

MEDIQUIP SYSTEMS PVT. LTD.
v.
PROXIMA MEDICAL SYSTEM G.M.B.H.

MARCH 17, 2005

[ASHOK BHAN AND DR. AR. LAKSHMANAN, JJ.]

Companies Act, 1956—Section 433(e)—Winding up proceedings—Maintainability of—Held : Maintainable when there is determined debt due and the company is unable to pay—Expression 'unable to pay its dues' to be taken in commercial sense—Machinery for winding up not to be utilised merely for releasing debts from a company—On facts, petitioning creditor failed to prove that the debt is payable to it by the company—Hence winding up orders cannot be passed.

Words and phrases—'unable to pay its dues'—Meaning of in the context of Section 433(e) of Companies Act, 1956.

Respondent-company filed a winding up petition against the appellant-company on the ground that appellant had failed and neglected to refund US \$ 5000 and US \$ 11000 which was remitted to it by respondent as bid amount. Appellant opposed petition contending that said amounts were not payable to respondent-company. Single Judge of High Court disposed of the winding up petition holding that appellant has disputed the amount of US \$ 5000 but so far US \$ 11000 is concerned, the same may be repatriated to the remitter and directed appellant to deposit Rs. 4.69 lacs equivalent to US \$ 11000 and in case of default, the petition would stand admitted and it would then be open to the petitioning creditor to pray for issuance for advertisement.

Aggrieved by the order, appellant filed an appeal before Division Bench along with stay application. Division Bench granted stay of issuance of advertisement and directed appellant to deposit Rs. 2 lakhs. Appellant made the deposit. Subsequently, Division Bench dismissed the stay application and the appeal.

In appeal to this court, appellant contended that the Division Bench erred in dismissing the appeal summarily on the finding that the appellant is not entitled to any stay; that the remitter of US \$ 11000 was not the

A petitioning creditor but altogether a different company and that the winding up proceedings is not maintainable by the alleged petitioning creditor as no debt is payable by appellant to them.

Allowing the appeal, the Court

B HELD: 1. The High Court has failed to appreciate that the petitioning creditor was not the remitter and was not entitled to the said sum of US \$ 11000. Admittedly, the remitter of the sum of US \$ 11000 was not the petitioning creditor. A reading of the order of the High Court would show that the learned Judges themselves had doubt regarding lawful entitlement of the petitioning creditor and erred in directing the appellant to deposit the amount and in default directing admission of the appeal.

[1022-G; 1023-B]

2. There is no clear cut finding by the Single Judge that a debt is *prima facie* due and payable by the appellant to the petitioning creditor. The impugned orders have been passed in a purported exercise of jurisdiction not vested with the Single judge sitting in the Company Court, for an application for winding up of the appellant, the Company Court had no jurisdiction to direct the appellant to deposit the amount payable to third party or to a party other than the petitioning creditor. The High Court is not justified in dismissing the appeal summarily holding that the appellant was not entitled to stay of the operation of the order passed by the Single Judge under appeal. [1023-C-D, E]

3.1. 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 dues' 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 utilized merely as a means for realising debts due from a company. The respondent is not a creditor and the appellant is not a debtor in so far as US \$ 11000 is concerned. The defence raised by the appellant is a substantial one and not mere moonshine, which is to be finally adjudicated upon on merits before the appropriate Forum. [1023-E-G]

3.2. The financial position of the appellant is sound. This apart, both, the Single Judge and the Division Bench have granted interim relief which

can be granted only in aid of, and as ancillary to the main relief which may be available to the party on final determination of its rights in a suit or proceedings. If the debt is *bona fide* disputed and the defence is a substantial one, the Court will not wind up the company. A

[1024-E-F; 1025-G]

Softsule (P) Ltd. Re, (1977) 47 Com. Cases 438 (Bom); *Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd.*, (1990) 3 Comp LJ 322, 326 (Mad) and *Madhusudan Gordhandas & Co. v. Madhu Woolen Industries Pvt. Ltd.*, (1972) 42 Com Cases 125 : AIR (1971) SC 2600, relied on B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1811 of 2005 C

From the Judgment and Order dated 11.8.2003 of the Calcutta High Court in A.P.O.T. No. 786 of 2002.

Dhruv Mehta and Mrs. Sarla Chandra for the Appellant.

Braj Kishore Mishra, D.P. Sharma, Mrs. Aparna Jha and Abishek Singh for the Respondent. D

The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J. Leave granted. E

This appeal is directed against the order passed by the Division Bench of the High Court at Calcutta in appeal from an order passed under its original civil jurisdiction being APOT No. 786 of 2002. The Division Bench of the High Court at Calcutta dismissed the appeal of the appellant as well as the application for stay. F

The short facts which are relevant for the purpose of disposal of this appeal are as follow:

The appellant-Company is engaged in business of import of medical equipment and service thereof in general and ULTRA-SOUND SCANNERS, in particular. The respondent-Proxima Medical System, GMBH, issued legal notice to the appellant-Company under Section 434 of the Companies Act mentioning that the appellant-Company is liable to pay the respondent a sum of US \$ 5000 and US \$ 11000 aggregating to US \$ 16000. The appellant replied to the said notice and denied the liability to pay the amounts to the respondent. The respondent-Company filed a winding up petition being C.P. H

A No. 316 of 2001 against the appellant-Company, *inter alia*, praying that the Company be wound up by the order of the Court and Official Liquidator of the Court be appointed as Liquidator of the Company to take charge of its assets. It was alleged therein that despite notice, the Company failed and/or neglected to refund US \$ 5000 and US \$ 11000 which was allegedly remitted by the respondent-Company as partial bid security in respect of two global tenders. The appellant filed affidavit in opposition to the winding up petition contending that the said amounts were not payable to the respondent-Company and the appellant disputed its liability. The following documents were relied in support of the aforesaid contention:

- B
- C
- (i) Intimation note issued by Vijaya Bank being FTTI/NSC/73/99 dated 3.5.1999.
 - (ii) Foreign Inward Remittance Certificate No. 0014709 dated 6.5.1999.
 - (iii) Memorandum issued by Reserve Bank of India No. CA EC 357/09 46 0662/98-99 dated 30.6.1999.
 - (iv) Document issued by Deutsche Bank showing the name of remitter as PAMEDA.
- D

E On 12.9.2002, the Company Judge disposed of the winding up petition holding, *inter alia*, that so far as US \$ 5000 is concerned, the appellant-Company has disputed the amount but in so far as US \$ 11000 is concerned, the same should be repatriated to remitter (which in the present case is not the respondent). The learned Judge directed the Company to deposit Rs. 4,69,480 equivalent to US \$ 11000 to the Registrar, Original side of the High Court at Calcutta. It was further observed by him that :

F “Mr. Dutta has, however, seriously disputed the entitlement of the petitioner to recover this sum. I have not adjudicated any of these points and as and when the petitioning creditor files a suit, it will be open to Mr. Dutta’s client to take all points available to him.

G It is made clear that it will be open to the Company to take such defence as is available to them both on points of fact and law.

H In default of deposit of the aforesaid sum within the stipulated period herein, this petition shall stand admitted and it will be open to the petitioning creditor to pray for direction for advertisement.

The money to be deposited shall remain to the credit of the lawful beneficiary thereof. A

Suit, if any, is to be filed by the petitioning creditor within three months from the date of deposit and in default of such, suit being filed, it will be open to the company to apply for refund of the money.” B

Aggrieved by the order dated 12.9.2002, the appellant-Company filed an appeal along with the application for stay. The Division Bench of the High Court, on 25.10.2002, granted interim stay of issuance of the advertisement, as per order dated 12.9.2002 passed by the Company Court, till 25.10.2002. The Division Bench further, by order dated 28.10.2002, directed the appellant to deposit Rs. 2 lakhs instead of Rs. 4,69,480 and extended the stay up to 12.11.2002. In compliance of the aforesaid direction, the appellant deposited Rs. 2 lakhs with the Registrar, Original Side of the High Court at Calcutta on 11.11.2002. Thereupon the Division Bench directed to list the stay petition for hearing as adjourned motion four weeks from date. Affidavits were required to be filed in the meantime. It was further directed that the stay granted earlier would continue for a period of three months or till further order. On 11.8.2003, the Division Bench of the High Court passed the impugned order dismissing the stay application as well as the appeal preferred by the appellant. Aggrieved by the said order, the appellant preferred this appeal by way of special leave. C D E

We heard Mr. Dhruv Mehta, learned counsel appearing for the appellant and Mr. Braj Kishore Mishra, learned counsel appearing for the respondent.

Mr. Dhruv Mehta, learned counsel appearing for the appellant made the following submissions: F

- (a) The Division Bench passed the order without due consideration of the documents on record showing that the remitter of US \$ 11000 was not the petitioning creditor but altogether a different company. G
- (b) The order passed by the Division Bench failed to appreciate that no debt is due and payable by the appellant-Company to the petitioning creditor as they are not the remitter of the subject sum of US \$ 11000 and as such the winding up proceedings is not maintainable by the said alleged petitioning creditor. H

- A (c) The Division Bench erred in dismissing the appeal of the appellant from the order of the Company Judge summarily on the finding that the appellant is not entitled to any stay.
- (d) The Division Bench also erred in passing the order giving liberty to the respondent-petitioning creditor to approach the Company Court for fresh direction including for advertisement when the said petitioning creditor failed to present any suit after deposit of Rs. 2 lakhs by the Company in compliance of order of another Division Bench and they cannot have any claim in respect of US \$ 11000.
- B
- C (e) The Division Bench had acted with material irregularity in passing the order directing the Company to deposit the balance security when no sum is *prima facie* due and payable to the petitioning creditor as *they are not the remitter* of US \$ 11000.

D Per contra, Mr. Braj Kishore Mishra, learned counsel appearing for the respondent submitted that the appellant was well aware of the fact that M/s Pameda Medizinische Systems was a sister concern of the respondent-Company and that the appellant being fully aware of the said fact, has admitted that the remittance was from the respondent in their reply to legal notice of the respondent. Therefore, he submitted that the contention of the appellant that the respondent-petitioning creditor was not the remitter of the money, is not correct. He would further submit that the appellant, in their reply to the notice sent by the respondent, nowhere claims that US \$ 11000 was not refundable to the respondent. Instead, the appellant accepts its liability to refund the said amount for which it was stated that it is taking steps to file a suit against its Bank which was not remitting the amount.

E

F According to the learned counsel appearing for the respondent, the High Court correctly held that the appellant had admitted that it was duty bound to remit the amount to the respondent and had in fact obtained permission from the Reserve Bank of India for the same. In view of the said fact, the appellant could not have been allowed to take advantage of its own wrongs and the order passed by the High Court is justified.

G

H Arguing further, learned counsel appearing for the respondent, submitted that once the stay was denied to the appellant, the appellant was duty bound to deposit the amount of US \$ 11000 with the Registrar of the High Court. The appellant had, admittedly, not done so even though the liability was admitted by the appellant and, therefore, the consequences mentioned in the

order of the Company Court would automatically follow.

It was further submitted that as per the direction of the Company Court, the suit was to be filed by the respondent only after the deposit of the amount of US \$ 11000 by the appellant. The appellant never deposited the said amount of US \$ 11000 but instead obtained a stay of the order of the Company Court. In these facts and circumstances, the respondent-petitioning creditor could not have had filed a suit for recovery of US \$ 11000.

Concluding his arguments, learned counsel appearing for the respondent, submitted that the appellant has denied its liability which it had earlier admitted in no uncertain terms and, therefore, this appeal is liable to be dismissed.

In this background of the facts, the following questions of law would arise for consideration of this Court:

- (i) Whether the Division Bench of the High Court at Calcutta justified in dismissing the appellant's appeal summarily holding, *inter alia*, that the appellant was not entitled to stay of operation of the order passed by the company Judge under appeal or, in other words, whether dismissal of connecting stay petition could be justified reason alone for dismissing appeal summarily which was based on cogent grounds?
- (ii) Whether the appellant-Company can be said to be indebted to the petitioning creditor/respondent in respect of US \$ 11000 equivalent to INR 4,69,680 when the said sum was not remitted by the said petitioning creditor namely, Proxima Medical Systems, GMBH?
- (iii) Whether the winding up proceedings under the relevant provisions of the Companies Act is maintainable against the company by the said petitioning creditor/respondent when it is evident from the document issued by the Deutch Bank (remitter's banker) and Foreign Inland Remittance Certificate (issued by Company's banker) that US \$ 11000 was remitted by another company namely, Pameda Medizinische System, GMBH and not by the petitioning creditor?
- (iv) Whether the Division Bench and as well as the Company Judge, in exercise of their jurisdiction under the Companies Act, erred in directing the company to deposit Rs. 4,69,480 to secure the alleged claim of the petitioning creditor when the petitioning creditor was

A not the remitter of the said amount and such was seriously disputed before the Company Judge and the Company Judge did not adjudicate the disputes at controversy and directed the petitioning creditor to file suit in respect thereof?

B (v) Whether the Division Bench in passing the order under appeal was justified to direct the company to deposit the balance amount when an earlier Division Bench by an interim order reduced the quantum of deposit from Rs. 4,69,480 as directed by the Company Judge to Rs. 2 lakhs in compliance whereof the company had duly deposited Rs. 2 lakhs on 11.11.2002 and the petitioning creditor failed to present any suit within three months thereof as per direction of the Company Judge?

C (vi) Whether the Division Bench is justified in passing the order under appeal by dismissing the stay application, on extraneous considerations, when an earlier Division Bench by an interim order granted stay of advertisement subject to appellant's depositing Rs. 2 lakhs which was duly deposited by the Company to the satisfaction of the Court?

D We have carefully considered the rival submissions made by the counsel appearing on either side. It is a matter of fact that the appellant-Company had duly deposited Rs. 2 lakhs in compliance of the direction given by another Division Bench of the High Court on 28.10.2002 when the interim stay of the advertisement was granted and the said sum of Rs. 2 lakhs is now in the custody of the Registrar, Original Side, of the High Court at Calcutta.

E In our opinion, the High Court has failed to appreciate that there is a *bona fide* dispute concerning US \$ 11000. While the learned single Judge has held that the dispute concerning US \$ 5000 is a *bona fide* dispute, he has erred in not holding that the dispute concerning US \$ 11000 also is *bona fide*. The High Court, on the one hand, has held that the Company has admitted in no uncertain terms that US \$ 11000 should be repatriated to the remitter on the other hand, the learned judge failed to appreciate that the petitioning creditor in the instant case was not the remitter and was not entitled to the said sum of US \$ 11000. It is not in dispute and as admitted by the respondent-petitioning creditor that the remitter of the sum of US \$ 11000 was one M/s Pameda Medizininische Systems and not the petitioning creditor and that because of the discrepancy in the name of the remitter, the Reserve Bank of India had initially withheld permission. In our view, the *prima facie* case has

H

been made out by the appellant for not remitting the Indian amount equivalent of US \$ 11000 as admittedly the petitioning creditor was not the remitter and cannot have any claim in respect of US \$ 11000. In our opinion, the learned Judges of the High Court have erred in directing the Company to deposit a sum of Rs. 4,69,480 with the Registrar, Original side of the High Court at Calcutta. The question of the company depositing the same with the Registrar, Original side, did not and could not arise since the petitioning creditor was not the remitter. A reading of the order of the High Court would show that the learned Judges themselves had doubt regarding lawful entitlement of the petitioning creditor and erred in directing the appellant-Company to deposit the amount and in default directing admission of the winding up petition.

We have carefully perused the order. There is no clear cut finding by the learned Single Judge that a debt is *prima facie* due and payable by the Company to the petitioning creditor. In our opinion, the impugned orders have been passed in a purported exercise of jurisdiction not vested with the Court sitting in the Company Court for an application for winding up of the company, the Company Court had no jurisdiction to direct the company to deposit the amount payable to third party or to a party other than the petitioning creditor.

In our opinion, the Division Bench is not justified in dismissing the appeal summarily holding that the appellant was not entitled to stay of the operation of the order passed by the Company Judge under appeal.

This Court in catena of decisions 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 dues' 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 utilized merely as a means for realising debts due from a company.

The respondent is not a creditor and the appellant is not a debtor in so far as US \$ 11000 is concerned. The defence raised by the appellant is a substantial one and not mere moonshine which is to be finally adjudicated upon on merits before the appropriate Forum.

Section 433 of the Companies Act says,

H

A "A company may be wound-up by the Court -

(a).....

(b).....

B (c).....

(d).....

(e) if the company is unable to pay its debts;

C (f)

From the above it follows:

(1) There must be a debt; and

D (2) The company must be unable to pay the same.

An order under clause (e) is discretionary.

The debt under Section 433 of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date. We are informed that the financial position of the appellant is sound.

E This apart, both, the learned single Judge and the Judges of the Division Bench have granted interim relief which can be granted only in aid of, and as ancillary to the main relief which may be available to the party on final determination of its rights in a suit or proceedings.

F The Bombay High Court has laid down the following principles in *Sofisule (P) Ltd. Re*, (1977) 47 Com. Cases 438 Bom :

G "Firstly, it is well settled that a winding up petition is not legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company. If the debt is not disputed on some substantial ground, the Court/Tribunal may decide it on the petition and make the order.

H Secondly, 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. A

Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a *bona fide* dispute, is not 'due' within the meaning of Section 434(1)(a) and non-payment of the amount of such a *bona fide* disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956. B

Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise." C

The *Madras High Court in Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd.*, (1990) 3 Comp LJ 322, 326 (Mad) has evolved the following principles relating to *bona fide* disputes: D

- (i) If there is a dispute as regards the payment of the sum towards principal however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a Civil Court; E
- (ii) The existence of a dispute with regard to payment of interest cannot at all be construed as existence of a *bona fide* dispute relegating the parties to a Civil Court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding up proceedings; and F
- (iii) If there is no *bona fide* dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company .

The Rules as regards the disposal of winding up petition based on disputed claims are thus stated by this Court in *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.*, (1972) 42 Com Cases 125 : AIR (1971) SC 2600. This Court has held that if the debt is *bona fide* disputed and the defence is a substantial one, the Court will not wind up the company. The principles on which the Court acts are: G

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

B In view of the judgment now passed, the appellant will be entitled for refund of the sum of Rs. 2 lakhs deposited by them in compliance of the direction given by the High Court when the matter was pending before it. The High Court is directed to refund the same to the appellant on production of a certified copy of this judgment.

C In view of all these, there is a *prima facie* dispute as to the debt. Thus we find no justification whatsoever for admitting the winding up petition. Accordingly, the judgment passed by the learned single Judge and of the Division Bench are set aside. The Civil appeal stands allowed. No costs.

D D.G.

Appeal allowed.