

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.03.2017

CORAM

THE HONOURABLE Dr. JUSTICE S.VIMALA

Company Petition No.209 of 2008

Export-Import Bank of The United States

811 Vermont Avenue, N.W.

Washington D.C. 20571, USA

Represented by their Power of Attorney Agent,

Mr. Kaviraj Singh

... Petitioner

Vs.

M/s. Palani Murugan Mills Ltd.,

6, IV Street, Tatabad,

Coimbatore 641 012

... Respondent

Prayer : Company Petition filed under Sections 433 (e) read with Sections 434 (1) (a) and Section 439 (1) (b) of the Companies Act, 1956, praying that: (a) the respondent company, namely, M/s. Palani Murugan Mills Limited be wound up by this Court under the provisions of the Companies Act, 1956; (b) the learned Official Liquidator of the High Court, Madras, be appointed as the liquidator of the respondent company; and (c) direct that the costs of this petition come out from the estate of the respondent company.

For Petitioner : Mr. T.K.Bhaskar

For Respondent : Mr. P.J.Rishikesh.

ORDER

The petitioner / creditor has filed this petition, seeking winding up of the respondent company, as per the provisions of Sections 433

(e), 434 (1) (a) and 439 (1) (b) of the Companies Act, 1956 (hereinafter referred to as "the Act").

2. The respondent is a company engaged in the business of cotton yarns and synthetic yarns. The respondent purchased bales of American raw cotton, but defaulted in the payment of the amount, to the extent of USD 239,730.95 plus 30% of the said amount.

3. Though the respondent has been repeatedly making assurances to pay the outstanding, ultimately it did not pay the amount. The petitioner issued statutory notice, dated 15.12.2007, calling upon the respondent to pay USD 239,730.95 along with interest 14% per annum, in addition to collection cost of 30%, as per the law of the United States. This notice was received by the respondent, but the respondent neglected to pay. Hence, the respondent company is deemed to be unable to pay the debt, as per Section 434 (1) (a) of the Companies Act.

4. Praying for winding-up and for appointment of the learned Official Liquidator, this Company Petition has been filed, on 11.09.2008. The Company Petition has been admitted on 14.02.2012 and thereafter, publication has been effected for the

hearing, on 16.04.2012. Thereafter, the respondent filed the counter, for which, the petitioner has filed the re-joinder.

5. The contentions raised in the counter with regard to the limitation was negated by this Court by the order dated 14.02.2012.

6. The learned counsel appearing for the petitioner would point out that the liability on the part of the respondent has nowhere been disputed and the dilatory tactics adopted by the respondent would go to show that there is willful neglect on the part of the respondent in paying the debt due to the petitioner and therefore, winding up has to be ordered.

7. In order to appreciate the contentions raised, it is necessary to look into the relevant provisions.

8. Section 433 (e) speaks about the circumstances under which a company may be wound up and as per this section, inability to pay the debts is the ground.

8.1. It is settled law that this debt should not be a disputed

debt and that when there is a genuine dispute as to the liability, it would not be proper for the Company Court to exercise the jurisdiction under Section 33 of the Act.

8.2. Here is a case where the debt is not a disputed debt and the liability is an admitted liability.

8.3. It is appropriate to consider the decision highlighting the essential requirements to maintain the petition under Section 433 (e) of the Act, which reads thus:-

“In **G.Loganayaki v. Moolangudi Chit Funds (P.) Ltd. [1979] 49 Comp Cas 644**, it has been held by the Madras High Court (Ramaprasada Rao J. (as he then was)) as follows (headnote) :

"It is fundamental that, in order to sustain a case for winding up of an incorporated company on the ground that it is unable to pay its debts, the debt which is the substratum of the action either under section [433\(e\)](#) on its own or under section [433\(e\)](#) read with section [434\(1\)\(a\)](#) of the Act is not a disputed debt or a debt which could be found after an investigation and adjudication on the claims made inter se between the so-called creditor and the debtor company. Any such investigation which would involve the determination of the quantum and quality of the liability would certainly raise a reasonable presumption that it is a disputed debt. Once such a

lingering doubt arises in the mind of the Company Court that the debt is not a sure debt but a debt which could only be ascertained and determined after an investigation into the facts and circumstances of the case, then, unless there is demonstrative mala fides on the part of the company concerned, the Company Court cannot undertake the examination as to the quantum of the liability or the nature of the indebtedness of the company in question to the claimant in a petition under section [433\(e\)](#) of the Act."

8. A similar view has been taken by the Karnataka High Court in **Kamadenu Enterprises v. Vivek Textile Mills P. Ltd. [1984] 55 Comp Cas 68**, which is as follows (headnote) :

"The jurisdiction of the court under section [433](#) of the Companies Act, 1956, is not that of a court which is essentially meant for settling money disputes between parties, but is to subserve the object of winding up of companies which have not paid their debts or which are unable to pay their debts. Therefore, the first pre-requisite must be to establish prima facie a debt against the respondent. But when a claim or debt is disputed, the proper forum for that is a Civil Court. Where, therefore, admittedly, there was a genuine dispute as to the liability of the respondent-company to pay the difference between what has been claimed, it would

not be proper to decide the case in the summary proceedings under section [433](#)."

8.4. The power of the court to pass the order has been spelt out in Section 443 of the Act and Section 450 (1) of the Act speaks about the appointment of the learned Official Liquidator to be the Liquidator provisionally. As per sub-clause (4), the Official Liquidator has cease to hold office as provisional liquidator and shall become the liquidator on a winding up order being passed.

9. It is contended by the learned counsel for the petitioner that as the grounds for winding up have been established by production of relevant documents, it is a case where the learned Liquidator has to be appointed.

10. Despite repeated notices and newspaper advertisements the respondent, though appeared initially, remained exparte at a later stage. The records and correspondences between the petitioner and the respondent prove the debt as well as the liability to pay the same. Hence, the petitioner's company is ordered to be wound up. The learned Official Liquidator, as liquidator of the respondent company, shall forthwith take charge of all the property

and effects of the company. The learned Official Liquidator shall cause a sealed copy of this order to be served on the company by prepaid Registered Post. The petitioner do advertise within fourteen days from this date a notice in the prescribed form of the making of this order in one issue of the Tamil daily. The petitioner shall also serve a certified copy of the order on the Registrar of Companies not later than one month from this date. The cost of this petition shall be taxed and paid out of the assets of the company. The learned Official Liquidator shall perform and discharge his duties and obligations, as per the provisions of the Act.

11. Under the Insolvency and Bankruptcy Code, 2016, the inability to pay the debt is not a ground to get an order of winding up. However, under the provisions of the said Code, the provisions are not retrospectively / not expressly made applicable to pending proceedings. Hence, this Company Petition deserves to be ordered and it is ordered accordingly. No costs.

23.03.2017

Index: Yes / No

Web : Yes / No

Speaking order / Non-speaking order.

Dr. S.VIMALA, J.,

srk

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