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**(2008) 01 KAR CK 0050**  
**In the Karnataka High Court**  
**Case No : O.S.A. No. 42 of 2006**

Baywest Power and Energy P. Ltd.

APPELLANT

Vs

Zipro International Ltd. and Another

RESPONDENT

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**Date of Decision :** 22-01-2008

**Acts Referred:**

Companies Act, 1956 — Section 433

**Citation :** (2009) 148 CompCas 751

**Hon'ble Judges :** K.L. Manjunath, J;Deepak Verma, J

**Bench :** Division Bench

**Advocate :** S. Ganesh Shenoy, for the Appellant; Sundaraswamy, Ramdas and Anand for Respondent No. 1 and Deepak, for Official Liquidator, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

K.L. Manjunath, J.—The appellant was the respondent in Company Petition No. 13 of 2002. The respondent was the petitioner in the aforesaid company petition. The present appeal is filed challenging the order passed by the learned company judge in Company Petition No. 13 of 2002 dated July 28, 2006, ordering to wind up the appellant-company under the provisions of the Companies Act, 1956, having found that the appellant herein has failed to discharge the admitted liability payable to the respondent.

2. For the sake of convenience, the parties would be referred to as per their status before the company court.

3. The petitioner is engaged in the business of manufacture and supply of high voltage electrical equipments. One of the group of companies of the respondent-company, M/s. Klen and Marshalls Manufactures and Exporters Ltd., vide letter dated August 5, 1999, expressed its desire to produce 72.5 KV and 123 KV rated lightning arrestors. After negotiation, the respondent-company placed an order on November 8, 1999, for supply of 90 numbers of 60 KV and 60 numbers of 96

KV lightning arrestors of value of Rs. 32,64,000 exclusive of excise duty and Central sales tax. Accordingly, the orders were placed for the purchase of the aforesaid Articles by its purchase order dated January 18, 2000 and January 20, 2000. In terms of the specification of the respondent, the petitioner-company manufactured lightning arrestors. Thereafter, the respondent-company has issued despatch advises. Pursuant to it, the petitioner supplied the equipment. The material supplied by the petitioner has been received by the respondent-company and its group of companies and they have issued a material acceptance certificate. Thereafter, the respondent-company had agreed to pay 85 per cent, of ex-works value with 100 per cent, excise duty, CST and freight and insurance on delivery through a letter of credit with usance period of 180 days with interest up to 90 days leviable at the rate of 12 per cent, per annum to the account of the petitioner. The respondent agreed to pay the balance 15 per cent, of the ex-works value within 90 days of issue of material acceptance certificate and commissioning of equipment.

4. On the ground that the respondent-company did not pay the amount as agreed upon, the petitioner by issuing a statutory notice as required under the law, called upon the respondent-company to pay a sum of Rs. 71,79,378 with interest at 24 per cent, per annum from the respondent.

5. The respondent-company filed its statement of objections admitting the placing of orders for the purchase of the above said materials. However, it was contended that the K.P.T.C.L. did not accept to collect all the materials supplied by the petitioner and therefore the respondent-company suffered heavy loss and a penalty was levied on the respondent-company by the petitioner. Therefore, it is contended that respondent-company was not liable to pay the amount as agreed upon to accept a sum of Rs. 18,02,500. It was also contended that the statutory notice issued by the petitioner-company is not in accordance with the provisions of Section 433 of the Act and therefore the appeal filed by the petitioner as bad in law.

6. The learned company judge after hearing the parties, noticed that the petitioner-company had issued a statutory notice addressed to the company only. In the notice, the name of the officer who represents the company was not mentioned. However, he has given a finding that the notice has been actually received by the head office of the respondent-company and held that issuance of such notice would satisfy the provisions of the Companies Act. The learned company judge has also held that the receipt of the statutory notice of the respondent-company has not been disputed by the respondent-company. But it has only contended that it has been received by a wrong person. The contention of the respondent-company has been negated.

7. In regard to the actual payment payable by the respondent-company to the petitioner, the learned company judge considering the settlement arrived at between the parties came to the conclusion that there was an admitted liability of the respondent-company in accepting of Rs. 18,00,000 since the said amount

has not been paid, the contention of the respondent-company has to be negated. Accordingly, he passed an order to wind up the company.

8. Being aggrieved by the order of the learned company judge, the present appeal is filed.

9. We have heard learned Counsel appearing for the parties and also Mr. Deepak who represents the official liquidator.

10. It is the contention of counsel for the appellant that the learned company judge has committed an error in passing the impugned order in not giving a finding in its favour on the following two grounds:

(a) According to him, notice issued by the respondent-company was not in terms of the provisions of the Companies Act, since the notice was not addressed to the person who can represent the company. According to him the notice has been served upon an employee of the appellant's company and receipt of such notice by employee who is not authorised to receive such notice cannot be said to be a valid notice in the eyes of law.

(b) According to him when the claim of the respondent-company was to the tune of Rs. 71,79,378 when the learned company judge has come to the conclusion that the appellant was liable to pay only Rs. 18,00,000 an opportunity should have been given to the appellant-company to discharge the said amount of Rs. 18,00,000.

11. Therefore, he requests the court to allow the appeal and set aside the order passed by the learned company judge.

12. According to learned Counsel for the respondent, none of the grounds urged by the appellant has any application to the facts and circumstances of this case. According to him when the notice has been served upon the registered office of the appellant's company, when it is received by an employee of the appellant-company it cannot be contended by the appellant that the service of such statutory notice as bad in law. When the appellant admits the receipt of notice by its employee, if it is not brought to the notice of the appellant-company by such employee, the appellant has to blame itself and not the respondent. He further contends that the contention of the appellant that further opportunity should have been given to the appellant-company to pay the admitted liability to an extent of Rs. 18,00,000 will not also arise for consideration, since the said amount of Rs. 18,00,000 has been admitted in the statement of objections filed by the appellant.

13. If really the appellant was commercially viable company, it should have deposited the amount before the company court or paid the amount to the respondent-company. He alternatively contends that when the matter was heard by this Court with another combination, after hearing, when an opportunity was given for the appellant to pay the admitted amount, when such opportunity had not been made use of by the appellant, again it is not open for the appellant to

contend that one more opportunity should be given to the appellant to pay the admitted liability of Rs. 18,00,000. He further submits though the respondent is entitled for a sum of Rs. 71,79,378 atleast there cannot be any dispute in regard to the admission made by the appellant-company. Therefore, he requests the court to dismiss the appeal.

14. Having heard counsel for the parties, what is required to be considered by this Court in this appeal is whether the learned company judge has committed any error in passing an order to wind up the appellant-company.

15. As discussed in the previous paragraphs, the dispute is only in regard to the issuance of statutory notice and the payment of admitted amount of Rs. 18,00,000 payable by the appellant. The issuance of notice by the respondent to the appellant-company is not in dispute. The only dispute is that though notice is addressed to the registered office of the company, the name of the officer who has to receive the notice has not been mentioned in the statutory notice. But it is not disputed that such a notice was issued by the respondent and the same was received by the appellant-company at its head office. When the notice is received by the registered office of the appellant and the same is served on an employee of the appellant, it is difficult for any court to accept the arguments of learned Counsel for the appellant that issuance of such notice is bad in law. Admittedly, it is addressed to the appellant-company's name. The registered office is also mentioned. It is served on the appellant-company only. Who has to receive in the office is not the concern of the respondent-company. A person who is in charge of receipt of such letters would only receive, even if the name of the company secretary or the managing director's name is addressed. As such letters or notice would be received by any company in the Section earmarked for receipt of letters and discharge of the letters. Since, the respondent has satisfied the requirement of law in issuance of such statutory notice, the contention urged by counsel for the appellant has to be negatived. As rightly pointed out by learned Counsel for the respondent, when the appellant has admitted the liability at least to an extent of Rs. 18,00,000, if the appellant's company is a commercially viable company in order to avoid the wound up order, it should have paid the amount after receipt of the notice under protest or also after receiving the summons from court the appellant has not chosen to deposit or pay the amount either immediately after receipt of the statutory notice or after receipt of summons from the court. As rightly pointed out by learned Counsel for the appellant, when this matter was heard by another Bench of this Court along with me, an opportunity was given to the appellant to deposit the admitted amount. Though time was taken by learned Counsel for the appellant, the appellant's counsel orally submitted that he is unable to deposit the amount due to non-cooperation of the appellant. When the opportunity was given by the appellate court when the same has not been made use of, the appellant went to the extent of requesting this Court to accept the bank guarantee which may be furnished by the appellant. As a matter of fact, there is no provision to accept the bank guarantee as sought by the appellant, when the appeal was heard on merits and

after having noticed that the appellant has no case on merits.

16. In the circumstances, we are of the opinion that the learned company judge has not committed any error to interfere with the considered order passed by the company court.

In the result, the appeal is dismissed.