

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**COMP No. 4 of 2013****Reserved on 14.11.2018****Pronounced on 12.12.2018**

M/s Goyal M G Gases Pvt. Ltd. through Its Authorised Signatory Shri K.V. Chandra Shekhar having its Registered Office at 53, Friends Colony (East), New Delhi-110065 and Corporate Office At A-38, 1st Floor, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, P.S. New Delhi.

---- Petitioner**Versus**

M/s IND Synergy Ltd. Having its registered Office at Gokulpuram Kachna Road, Khamardih Shankar Nagar, Raipur, P.S. Raipur 492007, C.G. And Corporate Office At Lotus Court, Opposite VCA Ground Gate No.2, Nagpur, Maharashtra-440001, Police Station Nagpur, Maharashtra.

---- Respondent

For Petitioner:	Shri Prateek Sharma along with Shri Tridib Bhattacharya, Advocate.
For Respondent:	Shri Ashish Surana, Advocate.

Single Bench: Hon'ble Shri Sanjay Agrawal, J**CAV Order/Judgment**

1. While invoking the provisions prescribed under Sections 433(e) read with Section 434 of the Companies Act, 1956 (hereinafter referred to as 'the Act, 1956'), the Petitioner company is praying for winding up of the Respondent Company i.e. M/s IND Synergy Ltd, a company duly incorporated under the relevant provisions of Companies Act, 1956.

2. Undisputedly, facts of the case are that the Petitioner company is engaged in the business of manufacture and supply of industrial gases and also as part of it, erects and installs Air Separation Units on Build Own and Operate Basis at the site of the buyer for supply of gases. It is

submitted in the Petition that the Petitioner company has entered into an agreement with the Respondent Company on 30.05.2008 (Annexure P4) for setting up of a Used Air Separation Unit on Build Own and Operate Basis for the purposes of manufacture and supply of gases for the plant of the Respondent company, the buyer. The said agreement provides for the payment of a "Fixed Facility Charge (FFC)" by the Respondent/buyer and in pursuance of it, the Respondent/buyer has issued as many as 60 post dated cheques of Rs. 26,00,000/- (Rs. Twenty-Six Lacs only) each to the Petitioner for its presentation for five years, which were issued in respect of discharge of its liability.

3. It is alleged in the Petition that as per the terms and conditions stipulated in the agreement, the Petitioner has started encasing the post dated cheques. However, as many as 37 cheques amounting to Rs. 9,62,00,000/- (Nine Crores Sixty-Two Lacs only) have been dishonored as its payment was stopped by the Respondent company. As a consequence of it, the Petitioner has initiated the proceedings prescribed under Section 138 of the Negotiable Instruments Act, in which, the Chairman, Managing Director and the other Directors of the Respondent company were summoned. The Respondent company in order to get rid of its liability, has initiated the proceedings as per the provisions prescribed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996') before the learned District Judge, Raipur seeking issuance of restraintment order for the presentation of the said post dated cheques. The said proceeding was dismissed by the Learned District Judge, Raipur vide its order dated 04.07.2011.

4. It is alleged further in the Petition that the District Judge, Raigarh on

the basis of an application filed by the Bank of India under Section 14 of the Secularization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act, 2002) has registered the case against the Respondent company as Revenue Case No. 61/B-121/2011-12 and passed an order on 30.07.2012 by directing the Respondent company to hand over the possession of mortgaged property/assets in order to pay the bank loans of Rs.583.19 crores.

5. It is pleaded further that the arbitration proceedings between the parties are pending in connection with the alleged agreement dated 30.05.2008 and the Respondent company has failed to make him payment of Rs. 8,84,00,000/- (Rs. Eight Crores Eighty-Four Lacs only) despite the issuance of demand notice dated 27.08.2012 in this regard under Section 433(e) read with Sections 434 and 439 of the Act, 1956. It is, therefore, submitted by the Petitioner that the Respondent company has been unable to make payment of the said debt amount of Rs.8,84,00,000/- (Rs. Eight Crores Eighty-Four Lacs only).

6. Based upon the above facts and circumstances, it is submitted by the Petitioner that since the financial condition of the Respondent company is poor and is not in a position to make the aforesaid debt amount, therefore, an order for winding up of the Respondent company be passed while appointing the liquidator by directing further to take charge of all its assets and affairs in accordance with law.

7. By order dated 03.04.2013, this Court has issued notice to the Respondent company at the pre-admission stage, who, upon service of notice, appeared and submitted its detailed reply on 20.06.2013. While

contesting aforesaid claim, it is stated by the Respondent that the provision prescribed under Sections 433(e) and 434 of the Act, 1956 cannot be used as tool to extract money from the other party in respect of the disputed amounts. It is contested further on the ground that by virtue of the alleged agreement dated 30.05.2008, the parties i.e. the Petitioner and the Respondent both are required to fulfill the terms and conditions as stipulated therein. According to the said agreement, the Respondent was required to provide the vacant land free from all encumbrance on lease to the Petitioner for setting up Air Separation Unit (ASU) for a period of 17 years from the date of the contract and to provide further a letter of comfort that the land so granted on lease shall not be encumbered in any manner. It is pleaded further that the Respondent was required to furnish the security deposit of Rs. 78,00,000/- (Rs. Seventy-Eight Lacs only) and to submit the post dated cheques towards payment of "Fixed Facility Charges" and was required further to carry out civil construction as per the drawings and designs which are to be supplied by the Petitioner as per the terms and conditions of the alleged agreement. The Petitioner, in turn, as per the terms and conditions of the alleged agreement, was not only required to furnish the bank guarantee in order to secure the said advance of Rs. 78,00,000/- (Rs. Seventy-Eight Lacs only), but also to provide drawings and designs to the Respondent for civil works. The Petitioner was required further to provide all the equipments, plants, machinery and tools on the plant site for setting up Air Separation Unit (ASU) and also to provide storage tank for liquid oxygen pending erection and commissioning of ASU.

8. It is contested further on the ground that despite the fulfillment of his

part, the Petitioner has failed to comply with his part despite the service of the legal notice dated 21.09.2009 (Annexure R2) in this regard. As the Petitioner failed to bring all the required equipments and instead has managed to get the said advance of Rs. 78,00,000/- (Rs. Seventy-Eight Lacs only) without furnishing the bank guarantee in specific violation of the terms and conditions stipulated in the alleged agreement by colluding with one Mr. Sanjay Mahajan, the Ex-AGM of the Respondent company, and therefore, the Respondent has been constrained to lodge the FIR against him and also against the Petitioner company and pursuance thereto, the criminal proceedings are going on. It is pleaded further that the Petitioner had continued with its false stand and illegally demanded "Fixed Facility Charges" which had even not become due and payable to the Petitioner owing to the non compliance of terms and conditions of the alleged agreement yet the Petitioner without any authority had presented the said post dated cheques of the Respondent. It is submitted further that the presentation of the post dated cheques towards "Fixed Facility Charges" was contingent and would accrue only in compliance of contractual obligations of Article 11.3 and 12.3 of the alleged agreement dated 30.05.2008. It is pleaded further that since the Petitioner had been threatening to present the same, therefore, the Respondent has issued "stop payment instructions" to its banker i.e. Bank of India, Raigarh vide its letter dated 27.04.2010.

9. It is stated further that since the Petitioner has started presenting the alleged post dated cheques issued towards FFC in contrary to terms and conditions of the alleged agreement, therefore, an application as per the provision prescribed under Section 9 of the Act, 1996 was made by the

Respondent before the learned Principal District Judge, Raipur. The said application was rejected on 04.07.2011 and the Arbitration Appeal No.66/2011 preferred against it was disposed of by the High Court by its order dated 12.12.2012 (Annexure-R9) as the arbitrator has been appointed and the arbitration proceeding has already commenced in the mean time. It is submitted further that the specific issues arisen between the parties could be decided by the Arbitration Tribunal. It is submitted further that the issuance of alleged post dated cheques at the inception of the contract does not amount to admission of debt or other liability so as to invoke the jurisdiction of this Court for the purpose of winding up of affairs of the Respondent company under Section 433(e) and 434 of the Act, 1956. Shri Ashish Surana, learned counsel of the Respondent while placing his reliance upon the decision rendered in the matter of “**IBA Health (India) Private Limited Vs. Info-Drive Systems Sdn. Bhd.**” reported in **2010 (10) SCC 553** has submitted that since there is a serious dispute regarding debt, therefore, the petition as framed deserves to be dismissed.

10. I have heard learned Counsel for the parties at the admission stage of this petition and perused the entire relevant papers annexed with the Petition.

11. The averments as made in the Petition would show that a proceeding for winding up of the affairs of the Respondent company has been initiated under Sections 433(e) and 434 of the Act, 1956 because post dated cheques amounting to Rs. 9,62,00,000/- (Rs. Nine Crores Sixty-two Lacs only) issued by the Respondent company in pursuance to the alleged agreement dated 30.05.2008 have been dishonored and

despite the issuance of demand notice dated 27.08.2012 under Section 433(e) read with Section 434 and 439 of the Act, 1956, the Respondent company has failed to make the payment of Rs. 8,84,00,000/- (Rs. Eight Crores Eighty-Four Lacs only). It is, therefore, submitted in the Petition that the Respondent company has been unable to make the said payment. However, from perusal of the record, it is evident that although the alleged post dated cheques were issued by the Respondent company in pursuance to the alleged agreement dated 30.05.2008 but on instruction regarding its "stop payment" was issued on 27.04.2010 (Annexure-R3) as the "Liquid Oxygen Storage Tank" was not installed by the Petitioner company as per the Article 11.3 of the alleged agreement and also the erection and commissioning was not completed within time and even after the stipulated period of eleven months. Therefore, under such circumstances, the Petitioner company, as per the averments of Respondent company was not entitled to present the alleged post dated cheques. The averments as made by the Respondent company while referring to Article 11.3 and 12.3 of the alleged agreement would, however, prima-facie establish the fact that the presentation of the said post dated cheques was contingent in nature and could be encashed only upon fulfillment of the terms and conditions of the alleged agreement dated 30.05.2008. What is, therefore, reflected from a bare perusal of the pleadings of the parties is that a serious dispute in relation to payment of debt is prima-facie involved between the parties.

12. Besides, an arbitration proceeding (Annexure-R11) has already been initiated between the parties and the issues which were framed therein on 09.09.2012 would show further that the main and specific issue

involved herein is pending under consideration before the arbitrator. It is the settled principles of law that if a debt is disputed bonafidely and the defence in this regard is a substantial one, then the Court will not wind up the affairs of the company in exercise of the powers enumerated under Sections 433(e) and 434 of the Act, 1956.

13. In such a similar situation, particularly when there is a prima-facie serious dispute is involved pertaining to debt, it was held by the Supreme Court in the matter of “**IBA Health (India) Private Limited Vs. Info-Drive Systems SDN. BHD.**” (Supra) in paragraphs 20,21,22, 23 and 33 as under:-

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 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* (1965) 35 Comp Cas 456

(SC) 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 stigmatised as a scandalous abuse of the process of the court..’ ”

22. The abovementioned decision was later followed by this Court in *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries (P) Ltd.* (1971) 3 SCC 632. The principles laid down in the abovementioned judgment have again been reiterated by this Court in *Mediquip Systems (P) Ltd. v. Proxima Medical Systems GmbH* (2005) 7 SCC 42 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 abovementioned judgments were later followed by this Court in *Vijay Industries v. NATL Technologies Ltd* (2009) 3 SCC 527.

23. The principles laid down in the abovementioned 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.

33. We may notice, so far as this case is concerned, there has been an attempt by the respondent company to force the payment of a debt which the respondent company knows to be in substantial dispute. A party to the dispute should not be allowed to use the threat of winding-up petition as a means of enforcing the company to pay a bona fide disputed debt. A Company Court cannot be reduced as a debt collecting agency or as a means of bringing

improper pressure on the company to pay a bona fide disputed debt. Of late, we have seen several instances where the jurisdiction of the Company Court is being abused by filing winding-up petitions to pressurise the companies to pay the debts which are substantially disputed and the Courts are very causal in issuing notices and ordering publication in the newspapers which may attract adverse publicity. Remember, an action may lie in appropriate court in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company and later dismissed when a proper defence is made out on substantial grounds. A creditor's winding-up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public.

14. In view of the facts and circumstances of the case as visualized from bare perusal of the pleadings coupled with the principles laid down hereinabove, it is evident that, a prima-facie dispute regarding the payment of "debt" is not only involved between the parties but the matter pertaining to the same issues is still pending under consideration before the Arbitration Tribunal. In such circumstances, I do not find any substance in this Petition. Consequently, the Petition as framed under Sections 433(e) and 434 of the Act, 1956 for winding up of the affairs of the Respondent company is rather prematured and liable to be and is hereby dismissed. No order as to costs.

Sd/-

(Sanjay Agrawal)
JUDGE