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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE OF RESERVATION :31.03.2015

DATE OF PRONOUNCEMENT: 30.04.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

CP.No.350/2014

SIMS Metal Management Limited
Sir Joseph Banks Corporate Park
Suite 3, Level 2, 32 Lord Street, Botany
New South Wales 2019, Australia Petitioner

Vs

Sabari Exim Private Limited
Trade Centre, 2nd Floor, 114 & 115,
Wallajah Road, Chennai-2 Respondents

Prayer:- This Company Petition is filed under Section 433
(e) read with 434(1)(a) and Section 439(1) of the Companies
Act, 1956, for the relief, as stated therein.

For Petitioner :Mr.J.Sivanandaraaj and
Mr.Roshan Balasubramanian

For Respondent :Mr.A.Thiagarajan, SC for
Mr.S.Ramesh Kumar

ORDER

The Petitioner, a Company registered in Australia, has
filed this Company Petition for winding up, after securing
a foreign award against the Respondent for non-payment of
the consideration for supply of scrap. The Petitioner had
also filed an Original Petition in O.P.No.56/2014 under
Part II of the Arbitration and Conciliation Act 1996 to



28.02.2013 is enforceable in India. The said original petition was allowed by this Court by order dated 26.06.2014, rejecting the objections of the Respondent. Since, the award has not been satisfied by the respondent, the Petitioner has come up with the present Company Petition for winding up of the Respondent Company.

2. The learned counsel for the Petitioner contended that the award has become final and the respondent has failed to satisfy it, despite the statutory notice. The learned counsel also contended that the objections, raised by the respondent in their reply notice, are untenable and the claim, with regard to another contract, has to be proved by initiating new and separate arbitration proceedings, which has not been done by the respondent till date and in any case, the same cannot be a reason to defeat the claim based on a decree. The learned counsel also contended that the respondent Company is unable to clear its liabilities and the defence of counter claim is only an afterthought. The learned counsel also contended that once the award against the respondent has become final and held to be enforceable, it is open to the Petitioner to exercise all the remedies available under the law to secure the payment. The learned counsel also contended that the respondent cannot now assail the award after the same has



upon the following judgements and pleaded for winding up of
the Respondent Company:-

1. **AIR 1961 Cal 439 (Sarkar Estates (P) Limited Vs. Kusumika Iron Works (P) Limited and others)**
2. **AIR 1966 SC 1707 (Harinagar Sugar Mills Limited Vs. M.W.Pradhan)**
3. **AIR 1971 SC 2600 (Madhusudan Gordhandas & Co. Vs. Madhu Wollen Industries P Limited)**
4. **1978 (48) CC 604-Cal (All India General Transport Corporation Limited Vs. Raj Kumar Mittal)**
5. **1980 1 MLJ 443 (Seethai Mills Limited Vs. N.Perumalsamy and another)**
6. **2011 (8) SCC 333 (Fuerst Day Lawson Limited Vs. Jindal Exports Limited)**
7. **2014 183 CC 395 (Bom) (Intesa Sanpaolo SPA Vs. Videocon Industries Limited)**
8. **2014 (2) SCC (LS) 804 (Balwant Rai Saluja Vs. Air India Limited)**

3. Per contra, the learned senior counsel for the Respondent, relying upon the notice dated 23.04.2013, contended that the respondent has a claim against the petitioner and only for that reason, the demand of the petitioner was denied. The learned senior counsel also contended that the provisions of Sections 433 (3) and 434 (1) of the Companies Act can be invoked, only if the debtor company is unable to pay its debt and in the instant case, the refusal is on account of denial of liability. Hence,



Petition for winding up is not maintainable. The learned senior counsel also contended that to enforce the award, it is incumbent upon the Petitioner to only file an execution petition and no permission was granted by this Court to file a winding up petition. The learned senior counsel also contended that the order in O.P.No.56/2014 has not become final and that the appeal in O.S.A SR.No 69044/14 has been preferred. The learned senior counsel, contending that there is no accepted liability, relied upon the decision of the Honourable Supreme Court reported in **2010 (10) SCC 553 (IBA Health (India) P Limited Vs. Info Drive Systems SDN.BHD)** and sought for dismissal of this Company Petition.

4. This court heard the learned counsel on either side and also perused the documents.

5. This court is inclined to take up the issue of maintainability of the petition as first issue.

6. The learned senior counsel for the Respondent has contended that only an execution petition ought to have been filed to enforce the award and the present application is not maintainable. Per contra, the learned counsel for the Petitioner has contended that it is for the Petitioner to decide the course of action.

7. In the decision of the Honourable Supreme Court



Vs. M.W.Pradhan) relied on by the learned counsel for the

Petitioner, it is held as under:-

"Under this order, all the necessary powers under O.XL, R.1, of the Code of Civil Procedure were conferred upon the Receiver, including the right to file suits. Assuming that a petition for winding up of a company is not a suit within the meaning of O.XL, R.1(d) of the said Code, the other powers mentioned therein are comprehensive enough to enable the Receiver to take necessary proceedings to realise the property of and debts due to the joint family. Can it be said that the petition filed by the Receiver for winding up of the Company is not a mode of realisation of the debt due to the joint family from the Company? In **Palmer's Company Precedents, Part 11, 1960 Edn., at P.25**, the following passage appears:-

"A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution, which the Court gives to a creditor against a company unable to pay its debts."

This view is supported by the decisions in **Bowes v. Hope Life Insurance and Guarantee Co., Re General Company** for Promotion of Land Credit and Re National Permanent Building Society. It is true that "a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it"; but nonetheless it is a form of equitable execution. Propriety does not affect the power but only its exercise. If so, it follows that in terms of cl.(d) of R.1 of O.XL of the Code of Civil Procedure, a Receiver can file a petition for winding up of a company for the realisation of the properties, movable and immovable, including debts, of which he was appointed as the Receiver. In this view, the respondent had power to file the petition in the Court for winding up of the Company."

8. In yet another decision reported in 1978 (48) CC

<https://hcservices.ecourts.gov.in/hcservices/>

604-Cal (All India General Transport Corporation Limited



Vs. Raj Kumar Mittal), relied on by the learned counsel for the Petitioner, it is held as under:-

"8. ... The Calcutta decisions cited by Mr.Sen, which I have mentioned above are all cases, where notice under Section 434(1)(a) has been served on the basis of a decretal debt and as such, the contention, which was sought to be raised by Mr.Sen that unless the decree is put into execution and it remains unsatisfied, then and then only the petitioning creditor can make an application for winding up and the deeming provisions under Section 434(1)(b) can be invoked cannot be accepted. I have already held in the unreported decision cited by Mr.Seth that the petitioning creditor has an option either to execute the decree and then come under the deeming provisions of Section 434(1)(b) or can serve a notice on the decretal debtor under Section 434(1)(a), at any stage, after the decree is obtained, whether the decree is put into execution and remains unsatisfied or without putting the decree in execution or at any intermediate stage."

9 . In yet another decision reported in **1980 1 MLJ 443 (Seethai Mills Limited Vs. N.Perumalsamy and another)**, relied on by the learned counsel for the Petitioner, it is held as under:-

"5. It is true that Section 434(1)(a) deals with the case of a creditor, to whom the company is indebted in a sum of exceeding Rs.500 then due and his serving on the company, a demand under his hand requiring the company to pay the sum so due and the company neglecting to pay the sum or to make satisfactory arrangement to secure the same within a period of three weeks thereafter. As against this, Section 434(1)(b) states that if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, the company shall be deemed to be unable to pay its debts. The question for consideration, therefore, is whether, simply



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because a creditor has instituted a suit against a company and obtained a decree, he has no remedy under Section 434(1)(a) and he has to confine his remedy only under Section 434(1)(b) of the Act. We are of the opinion that there is no such mutually exclusive dichotomy between Section 434(1)(a) and Section 434(1)(b) of the Act. From the very language of Section 434(1)(b), it may be stated that it does not even contemplate a money decree or order for payment of money and it generally uses the expression "if execution or other process issued on a decree or order of any court in favour of a creditor of the company". Therefore, the decree or order, that is contemplated by Section 434(1)(b), is not confined only to a money decree or an order for payment of money. On the other hand, it is general in nature. However, what we have to concentrate on is, whether a person who had obtained a decree for money against a company will cease to be a creditor because of that fact, so as to take his case out of Section 434(1)(a) of the Act. We are of the opinion that there is no warrant for such a contention. A creditor, who has instituted a suit and obtained a decree against the company, will still be a creditor of the company to whom money is due by the company. It may be that the original debt had merged in the decree and the person who was originally a creditor had become a decree-holder afterwards, but that does not in any way destroy his character as a creditor or the character of the money due to him from the company as a debt. As a matter of fact, Section 434(1)(a) does not even use the word "debt" and it merely states to whom the company is indebted in a sum exceeding five hundred rupees then due. Consequently, all that is necessary to be satisfied under Section 434(1)(a) is that there must be a creditor and to that creditor the company must be indebted in a sum exceeding Rs.500 then due and that creditor must have served a notice on the company and the company had not complied with the demand within three weeks from the date of the service of the notice. Even a judgement debtor in respect of a money decree can be said to be indebted to the decree-holder, who would be a creditor. Consequently, in our opinion, there is no mutual exclusion between Section 434(1)



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(a) and 434(1)(b) of the Act and there is a region common, to both, which may be said to overlap. Hence we are of the opinion that even a decree-holder in respect of a money decree can institute proceedings under Section 434(1)(a) if the other requirements of that provision are satisfied.

6. Our attention was drawn to the decision of a single Judge of the **Delhi High Court in Madhuban Pvt. Ltd. v. Narain Dass Gokal Chand [1971] 41 Comp Cas 685 at 692-693**. It would appear that in that case, a similar argument was urged before the learned judge and the same was rejected.

7. It was stated therein as follows (p. 692) :-

"The learned counsel submitted that it was not necessary in the case of a creditor holding a decree against the company to serve a notice. Specific provision, on the other hand, was made for taking out execution of the decree in such a case, which was not done in this case. The argument, of the learned counsel, however, is without any merits. Clauses (a) and (b) provide two alternative methods of showing that the company is unable to pay its debts. A creditor does not cease to be a creditor, if he obtains a decree in his favour against the company. Clause (a) becomes applicable when a creditor has served on the company a demand under his hand requiring it to pay the sum due and the company has neglected to pay the same. The provision, in Clause (b) that if the creditor has a decree of a court in his favour and the execution is returned unsatisfied in whole or in part, the company shall be deemed to be unable to pay its debts, does not mean that the effect of Clause (a) is negatived in the case of a decree-holder creditor. The object of the two clauses is the same, that is, to show that the company concerned is unable to pay its debts. Action can be taken under either of them."

8. Thus, it will be seen that the view taken by the learned judge of the Delhi High Court is on the same lines as we ourselves have taken in the present case."



10. In yet another decision reported in **2014 183 CC**

395 (Bom) (Intesa Sanpaolo SPA Vs. Videocon Industries Limited), relied on by the learned counsel for the Petitioner, it is held as follows:-

"42. It is trite to say that winding-up proceedings and a suit for recovery of money are not one and the same. It is also established that the right to move a petition for winding-up is a statutory right of a creditor. (**Euromental Limited Vs. Aluminium Cables Conductors (U.P. Pvt. Ltd.)**). The position that when a suit is filed for recovery of the amount, a petition for winding-up is also simultaneously maintainable, is well settled. In **Seethai Mills Ltd. Vs. N. Perumalsamy and Another**, the Division Bench of the Madras High Court has held as under :-

"The question for consideration, therefore, is whether, simply because a creditor has instituted a suit against a Company and obtained a decree, he has no remedy under Section 434(1)(a) and he has to confine his remedy only under Section 434(1)(b) of the Act. We are of the opinion that there is no such mutually exclusive dichotomy between Section 434(1)(a) and Section 434(1)(b) of the Act. From the very language of Section 434(1)(b), it may be stated that it does not even contemplate a money decree or order for payment of money and it generally uses the expression "if execution or other process issued on a decree or order of any court in favour of a creditor of the Company". Therefore, the decree or order that is contemplated by Section 434(1)(b) is not confined only to a money decree or an order for payment of money. On the other hand, it is general in nature. However, what we have to concentrate on is, whether a person who had obtained a decree for money against a Company will cease to be a creditor because of that fact, so as to take his case out of Section 434(1)(a) of the Act. We are of the opinion that there is no warrant for such a contention. A creditor, who has instituted a suit and obtained a decree against the Company, will



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still be a creditor of the Company to whom money is due by the Company. It may be that the original debt had merged in the decree and the person, who was originally a creditor, had become a decree-holder afterwards, but that does not in any way destroy his character as a creditor or the character of the money due to him from the Company as a debt."

Thus, the position is that merely because a decree is obtained the creditor does not cease to be creditor of a Company.

43. Two decisions recorded in identical facts need to be noticed. First is the decision of the learned Single Judge of this court in case of **China Shipping Development Company Ltd. Vs. Lanyard Foods Limited**. In this case, the respondent had, pursuant to the contract of affreightment, had executed four letters of indemnity. The indemnity bonds executed by the Respondent indemnified the Petitioner in respect of loss, damages, expenses that the Petitioner would suffer. The Petitioner delivered the cargo in compliance with the request made by the Respondent. The Petitioner therein gave a notice under Section 433 and 434 of the Companies Act, calling upon the Respondent to pay the amount due under the judgement of the Court in England and thereafter the petition for winding-up was filed. A defence was sought to be urged that the notice is based on a decree of English Court and not on indemnity and the decision of the English Court does not fulfill the requirement of Section 13 of the Code of Civil Procedure and that the petition for winding-up is not moved for execution of decree. The learned Single Judge accepted the locus of the Petitioner as a creditor of the Company. The learned Single Judge did not refuse to entertain the petition on the ground that the Petitioner therein was a holder of a foreign decree.

44. Second is the decision of the learned Single Judge of Gujarat High Court in the case of **Vanguard Textiles Limited Vs GHCL Ltd.**, In this case, deed of guarantee was executed by the Respondent Company in United Kingdom. The



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Petitioner had also filed a suit based on the guarantee before the Court at UK and since the Respondent did not appear, there was an exparte default Judgement. An argument was advanced by the Respondent Company that the deed of guarantee was executed in UK and therefore, cause of action arose outside the Indian territory and the deed of guarantee is not enforceable in Indian Courts. It was also urged on behalf of the Respondent Company that the deed of guarantee was without prior approval of the RBI under the provisions of Foreign Exchange Regulation Act (FERA). The learned Single Judge negated these contentions. The learned Judge held that obligation to obtain permission of the RBI, if it was required to be obtained, was upon the company and the company cannot take this as a ground to avoid to discharge its obligation. The learned Single Judge also held that non-executability of the decree of the Court in UK would be at the most considered in the execution proceedings and it cannot be a ground to refuse to entertain a petition for winding up. The learned Single Judge held that in view of clear liability, the defences taken were not genuine. The relevant passages from the judgement are reproduced below :-

"9. It was lastly contended by Mr.Sanjanwala, learned counsel appearing for the Respondent Company that the decree of Court of England is non-enforceable in India as per the provisions of Section 13B and 13D of CPC and it was submitted that the remedy for enforcement for execution of such decree of the Courts of UK is as per Section 44A of CPC since the UK being a country of reciprocating territory, but in view of the fact that such decree is non-executable as per Section 13 of CPC, and if such decree is non-enforceable, there is no valid claim which can be made as the basis for invoking the power of this Court for winding up of the Respondent Company.

<https://hcservices.ecourts.gov.in/hcservices/>10. It deserves to be recorded that as per the Decree of the Court of UK, the



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process is served, but the Respondent Company has not defended. It may be that the decree is not on merit after dealing with each and every contention of the plaintiff, but thereby, it cannot be said that there is no foreign judgement against the Respondent Company. After having being served the statutory notice by the Petitioner, nothing prevented the Respondent Company for filing the suit for a declaration that the decree is not binding, but such an option available has not been exercised. Further, when there is a decree/judgement of a foreign Court for fastening the liability, it cannot be prima facie said that their would not be any liability at all of the Respondent. In any case, the aspects of non-enforceability may be required to be considered in execution proceedings, if resorted to, but such cannot be a sole ground to deny the entertainment of the petition for winding up of the Company, on the basis of such liability. The reference may be made to the decision of the Andhra Pradesh High Court in the case of **Enernorth Industries Inc. Vs. VBC Ferro Alloys Ltd. reported at [2006] 133 Comp Case 130 (AP)**, more particularly, the observations made at para 34 and 35 that merely because the other modes are available, it cannot be said that the petition for winding up is not maintainable.

The learned Single Judge accordingly proceeded to pass a conditional order of deposit of the amount and the petition was admitted. The facts in this case closely correspond to the facts in the present case.

45. In the above two decisions there was a decree of the foreign court in favour of the petitioner and the Courts still considered the petition for winding up. The law is that any creditor has a right to approach the Company court pointing out that its admitted debt is not paid. The Company Court then considers whether the company needs to continue, or be



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wound up and the assets be distributed. The considerations for entertaining a petition for winding up are thus different from entertaining a suit. The jurisdiction is also different. Merely because the creditor is a decree holder, it does not change the character of it as a creditor for the purpose of maintaining petition for winding-up. There is no warrant to make a distinction between creditors on the basis of decree of which Court they hold. The Apex court in the case of **Rajah of Vizianagaram vs. Official Receiver and Official Liquidator of Vizianagaram Mining Co. Ltd.**, observed as under:-

"11. Section 166 provides for an application to the court for the winding up of a Company. Any creditor or contributory is entitled to apply for the winding up of the Company. No distinction is made between the creditors resident in India or outside India. Section 167 specifically states that an order for winding up of a Company shall operate in favour of all the creditors and of all the contributories of the Company as if made on the joint petition of a creditor and of a contributory. It is not possible, therefore, to urge successfully, that the order of winding up of an unregistered Company, does not operate in favour of all the creditors and of all the contributories of the Company. All the creditors of the Company can take advantage of the winding up of the Company as operating in India, when it has ceased to carry on business there. There is no reasonable basis for depriving them from participating in the distribution of the assets collected by the Official Liquidator in the winding up proceedings. All the creditors including the foreign creditors will get rateably out of the assets of the Company which have been collected. When that Company itself is wound up, all of them would be entitled to similar rateable share in the assets collected



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during the winding up proceedings of the Company in the country where it is incorporated."

Though these observations were made interpreting the Companies Act, 1913, there is no change in the position under the 1956 Act, that any creditor is entitled to bring a petition for winding up. What this decision indicates is that irrespective of status of the creditor a distinction amongst them is not warranted.

46. If a creditor, with or without a decree of an Indian Court, can file a petition for winding up based upon a original cause of action, pending the suit and after decree, there is no warrant to deprive a creditor with a decree of foreign Court to present a petition for winding up, independently of the decree, in the Company court having jurisdiction. The Companies Act does not contemplate such exclusion. To deprive a creditor with a decree of foreign court of this statutory right, will also not be in larger public interest. If a foreign creditor with decree of foreign Court is barred from presenting a petition for winding up on the original course of action and till the decree by Indian Court is passed in its favour, it will make a distinction between two classes of creditors. This will lead to the Indian companies adopting unhealthy practices of borrowing capital abroad and then refuse to repay admitted debts and resist winding up. This will have negative effect on the cross border flow of capital and international commerce. Thus, there is no warrant to read such an exclusion of the statutory right by way of interpretation.

47. Therefore, there is no impediment in the way of the Petitioner to proceed on the basis of the Patronage Letter as a creditor of the Company for presenting this petition for winding-up. There is no question of merger of the Patronage Letter into the decree. The admissions as regards the liability given in the correspondence is sufficient to form basis of the petition for winding up. Even assuming



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that there is a suit filed for enforcement of a foreign decree, it cannot be said that the petitioner has ceased to become a creditor of the Company.

11. The consensus of judicial decisions is that the decree holder can also file a winding up petition, despite having the option of enforcing the decree by filing an execution petition.

12. This court is in full consonance with the above views. A decree holder would not cease to be a creditor. The liability is only crystallized in the form of a decree or award. A creditor has a right to invoke the provisions of the Companies Act. This court is of the view that a decree holder can only be in a better position. He will have a right to either execute a decree or file an application for winding up.

13. The learned senior counsel for the respondent has contended that the respondent has filed an appeal against the order in O.P.No.56/2014. The learned counsel for the petitioner has relied upon the judgement of the Honourable Supreme Court reported in **2011 (8) SCC 333** cited supra to contend that the appeal under the Letters Patent Act is not maintainable.

14. Upon perusal of the records, it can be seen that the Respondent has raised all the defences available to them under Section 48 before this Court in O.P.No.56/2014

and the same was negatived. The Respondent has not



challenged the award before the jurisdictional court. The appeal said to have been filed by the Respondent in 2014 is not even numbered. Obviously, there is no stay. This court feels that it is unnecessary to go into the maintainability of the appeal. In the said circumstances, it can only be construed as no appeal is pending against the order in O.P.No.56/2014 and therefore, the award has become final and enforceable. As per Section 49 of the Arbitration and Conciliation Act, once the court finds that the foreign award is enforceable, the award shall be deemed to be a decree of that court. Therefore, the Petitioner is deemed to have obtained a decree from this court. As this court has already held that the decree holder would still continue to be creditor, this petition for winding up is maintainable. This court is also of the view that any leave or permission need not to be obtained when the right is conferred by law. Therefore, the contention of the learned senior counsel for the respondent that the decree in O.P.No.56/2014 only permits the Petitioner to file an execution petition is also rejected.

15. Now coming to next issue, the learned senior counsel for the Respondent has contended that the respondent has a claim against the petitioner with respect to another contract and has relied upon numerous e-mail



learned senior counsel Senior has relied upon the judgement reported in **2010 (10) SCC 553** cited supra, wherein the

Honourable Supreme Court has held as follows:-

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 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.

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.



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Malicious Proceedings for Winding Up:-

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 pressurize the companies to pay the debts which are substantially disputed and the Courts are very casual 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.

Public Policy Considerations:-

34. A creditor's winding up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the Newspaper of the filing of winding up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the



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petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of public at large.

35. We have referred to the above aspects at some length to impress upon the Company Courts to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed. A Company Court, therefore, should be guarded from such vexatious abuse of the process and cannot function as a Debt Collecting Agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere.

16. Repudiating the arguments of the learned senior counsel for the Respondent, the learned counsel for the Petitioner has contended that the plea of claim is unsustainable and is only for the purpose of evading payment. The learned counsel has relied upon the following judgements in support of his contention.

(a) In **AIR 1961 Cal 439 (Sarkar Estates (P) Limited Vs. Kusumika Iron Works (P) Limited and others)**, it is held as under:-

"5. It was also faintly argued that the petitioning creditors' debt is a disputed debt and so cannot form the foundation of a winding up petition. The argument is that the Appellant Company has filed a suit against the Respondent Company claiming over three lacs of rupees and if this suit, which is pending, succeeds, the Appellant Company will be entitled to set off the amount of the decree that may be passed against the claim of the Respondent Company. But, I fail to see how the mere fact that a claim has been put



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63. It is no doubt true that the court will keep in mind the commercial solvency of a Company, larger public interest and repercussions of the order of admission. The commercial solvency, however, cannot be a stand alone ground. If that be so, then every Company which is commercially solvent will refuse to pay the admitted debts and then take up the ground of commercial solvency. The Apex Court in the case **IBA Health (I) (P) Limited Vs. Info Drive Systems Sdn.Bhd,** **MANU/SC/0772/2010: 2010-10-SCC-553**, has clearly laid down in the passage reproduced below that the commercial solvency cannot be considered as a stand alone ground:-

"25. An examination of the Company's solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the Company's liability, it is difficult to hold that the Company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an undisputedly owing, then it should be paid. If the Company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant as to whether there was a dispute as to the debt not as a ground in itself, that means it cannot be characterized as a stand alone ground."

17. As laid down by the Honourable Supreme Court,

<https://hcservices.ecourts.gov.in/hcservices/>

in one of its earliest decisions rendered in the case of



Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt.

Limited {(Vol.42) 1972 Company Cases Page 125 (SC)}, this Court will not order winding up, if the debt is bona fide disputed and the defence is a substantial one. The test to be applied by the Court are:-

- (i) Whether the defence of the Company is in good faith and one of substance;
- (ii) Whether the defence is likely to succeed in point of law; and
- (iii) Whether the Company adduces prima facie proof of the facts, on which the defence depends.

It was made clear by the Honourable Supreme Court in that case that when the debt is undisputed, the Court will not reject the petition, merely because the Company has the ability, but not the willingness to pay the debt.

18. Section 433 of the Companies Act sets out the circumstances, under which a Company may be wound up by the Court, which are to be quoted hereunder:-

"Section 433:- Circumstances, in which Company may be wound up by Court:-

A Company may be wound up by the Court:-

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) if the Company is unable to pay its debts;
- (f) if the Court is of the opinion that it is just and equitable that the Company should be wound up."



deemed to be unable to pay its debts as under:-

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(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor, if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm.

20. To deny the liability and to escape from the deeming provision under section 433, the Respondent has to establish that the dispute raised by them is bona fide and that there is a possibility for them to succeed in law. Upon perusal of the documents, this court is of the view that the claim of the Respondent is surreal. From the



relating to the transactions in 2008, it is seen that there was disagreement with regard to the quality of materials supplied by the Petitioner based on an independent contract. Though there are numerous mails, a legal notice seems to have been issued only on 23.04.2013 after the award. However, no proceedings either in the form of arbitration or suit has been initiated by the Respondent. Further, the claim has nothing to do with this award. Upon perusal of the contract between the parties, there is no provision to withhold any payments for disputes under other contracts. If the claim was genuine, the Respondent would have raised a counter claim before the Arbitrator or initiated proceedings against the petitioner. As held above, the award has become final and no dispute can be raised against the award. It is settled law that the dispute must be bona fide and not a dispute on papers. In view of the above, this court comes to an irresistible conclusion that the Respondent is unable to clear its debts and has neglected to satisfy the demand without any sustainable reasons. Hence, the Petitioner has made out a prima facie case and is entitled to succeed in this petition.

21. In the result, this Company Petition is ordered to be admitted, with the following directions:-

