12.2011 upheld the order of dismissal. The Debts Recovery Appellate Tribunal (DRAT) rejected the appellant/petitioner's application for substitution in respect of Kotak Mahindra Bank before the DRT on 07.07.2010 on the reasoning that Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, does not cover it.

3. The appellant issued a statutory notice to the company on 23.12.2010 under Section 434(1)(a) calling upon it to pay the sum of ₹28,99,00,000/-

together with interest. Upon inaction by the company, the appellant instituted winding-up proceedings.

4. The company Court initially was not inclined to issue notice on the petition having regard to the earlier round of litigation between the company, the present appellant and predecessors-in-interest, i.e. IDBI and later Kotak Mahindra Bank. However, upon statement on its behalf that it would confine its claims to the OTS amount relied upon by the company, notice was issued on 24.05.2012. On 26.08.2012, a direction was issued to the company to deposit ₹250 lakhs, which was to be kept in a fixed deposit.

5. In the impugned judgment, learned Single Judge considered whether it was appropriate to issue an order of winding-up, having regard to the entirety of circumstances. Learned Single Judge considered the submissions from the perspective of whether the offer of the company was accepted by the empowered Committee of the IDBI. The Committee had decided that a counter offer of ₹250 lakhs should be made and that the entire sum was to be paid by 30.06.2006. Learned Single Judge, after considering the materials, was of the opinion that there was no concluded agreement between IDBI and the company for settlement of dues and offer made by it of ₹225 lakhs was rejected. He thereafter recorded that the company could be called upon to pay reasonable interest of ₹250 lakhs provided the petitioner/appellant was willing to accept it. The company was willing to pay simple interest @ 12% with effect from 27.03.2006. It was not acceptable to the appellant who demanded 21% compound interest.

6. Having regard to the entire background of circumstances, the learned Single Judge held that this was not an appropriate case for winding-up of the company on the ground of its inability to pay debts under Section 434(1)(a).

The learned Single Judge thereafter held as follows:

“15. The next question to be addressed is whether the respondent company is liable to be wound up under Section 433(c) or 433(f) of the Act. Although, the pleadings filed by the petitioner does mention that the respondent has not commenced its business, the focus of the petition is not that the respondent is liable to be wound up on account of noncommencement/suspension of business. The petitioner had confined the petition only to a claim of debt, at the time of issuance of notice. This by itself would be reason enough for not permitting the petitioner to urge that the respondent has lost its substratum and should be wound up on account of its failure to commence business. Having stated the above, I deem it appropriate to also consider the merits of the said contention.

16. In order to consider whether a company should be wound up under Section 433(c) on account of non-commencement of public suspension of business, it would be necessary to investigate whether there is a good reason for the same and whether there is reasonable chance for the company to be revived...

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17. The respondent has submitted that it could not commence its business on account of failure on the part of the IDBI to adhere to its obligations. The respondent is also pursuing a counter claim against IDBI and it was contended that the company would be able to revive itself, once the said controversy is decided. It is also to be borne in mind that winding up of a company has serious consequences and the Courts have always leaned towards ensuring that the ailing companies are given a fair and reasonable opportunity to revive. In the present case, the company is pursuing its counter claim against IDBI and the question whether the company would be able to revive or not can only be considered after that controversy has concluded. Concededly, the jurisdiction to wind up a company under section 433(e) and 433(f) of the Act is discretionary. In my view, this is not a case where this court should exercise its discretion to wind

up of the company. Further, no prejudice has been caused to the petitioner by the existence of the respondent company.”

7. The learned counsel for the appellant relied upon the balance sheet issued by the company to contend that there is no defense to the claim for payment and that in the given circumstances of the case whereby an admission was made with respect to payment of ₹250 lakhs, the learned Single Judge fell into error in rejecting the petition. It was submitted that even without recourse to the deeming provision with respect to the company's inability to pay debt, the learned Single Judge ought to have held that the respondent company was unable to pay the debts on the face of the record. It was emphasized that the company has no means to repay the debts and has no cash flow. It is urged that the learned Single Judge's observations that the question of interest and the rate being one of dispute and a mixed question of fact, is erroneous. The appellant points out that the secured creditor has a right to claim contractual rate of interest. Learned Single Judge lastly submitted that the commercial licenses for the business activity of the company were cancelled and that it has no prospects of starting any worthwhile business.

8. Learned counsel for the respondent/company submitted that at the initial stage itself, the learned Single Judge was not satisfied as to the maintainability of winding up petition but in view of the appellant's statement that the claim would be confined to ₹250 lakhs, a Show Cause Notice was issued. It is pointed out that there is no averment in the petition with respect to the conditions under Sections 433(c) and (f). Learned counsel pointed out that in the initial stage of securing notice, the appellant expressed satisfaction if the sum of ₹250 lakhs was paid but later sought to

enlarge its demands with an untenable claim for 21% compound interest. In these circumstances, a winding up petition at the behest of someone who was a second assignee of a debt, which was disputed, was neither appropriate nor maintainable.

9. One of the principles, which govern the law here is that a winding up petition is not to be filed as a coercive means of recovery of debt. Long ago, in *Amalgamated Commercial Traders (P) Ltd v ACK Krishnaswami & Anr* (1965) 35 Company Cases 456 (SC), the Supreme 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.'"

10. This Court, in *Agro Anlagewbau GmbH v. Orient Ceramics & Industries Ltd* [1986] 60 Com Cas 691 (Del) observed that the winding up jurisdiction is not to be use as an arm-twisting device to compel a company to pay up a claim, which it is unwilling to pay for. In *IBA Health (India) (P) Ltd. v. Info-Drive Systems Sdn. Bhd*, (2010) 10 SCC 553 the position was again reiterated by the Supreme Court as follows:

"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."

11. In the present case, whilst there is no doubt that the respondent company had made an OTS offer, there is no material to suggest that this offer was accepted by the IDBI and so communicated. On the other hand,

the IDBI in fact assigned the debt to Kotak Mahindra Bank, which later assigned it to the present appellant. On the other hand, the company's counter claim is still pending. The record also shows that the appellant got its "foot into the door" metaphorically speaking, by offering to the Court- which was reluctant to entertain the winding up proceeding- that it would be content accepting the said sum of ₹250 lakhs. However, the appellant was not agreeable for that amount and demanded a high rate of interest. This Court is unpersuaded by the submission that the Company Court overlooked the admissions, by way of the balance sheet issued by the respondent; it was shown during the hearing that the explanation for the so called credit liabilities were found in the notes to accounts, which disputed the liability and stated that the matter was pending before the Debt Recovery Tribunal. In these circumstances, it cannot be said that the requirements for entertaining a winding up proceeding, so as to compel the Court to admit the petition, had been made out.

12. In view of the foregoing reasons, this Court finds no merit in the appeal. Any amounts deposited in Court by the respondent shall be refunded to it, with accrued interest. The appeal is dismissed without order as to costs along with the pending application.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

MARCH 2, 2016