

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**COMP No. 01 of 2005**

M/s. Bhilai Builders Pvt. Ltd. Through Director, Smt. Madhu Jain,
W/o. Gulab Jain, Aged about 43 years, R/o. Shanichari Bazar,
Durg (C.G.)

---- **Petitioner****Versus**

M/s. Himalaya Commercial Complex Pvt. Ltd. Through Director,
Santosh Golchha, Supela Square, Supela, Bhilai (C.G.)

---- **Respondent**

For Petitioner : Mr. M.L. Sen, Advocate on behalf of Mr. S.C.
Verma, Advocate.

For Respondents : Mr. S. Rajeshwar Rao, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****10/11/2017**

(1) Learned counsel appearing for the petitioner would submit that this Company Petition has been filed for winding up under Sections 433 & 434 of the Companies Act, 2002 (henceforth "Act, 2002") stating *inter alia* that respondent-Company had taken loan of Rs.31,74,000/- from the petitioner Company in the year 1996. The said amount itself was borrowed by the petitioner-Company from the L.I.C. Housing Finance Limited @ 21% per annum and when the petitioner Company made demand for repayment of amount given to the respondent Company, the respondent Company refused to pay the said amount. Thereafter, the matter was settled in the year 1999 vide Annexure P-2 and the respondent Company was required to pay an amount of Rs.27,00,000/- to the petitioner company but despite settlement between the parties,

the amount has not been paid to the petitioner-Company and as a result of non-payment of amount, the petitioner Company has been declared as defaulter by the Life Insurance Corporation of India as the loan has been taken by the petitioner-Company from the LIC Housing Finance Limited. Thereafter, the petitioner Company had also served a registered notice to the respondent Company, but despite legal notice, the amount in dispute has not been paid to the petitioner-Company.

(2) On the other hand, counsel for the respondent would submit that the company petition filed by the petitioner does not meet out the various requirements under the Companies Act, 1956 and the same is in breach of Rule 95 of the Companies (Court) Rules, 1959 and therefore, the same is liable to be dismissed. He would further submit that this Company petition is beyond the scope of under Sections 433 or 434 of the Act, 2002, as such, the respondent-Company is fully solvent and the petitioner has not averred anywhere in the petition that the respondent has become insolvent, which is most essential pleading for seeking a winding up under Section 433 (e) of the Act, 2002, therefore, the writ petition as framed and filed is liable to be dismissed.

(3) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also gone through the material available on record with utmost circumspection.

(4) 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.

(5) 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 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

1 (1983) 4 SCC 625

the petition. Therefore, the power is conferred on the Judge before whom the petition comes-up for admission to issue preadmission 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.”

(6) 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 should dismiss the petition and leave the creditor first to establish

2 (2010) 10 SCC 553

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 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 nonpayment 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.

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

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

4 (1971) 3 SCC 632

5 (2005) 7 SCC 42

6 (2009) 3 SCC 527

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."

(7) 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.

(8) Their Lordships of the Supreme Court in the matter of **Pradeshia Industrial and Investment Corporation of U.P. v. North India Petro Chemical Limited and another**⁷ 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.

(9) Similarly, Division Bench of the High Court of Karnataka in the matter of **Airwings Private Limited v. Viktoria Air Cargo GmbH Langer Kornweg**⁸ 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:

7 (1994) 3 SCC 348

8 AIR 1995

(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 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.

II. When a winding-up petition is filed seeking winding-up of the Company under [S. 433\(e\)](#) of the Act and from the 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:"

(10) 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."

(11) 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 and the respondent company has valid and bonafide defence and there is no neglect to pay within the meaning of Section 434(1)(a) of the Act and provisions of winding up cannot be pressed into service for recovery of amount in dispute.

(12) 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. However, the petitioner would be at liberty to file civil suit before the jurisdictional Civil Court for amount in dispute.

Sd/-

(Sanjay K. Agrawal)

Judge

D/-

