IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.

Company Petition No. 15 of 2015

M/s Sanson Equipments a
Partnership firm registered
under the provisions of the
Partnership Act, 1932, having
its registered Office at IX/334,
Kavumthazham, Puthencruz,
Ernakulam, Kerala – 682308. **… Petitioner**

- Versus -

Terra Infra Development Limited,
a Company incorporated under
the provisions of Companies Act,
1956 and having its Registered
Office at F-8, MIDC Industrial
Area, Hingna Road,
Nagpur 440016. **… Respondent**

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Mr. R. P. Masurkar, Advocate for the petitioner
Mr. Anand Jaiswal, Senior Advocate assisted by Mr. Rahul Pandey and Mr. Harshit Tiwari, Advocates for the respondent

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CORAM : ANIL L. PANSARE, J.

Date : 22-03-2024

JUDGMENT

Rule. Rule made returnable forthwith.

2. Heard finally with consent of learned counsel for the parties.

3. On 16-2-2024, following order was passed.

"Heard.

2. M/s. Sanson Equipments has initiated this petition against Terra Infra Development Limited under Sections 433(e), 434 1(a) and (b) and Section 439 1(b) of the Companies Act, 1956 on the ground that the respondent company is unable to pay debt around Rs. 56,00,000/-. It appears that the petitioner – company claims that it has supplied machinery for road construction, payment of which has been not made by the respondent – company.

3. Learned counsel for the respondent – company submits that this claim is fictitious. The petitioner is hand in glow with sub contractor and thus claim is not maintainable at all. He further submits that whatever bills were raised, have been paid. He further submits that respondent – company is part of Neco Group having annual turnover of more than Rs. 5000 Crores.

4. The attention of the petitioner is invited to sub-section (2) of Section 443 of the Companies Act, 1956 which reads thus :

> *"(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."*

5. Since there is serious dispute as regards claim under question and on the strength of submissions made by respondent – company that it is a going concern, having turnover of Rs. 5000 Crores, I am of the view that the remedy available to the petitioner lies somewhere else, and therefore, the petitioner shall on next date, satisfy as to why this Court should not refuse to make an order of winding up.

6. Stand over to 23-2-2024."

4. In response, learned counsel for the petitioner has invited my attention to Section 434 of the Companies Act, 1956 (hereinafter referred to as 'the Act of 1956'). Clause (a) of sub-section (1) of Section 434 of the Act of 1956 reads as under.

> *"**434. Company when deemed unable to pay its debts.** - (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 [one lakh 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;"*

5. Learned counsel for the petitioner states that on 30-1-2015, the petitioner had issued a notice to the respondent under Section 434(1)(a) of the Act of 1956. He has invited my attention to the certificate dated 25-10-2012 issued by the Project Manager of the respondent - company which reads thus :

> *"TO WHOM SOEVER IT MAY CONCERN*
>
> *This is inform that M/s. Sanson Equipments has supplying Machinery to our on going Road Project of NH-47, Section Vadakkencherry – Mannutty since 2 years.*
>
> *According to our Ledger, Outstanding as on date is Rs.46,62,610/- (Forty Six Lakh Sixty Two Thousand Six Hundred and Ten Only). Bills Yet to certify from July.12 to Oct.12. Payment will be release soon."*

6. Learned counsel for the petitioner submits that the respondent – company has, through the aforesaid certificate, admitted the claim of the petitioner. The notice under Section 434(1)(a) of the Act of 1956 was given on 30-1-2015. Respondent – company neglected to pay the same and, therefore, the company is deemed to unable to pay its debt and thus, the petition is maintainable.

7. As against, Mr. Jaiswal, learned Senior Counsel for the respondent submits that the respondent has on 20-2-2015 given reply to the notice sent by the petitioner and has denied the claim of the petitioner for want of documents, one of which was certificate dated 25-10-2012 allegedly issued by the Project Manager of the respondent – company. This certificate was later on supplied by the petitioner to the respondent. The respondent thereafter realised that Mr. Madhusudahn Rao, Project Manager is acting hand in glove with the petitioner – company.

8. Learned Senior Counsel has invited my attention to the resolution dated 23-4-2012 passed by the Board of Directors of the petitioner – company wherein the company has given power of attorney to the same person i.e. Mr. Madhusudahn Rao on its behalf for smooth functioning of the project of execution of road in State of Kerala and further authorized him to sign various documents.

9. Thus the petitioner – company has within eleven days of issuing certificate by the Project Manager of respondent – company acknowledging its liability towards petitioner – company authorized the same person to represent the petitioner - company for execution of road project.

10. Learned Senior Counsel is, therefore, fully justified in contending that the petitioner – company is acting hand in glove with the Project Manager of respondent – company. In that sense, no reliance could be placed on the certificate dated 12-4-2012 issued by the Project Manager of the respondent – company.

11. Be that as it may, the question is whether the respondent – company is unable to pay its debt. Learned counsel for the petitioner has relied upon Section 434 of the Act of 1956.

12. In my view, the reliance is misconceived. The deeming provision as regards the inability to pay debts will come into effect, if there is any material to show that after issuance of notice by the creditor making demand of sum due, the addressee company has for three weeks neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

13. In the present case, the petitioner – company has issued notice on 30-1-2015. The respondent company has replied the notice on 20-2-2015 disputing the claim. In the circumstances, it cannot be said that the respondent company has neglected to pay the sum.

14. In fact, pending present petition, the petitioner in the year 2016 had filed a suit against the respondent – company for recovery of amount stating therein that the respondent – company has in the present petition disputed the transaction. I am informed that the suit has been dismissed for want of prosecution. The pursis to that effect has been filed by the respondent on 25-2-2021. Thus, the petitioner is aware that the sum claimed by it has been disputed by the respondent. The petitioner, therefore, cannot take recourse to sub-section (1) of Section 434 of the Act of 1956 to argue that respondent – company has neglected to pay the sum or that it is unable to pay debts.

15. The sum claimed by the petitioner is Rs. 56,00,000/-. The respondent has placed on record the certificate dated 31-3-2015 issued by the Chartered Account stating therein that the net worth of the respondent – company as on 31-3-2015 is/was about Rs. 18 Crores. The certificate thus indicate that the respondent – company is capable of paying the amount claimed by the petitioner.

16. At this stage, learned counsel for the petitioner has invited my attention to Form No. 26 AS issued by the Income-Tax Department reflecting the annual tax statement of petitioner – company. The statement indicates that during the period from 31-5-2011 to 31-3-2012, the respondent - company has paid/credited an amount of Rs. 47,00,000/- approximately. The tax deducted is Rs. 95,365/-. Learned counsel submits that the entry of Rs. 47,00,000/- is fictitious. The respondent has actually not paid the amount. He submits that the respondent – company has thus admitted the claim of the petitioner to the tune of Rs. 47,00,000/-.

17. On the point of TDS entries, learned Senior Counsel has relied upon the judgment of this Court in the case of ***S.P. Brothers Vs. Biren Ramesh Kadakia [2008 SCC OnLine Bom 1599]*** wherein the Court held that the issuance of TDS certificate does not amount to acknowledgment of defendant. The Court held that TDS certificate is primarily to acknowledge deduction of tax at source.

18. True it is that the TDS certificate does not amount to acknowledgment of liability. However, in the present case, the petitioner is relying upon the said document. The annual tax statement is belonging to petitioner - company. The document will have to be, therefore, accepted in its entirety. The entries made in the tax

statement show that the respondent – company had paid/credited an amount of Rs. 47,00,000/- approximately. The petitioner has not placed on record its bank statement to ascertain the correctness of its submission that the amount is not so credited. On the other hand the respondent's counsel had submitted that whatever bills were raised by the petitioner have been already paid. This statement, if considered in the light of the annual tax statement submitted by the petitioner – company, the presumption would be that the petitioner – company has received an amount of Rs. 47,00,000/- approximately. In the circumstances, unless otherwise proved, the entries in the annual tax statement would go against the petitioner's claim.

19. Learned counsel for the petitioner has relied upon following authorities to contend that winding up proceedings are maintainable once the respondent - company has neglected to pay the amount.

(1) ***Karpara Project Engineering, Surat Vs. Ballarpur Industries Ltd. [2007(2) Mh.L.J. 880]***,

(2) ***Varkey Souriar Vs. Keraleeya Banking Co. Ltd. Thiruvalla [1956 SCC OnLine Ker 32]*** and

(3) ***Shital Fibers Limited Vs. Indian Acrylics Limited [(2021) 19 SCC 799]***.

20. I have gone through these judgments to only find that in none of the judgments, this Court or the Hon'ble Supreme Court has held that despite there being *bona fide* dispute as regards payment of sum claimed by the creditor, failure by the company to pay the disputed sum will amount to neglecting payment of sum. In my view, the expression "neglect to pay sum" used in clause (a) of sub section (1) of Section 434 would mean an ascertained sum like in the case of ***Karpara Project Engineering*** (supra), the coordinate Bench of this Court found that sum due was adjudicated in civil court and in that context, the Court held that once fact essential for deeming fiction is established, the fiction needs to be drawn and course of Section 434(1)(a) cannot be arrested. The Court further added that the discretion available to Court is only when the amount is not paid as it is not due because of *bona fide* dispute.

21. Thus "neglected to pay sum" would include an adjudicated claim or the undisputed claim. Further the deeming provision presumes the inability of the company to pay its debt but only for the purpose of filing winding up proceeding. Mere filing petition would not, however, raise a presumption of admission of claim made by the creditors. In such eventuality, if the respondent – company could show existence of

bona fide dispute, the Tribunal may invoke powers under sub-section (2) of Section 443 of the Act of 1956.

22. Mr. Jaiswal has referred to the judgment of the Hon'ble Supreme Court in the case of ***IBA Health (India) Pvt. Ltd. Vs. INFO-Drive Systems SDN. BHD. [(2010) 10 SCC 553]*** wherein the question that fell for consideration was, when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability. The Court held in paragraph nos. 20 to 23 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 Trader (P) Ltd. v. A.C.K. Krishnaswami 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 Woolen Industries Pvt. Ltd. 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 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.

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."

23. Thus, the Court has held that if the debt is *bona fide* disputed, there cannot be "neglect to pay" within the meaning of Section 434(1)(a) of the Act of 1956.

24. Thus, what transpires is that on 30-1-2015, the petitioner had issued notice under Section 434(1)(a) of the Act of 1956. The respondent has on 20-2-2015 i.e. within 21 days replied the same and categorically disputed the claim made by the petitioner. Pending company petition, the petitioner has in the year 2016 filed suit for recovery of sum under question on the ground that the respondent has disputed the claim. The said suit has been dismissed for want of prosecution. There appears serious dispute as regards the claim made by the petitioner. Further, the respondent – company is an ongoing concern and had turnover of about Rs. 18 Crores in the year 2015. The respondent, therefore, is a company capable of paying the amount claimed by the petitioner. The petitioner has, therefore, other remedy available to recover its alleged dues. In fact the petitioner had availed the remedy but did not pursue the same. Instead, the petitioner is pursuing winding up proceedings. The winding up of a company is a serious action and has far reaching effects.

25. There is, thus, every reason to believe that the petitioner is acting unreasonably in seeking to have the company wound up instead

of pursuing the other remedy. I am, therefore, not inclined to make an order of winding up. The petition is accordingly dismissed with no order as to costs.

26. Rule is discharged.

(Anil L. Pansare, J.)

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