

HIGH COURT OF CHHATTISGARH, BILASPUR

Company Petition No.24 of 2010

Smt. Rekha Jain, W/o Shri Prem Raj Jain, aged about 50 years, R/o C-124, Tagore Nagar, Pujari Park Road, Raipur (C.G.)

---- Petitioner

Versus

M/s. Nanesh Builders Pvt. Ltd., C.G. Press Complex, Shop No.1, Rajbandha Maidan, Raipur (C.G.)

---- Respondent

For Petitioner:	Mr. Prafull Bharat and Mr. Keshav Dewangan, Advocates.
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For Respondent:	Mr. Adhiraj Surana, Advocate.
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Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

28/06/2017

1. Invoking Sections 433 (e) and 434 of the Companies Act, 1956, this company petition has been filed for winding up of the respondent Company.

2. Facts pleaded in the petition to claim relief of winding-up are as under: -

2.1) The petitioner advanced unsecured loan to the respondent Company bearing interest at the agreed rate of 12 % per annum amounting to ₹ 5,61,765/- as on 31-3-2003. During the financial year, the respondent Company has paid to the petitioner a sum of ₹ 77,974/- towards accrued interest at the rate of 12% per annum after deducting TDS of ₹ 8,187/- as per the provisions of the Income Tax Act. It is further case of the petitioner that the

unsecured loan suddenly disappeared from the books of accounts and balance sheets of the respondent Company due to fraud and forgery committed by the Directors of the respondent Company and the unsecured loan was not reflected in the balance sheets and books of accounts of the respondent Company in 2003-04, 2004-05 and 2005-06 to 2008-09. Therefore, legal notice dated 28-2-2010 (Annexure P-2) was served upon the respondent in conformity with the provisions contained in Section 434 (1) of the Companies Act and thereafter, the respondent Company was called upon to repay the aforesaid unsecured loan within the statutory period of three weeks from the date of service of the said legal notice. By reply Annexure P-3 dated 26-3-2010, the respondent Company refused to repay the amount of aforesaid unsecured loan to the petitioner and thus, this petition for winding up of the respondent Company in accordance with Sections 433 and 434 of the Companies Act, 1956 has been filed for winding-up of the respondent Company.

2.2) The Court has issued notice to the respondent at the pre-admission stage to show cause for winding-up of the respondent Company. Reply to show cause been filed by the respondent Company. This is how the petition is before this Court at pre-admission stage for admission on the question of winding-up of the respondent Company.

2.3) Reply has been filed by the respondent Company and plea of discharge has been taken that liability was already discharged by

the respondent by way of cheque dated 15-2-2004 of the State Bank of India amounting to ₹ 5,97,058/- which has been received by the petitioner and it was never presented by the petitioner for clearing for the reasons best known to them and it was again renewed by the respondent Company in favour of the petitioner in the month of December, 2004, even the renewed cheque was not presented for clearance due to some ulterior motive and at the belated stage to exert pressure for such a liability, which has already been discharged in the year 2004, this company petition under Section 433 of the Companies Act has been filed. It is further submitted that the respondent Company is commercially solvent and current assets of the company as on 31-3-2016 comes out to ₹ 1,96,15,860/-. Thus, the financial condition of the respondent Company is in very good shape and the company has been able to carry out its business and functioning in the past and shall also be capable to do the same in the future. The audited financial statements of the years 2013-14, 2014-15, and 2015-16 have been filed collectively. This defence is an alternative defence of the respondent Company.

3. Mr. Prafull Bharat, learned counsel appearing for the petitioner, would submit that the respondent Company is unable to pay its debt as it is commercially insolvent and therefore the present company petition be admitted for winding-up of the respondent Company.
4. Mr. Adhiraj Surana, learned counsel appearing for the respondent

Company, would submit that the respondent Company has discharged the liability by making payment of amount in dispute and the respondent has valid and bona fide defence based on substantial ground, therefore, there is no neglect to pay within the meaning of Section 434 (1) (a) of the Companies Act and the present company petition has only been filed to pressurize the respondent Company who is commercially solvent running and carrying out its day to day affairs which is apparent from the statement of audited balance sheets and is able to meet its current demand apart from its commercially solvent and it cannot be held that the respondent Company is unable to pay its debts.

5. I have heard learned counsel for the parties on the question of admission of the petition and has given thoughtful consideration to the submissions made herein-above and also gone through the record with utmost circumspection.
6. The first question for consideration is whether the respondent Company has a 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 Companies Act.
7. 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, 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.

8. Way back in the year 1983, in the matter of **Cotton Corporation of India Limited v. United Industrial Bank Limited and others**¹, Their Lordships of the Supreme Court have clearly held 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 should not admit the petition, and held as under: -

“It is undoubtedly true that winding-up petition is not a

¹ (1983) 4 SCC 625

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.”

9. Likewise, Their Lordships of the Supreme Court in the matter of

IBA Health (India) Private Limited v. Info-Drive Systems SDN.

BHD.² while considering earlier decisions of the 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:-

“Substantial dispute – As to liability

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

2 (2010) 10 SCC 553

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](#)³ 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](#)⁴. 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](#)⁵ 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](#)⁶.

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.

3 (1965) 35 Comp. Cas 456(SC)

4 (1971) 3 SCC 632

5 (2005) 7 SCC 42

6 (2009) 3 SCC 527

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."

10. Thus, Their Lordships of the Supreme Court in aforesaid cases have held in no uncertain terms that if the debt is *bona fide*ly disputed, there cannot be neglect to pay within the meaning of Section 434 (1) (a) of the Act, 1956 so as to incur liability under Section 434 (e) read with Section 434 (1) (a) of the Act, 1956.
11. 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, it is not in dispute that an amount of ₹ 5,61,765/- was advanced by the petitioner to the respondent Company as on 31-3-2003. The respondent in its return has clearly averred in para 4 that in discharge of that responsibility a cheque was issued by the respondent Company to the petitioner on 15-2-2004 amounting to ₹ 5,97,058/- and again on the request of the petitioner, it was renewed in the year 2004, but it was never presented for clearing and after six years, the company petition has been filed for winding-up of the company. Photostat copy of the cheque has been filed as Annexure R-2. The petitioner has not countered the said averment by filing rejoinder affidavit before this

Court, so it is uncontroverted statement on record to hold that the respondent Company has taken the plea of discharge in the instant petition.

12. Now, the question is whether the plea of discharge can be said to be *bona fide* defence on the part of the respondent Company.
13. A Division Bench of the Madras High Court in the matter of **Messrs. Shadiram and Sons, represented by partner Smt. Premalata Samani v. Southern Aviation Pte. Ltd.**⁷ has held that if a plea of discharge is set up by the respondent Company and if it is prima facie established, it implies that the debt as claimed is disputed. But, when the debtor company admits the debt and raises a plea of discharge either in part or in whole of the debt claimed, then the burden of proof normally shifts to the debtor company to prove such a discharge at least to the extent pleaded so as to satisfy the Court that the debt as claimed is not due and that, therefore, there is a bona fide dispute by the company regarding the existence of such a debt. It is for the Company court to examine the said defence. The Madras High Court held in paragraph 2 of the report as under: -

“2. One of the circumstances in which a Company may be wound up by the court as provided in S.433 of the Companies Act is that the company may be wound up by the court if the company is unable to pay its debts. Here also a judicial discretion is vested in the Company Court while effacing corporate existence of a company. The word 'debt' used in sub-clause (e) has to be understood in a practical and pragmatic sense. As the existence of the Company Court cannot be sought for realisation of the debts due by a creditor or for its enforcement under the guise of a petition for

⁷ (1978) 91 L.W. 276 : (1978) 48 Comp Cas 570

winding up, caution should be observed in a case where the main objection to the petition to wind up is that the debt is disputed. A given case might present a slight complication if the debt is admitted, but discharge is pleaded. Undoubtedly, in a case where the allegation is that the debtor Company is indebted and is unable to pay its debts, the initial burden is on the petitioning creditor who alleges the existence and reality of such a debt. But, when the debtor company admits the debt and raises a plea of discharge either in part or in whole of the debt claimed, then the burden of proof normally shifts to the debtor company to prove such a discharge at least to the extent pleaded so as to satisfy the Court that the debt as claimed is not due and that, therefore, there is a bona fide dispute by the company regarding the existence of such a debt. In such circumstances, it is for the Company court to discover through a reasonable lens of investigation whether the plea of discharge is totally unfounded and is utterly baseless and is only a ruse to abuse the winding up provisions provided for by the statute or whether there is any substratum of truth in it. If on such an enquiry it comes to a reasonable conclusion not by astute reasoning but by a prima facie examination of the evidence and the records produced that the discharge pleaded can be true, then it obviously follows that there is a bona fide dispute regarding the debt as raised by the company. The guiding principles have been well laid by decided cases and it appears to us that if in a particular case the evidence is such that there is a prima facie proof on which the defence of discharge is available and a reasonable possibility of their success is then in a properly instituted action by the petitioning creditor for recovery of such a disputed debt, and above all, if the plea of discharge is not without any reasonable substance but raised in good faith then it is by now well settled that the court will not wind up that company. In fact, the Supreme Court in *Amalgamated Commercial Traders, Ltd. v. Krishnaswami* (supra) observed as follows—

“If a petitioning creditor in such circumstances is encouraged, then the petition filed by him would be an ostensible one seeking for a winding up order, but really to exercise pressure and therefore ought to be dismissed, since it may be stigmatised as a scandalous abuse of the process of the Court. ...”

14. It has been further held by the Madras High Court that the

jurisdiction to wind up a company incorporated under the Companies Act is discretionary and all the circumstances have to be considered by the Company Court before it exercises its judicial discretion to efface the existence of a corporate body.

15. In the instant case, as already been held in the aforesaid paragraph, there is uncontroverted statement on record to hold that the respondent Company has issued cheque to discharge its liability and it is further renewed thereafter. Photocopy of the cheque has been filed. It is one thing to say that the cheque has not been encashed, therefore, there is no discharge, but the fact remains that the cheque has validly been issued towards discharge of company's liability and it is not the case of the petitioner herein that the cheque was dishonoured upon presentation for clearing and as such, the plea of discharge cannot be taken. Therefore, the plea of discharge set up by the respondent Company is established and the jurisdiction to wind up a company incorporated under the Companies Act being discretionary, this Court would not like to step up and direct for winding up of the respondent Company.

16. So far as the question of company being commercially insolvent, there is an overwhelming evidence available on record that the respondent Company is commercially solvent and is able to discharge its current need and audited statement of accounts as on 31st March, 2016 has been filed which goes to show that the Company is unable to pay its debts or has neglected to pay its debts.

17. Their Lordships of the Supreme Court in the matter of **Pradeshiya Industrial and Investment Corporation of U.P. v. North India Petro Chemical Limited and another**⁸ in detail laid down the requirement to be established even *prima facie* before getting a petition under Section 433(e) of the Act, 1956 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.

18. Similarly, Division Bench of the High Court of Karnataka in the matter of **Airwings Private Limited v. Viktoria Air Cargo GmbH Langer Kornweg**⁹ 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 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 tentative 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.

8 (1994) 3 SCC 348

9 AIR 1995 Kant 69

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:”

19. 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 Section 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.”

20. Thus, the details of insolvency are wanting and the petitioner has failed to establish that liabilities of the respondent Company are disproportionate to its assets, as such, commercial insolvency of the respondent Company has not been established by the petitioner whereas, the respondent Company has established that it is commercially solvent.

21. As a fall out and consequence of aforesaid discussion, the petition does not deserve to be admitted and the notice issued to the respondent Company to show cause at pre-admission stage is

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

Sd/-
(Sanjay K. Agrawal)
Judge

Soma