
(2009) 10 MAD CK 0287

In the Madras High Court

Case No : C.A. No. 671 of 2009 in C.P. No. 107 of 2009

Chettinadu Constructions

APPELLANT

Vs

Muthukumarasamy Textiles Ltd.

RESPONDENT

Date of Decision : 08-10-2009

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 21, 85(2)

Companies Act, 1956 — Section 207, 433, 434, 434(1), 557

Citation : (2010) 156 CompCas 203

Hon'ble Judges : N. Paul Vasanthakumar, J

Bench : Single Bench

Advocate : T.V. Badrinarayanan, for the Appellant; G. Saikrishnan, for Sai, Baranth and Ilan, for the Respondent

Final Decision : Dismissed

Judgement

N. Paul Vasanthakumar, J.—The prayer in the company petition is to wind up the respondent-company and for a consequential direction that the properties of the company be directed to be vested with the official liquidator.

2. The respondent-company is a limited liability company involved in textile business since 2006. The authorised share capital of the respondent-company, according to the petitioner, is Rs. 11 crores of 1,10,00,000 equity shares of Rs. 10 each and the issued, subscribed and paid-up share capital is Rs. 3 crores, consisting of 30,00,000 equity shares of Rs. 10 each. The main objects of the respondent-company is to carry on the business of manufacture, processors, imports, exports, buy, sell and deal with all kinds of yarn like cotton yarn, polyester cotton yarn, synthetic yarn and polyester yarn in all range of counts and hosiery goods, readymade garments manufactured from cotton, wool, silk, jute, etc.

3. The respondent-company with an intention to develop its existing set of patterns and building and functioning had called for quotations from various

individuals and construction companies. The petitioner submitted its quotation for carrying out the building construction and for its operations. The respondent appointed the petitioner as construction agent/ builder for carrying out the construction of the proposed textile building at the respondent's premises situated at Dharapuram, Ottanchathiram Road, Erode District. According to the petitioner it executed the work of construction of spinning mill at Dharapuram in terms of the agreement and specifications for construction and fulfilled its obligations under the construction agreement.

4. The petitioner states that certain additional works were also agreed to be carried out by the petitioner and the extra/additional work done by the petitioner was duly ratified/certified by the architect, named in the agreement. For carrying out the construction work, the petitioner was taking advance amounts from the respondent on the work basis from time to time. The spinning mill has been commissioned and taken possession of by the respondent. The petitioner raised the first bill duly certified by the architect, named in the agreement and the respondent paid the first part bill in a phased manner. Pursuant to the completion of the balance and additional construction and the work undertaken, petitioner raised the second bill against the respondent. The second and final bill dated February 22, 2008, was also approved and certified by the architect and according to the petitioner, the respondent failed to pay the second bill amount. It is averred in the petition that as per the terms of the agreement the respondent can retain only 5 per cent, of the bill amount for the purpose of carrying out the defect, if any, being pointed out by them and no defect was pointed out by the respondent till date. The period mentioned in the agreement also lapsed on February 21, 2009 and the amount having not been paid the petitioner issued a statutory notice to the respondent on March 25, 2009 and called upon the respondent to pay the second bill amount. It was also stated in the notice that if the amount is not paid, winding up proceedings will be initiated. For the said notice, the respondent issued a reply stating untenable reasons for not paying the amount. Hence, the petitioner has filed this company petition for winding up of the respondent-company. It is averred in the petition that the respondent had become commercially insolvent and the respondent is in the habit of defaulting payment to many other creditors.

5. When the company petition was posted for admission, notice was ordered and in C.A. No. 671 of 2009 filed by the petitioner seeking interim injunction restraining the respondent, its men, agents, officers or anyone claiming through it from alienating, disposing of or otherwise encumbering all machinery, stock in trade and raw materials at the factory site at M/s. Muthukumarasamy Textiles Ltd., Ponnivadi Village, Yeragampatti Pirivu, Dharapuram to Oddanchatram Main Road, Dhara-puram-638 656, Erode District, this Court granted interim injunction by order dated May 20, 2009.

6. The respondent filed counter affidavit for both injunction application and in the company petition contending that the company petition is not maintainable as

there is no debt payable by the respondent to the petitioner. The legal notice issued by the petitioner to the respondent on December 1, 2008; the reply notice issued by the respondent to the petitioner on December 13, 2008; and filing of O.P. No. 229 of 2009 before this Court u/s 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an arbitrator are suppressed in the company petition. It is stated in the counter affidavit that the construction agreement was executed and the amount payable as per the construction agreement is a sum of Rs. 4,84,49,674 and the entire amount has already been paid and after receiving the said amount, petitioner falsely raised a claim for Rs. 1,37,68,025.73 towards the additional work alleged to have been carried out. According to the respondent no such additional construction has been made by the petitioner and for the first time the claim was raised in the legal notice dated December 1, 2008, stating that one Mr. S. Kanagaraj of M/s. Creators was appointed as the arbitrator to adjudicate upon the claim. The said claim made by the petitioner was refuted by the respondent by reply notice dated December 13, 2008. The petitioner also filed O.P. No. 229 of 2008 before this Court u/s 11 of the Arbitration and Conciliation Act, 1996, and prayed for appointment of an arbitrator to resolve the dispute in this aspect. It is further stated in the counter affidavit that the above facts clearly demonstrate that no quantified sum is payable by the respondent to the petitioner as debt. The petitioner having chosen to file O.P. No. 229 of 2009 before this Court seeking appointment of an arbitrator, this company petition filed for winding up, is not maintainable. It is stated in the counter affidavit that the expected cost of the total consideration under the construction agreement was specified at Rs. 3,25,00,740 which is inclusive of construction of cotton godown, works in main building, flooring works, cotton godown main building cable and other auto coner, sunshade and other works and for all the above said works respondent had paid a sum of Rs. 4,84,49,674 and the said payment was made between November 20, 2006 and November 7, 2007. After receiving the entire amount the second bill dated February 22, 2008, has been raised by stating that for the additional construction, respondent has claimed the above amount in the bill. The certification alleged to have been made by the architect in the bill dated February 22, 2008, clearly contains an endorsement that the alleged work in respect of the bills require to be checked by the engineer also. Further, the said alleged bills are not coming within the scope of construction agreement. In so far as the allegation that the respondent is unable to pay the debts to several persons, the same was made with mala fide and dishonest intention knowing fully well that no amount is payable by the respondent to the petitioner or to anyone.

7. Learned Counsel for the petitioner submitted that the second bill raised by the petitioner was verified by the architect in accordance with the terms of the agreement and therefore there is no dispute with regard to the liability on the part of the respondent in paying the said amount. Learned Counsel also relied on Clause 13 of the agreement in support of his contention. Clause 26 of the agreement provides for settlement of all disputes and differences of any kind

arise between the parties, pursuant to which the petitioner had filed an application u/s 11 of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator and the said filing of the petition will not be an embargo to maintain this petition seeking winding up. Learned Counsel relied upon the judgment of this Court reported in (1971) 41 Comp Cas 548 (Hind Mercantile Corporation P. Ltd. v. H. Rayner and Co. Ltd.), for the proposition that mere filing of an application for appointment of arbitration will not abate the company petition. He has also cited the judgment of the Supreme Court reported in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., and contended that the arbitrator has no power to order winding up of the company and winding up petition cannot be referred to arbitrator.

8. Learned Counsel for the respondent on the other hand submitted that the petitioner has approached this Court by not stating the correct facts, particularly with regard to issuance of notice by the petitioner on December 1, 2008, reply issued by the respondent on December 13, 2008, disagreeing with the proposal to nominate an arbitrator, viz., Sri. S. Kanagaraj of M/s. Creators and the consequential filing of arbitration O.P. No. 229 of 2009 u/s 11 of the Arbitration and Conciliation Act, 1996, praying this Court to appoint a sole arbitrator for resolving the dispute between the petitioner and respondent. Learned Counsel also submitted that there is no debt payable by the respondent to the petitioner. Learned Counsel also cited the judgment of the Supreme Court reported in Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, and submitted that if a debt is bona fide disputed and the defence is substantial one the court will not wind up the company. Learned Counsel also cited the decision of the Supreme Court reported in Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, for the proposition that if a dispute is already referred to arbitration and the same is pending adjudication, no winding up petition is maintainable as there is bona fide defence, which has to be determined. An unreported decision of the Division Bench of this Court in O.S.A. No. 319 of 2007 dated September 4, 2008, is also cited to show that when a suit is pending with regard to the liability, company petition to pressurise the respondent to make payment is not maintainable.

9. I have considered the rival submissions made by learned Counsel for the petitioner as well as the respondent.

10. The point for consideration is as to whether this company petition filed before this Court for winding up of the respondent-company for non-payment of the alleged debt of Rs. 1,37,68,025.73 is maintainable when the petitioner has already filed application seeking appointment of an arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996, for determining the very same claim?

11. The case of the petitioner is that after paying the first bill raised, the petitioner raised the second and final bill dated February 22, 2008, for the said sum, which according to the petitioner is payable for putting up additional construction. The case of the respondent is that there was no agreement for

making the said alleged additional construction and all constructions made by the petitioner is covered by the agreement executed and the entire amount has been paid. The same is disputed by issuing a notice on December 1, 2008, by stating that a sole arbitrator can be appointed in terms of the construction agreement to adjudicate upon the claim made in the bill dated February 22, 2008, by a named arbitrator. The respondent through its counsel sent reply dated December 13, 2008 and stated that the entire amount payable as claimed in the first bill for a sum of Rs. 4,84,49,674 has already been paid and the second bill dated February 22, 2008, claiming the disputed sum has no basis and there is no prior agreement for that amount. The suggestion made by the petitioner for appointment of a named arbitrator was not accepted. It is also stated in the reply notice that no additional construction work is made by the petitioner and the cost for the entire construction made has been fully paid, as the estimated amount is Rs. 3,25,00,740 and the actual amount paid was Rs. 4,84,49,674. From the above said pleadings it is clear that there is genuine dispute with regard to the claim made by the petitioner by bill dated February 22, 2008.

12. The petitioner having understood the said dispute has chosen to nominate the arbitrator and the name proposed by the petitioner for appointing the arbitrator having not been accepted by the respondent, the petitioner filed O.P. No.229 of 2009 u/s 11(6) of the Arbitration and Conciliation Act, 1996, before this Court on January 30, 2009, praying this Court to appoint a sole arbitrator for resolving the dispute between the petitioner and respondent, arising out of the claim made by the petitioner in terms of the bill dated February 22, 2008, for a sum of Rs. 1,37,68,025.73. As rightly contended by learned Counsel for the respondent that there is no determined amount of debt payable by the respondent as on the date of filing company petition or even today. The very fact that the petitioner approached this Court for appointment of an arbitrator u/s 11(6) proves that there is a dispute to be resolved. The only dispute to be resolved between the petitioner and the respondent is with regard to the claim amount raised through bill dated February 22, 2008, for the alleged additional construction.

13. The very moment the petitioner requested for arbitration by suggesting the name of an arbitrator, the arbitration proceedings commenced as per Section 21 of the Arbitration and Conciliation Act, 1996, which is extracted hereunder:

21. Commencement of arbitral proceedings. -- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. 2.

14. The Supreme Court in the decision reported in Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd., , in paragraphs 49 and 72 considered the said issue and held thus (page 597 of 121 Comp Cas):

Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the

arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding.

Keeping in view the fact that in all the decisions, referred to hereinbefore, this Court has applied the meaning given to the expression "commencement of the arbitral proceeding" as contained in section 21 of the 1996 Act for the purpose of applicability of the 1940 Act having regard to Section 85(2)(a) thereof, we have no hesitation in holding that in this case also, service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceeding.

15. The said position is reiterated by the Supreme Court in the decision reported in U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and Another, and in paragraph 9 it is held thus (page 149 of 122 Comp Cas):

The only question which survives consideration is the applicability of the 1996 Act in the facts of the present case. Disputes and differences between the parties arose in the year 1991. The respondent filed an application u/s 20 of the 1940 Act on May 1, 1991. It invoked the arbitration agreement as contained in Clause 34 of the contract. The arbitral proceeding was, therefore, set in motion. In terms of Section 21 of the 1996 Act, the arbitral proceedings in respect of a particular dispute commences on a date on which the request for that dispute to be referred to arbitration was received by the respondent.

Thus, it is manifest that in the dispute between the petitioner and the respondent, arbitration proceedings commenced already.

16. The Supreme Court in Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, , considered similar issue as to whether winding up petition is maintainable after the disputes are raised or referred to arbitration and when the adjudication is pending. In paragraphs 13 and 14 it is contended as follows (page 839 of 79 Comp Cas):

It may be noted, as stated above, that the second respondent has already referred the dispute to arbitration under Clause 27 of the promoters' agreement for adjudication claiming specific performance of the promoters' agreement and in the alternative for damages for breach of contract. The said amount is the basis for the winding up petition as it is one of the claims in the statement of claims before the arbitrators. One further fact requires to be noted; the promoters' agreement had already been cancelled as per notice dated October 31, 1992.

In view of the above, the appellant denied the liability to pay the amount on various grounds not only in the company petition but also before the arbitrators. Inter alia, it was urged that the winding up petition was not maintainable. The claim itself was doubtful. It was a matter which required adjudication. Therefore, it was not a debt as contemplated within the meaning of Sections 433 and 434 of the Act. Respondent No. 1 is not a creditor.

For the said contention, the Supreme Court gave finding in paragraphs 23 to 30 which reads thus (page 842 of 79 Comp Cas):

The second respondent, Dalmia Industries Ltd., has resorted to arbitration proceedings and has claimed this money. Hence, there is a substantial dispute inasmuch as the second respondent claims the said payment of Rs. 72.50 lakhs on the ground that they should be reimbursed.

The appellant is a financial corporation which is fully owned by the State of Uttar Pradesh. It cannot be denied that it is a profit-making organisation and is not incurring losses. It is paying dividends on its annual profits. Therefore, there is no relationship of debtor and creditor.

The defence of the appellant in relation to non-payment is a bona fide defence. Whatever it may be, the liability of the appellant is yet to be determined. It is in this factual background that we will deal with the legal aspect of the matter. Section 433 of the Act says :

A company may be wound up by the court,--...

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

From the above, it follows:

(1) there must be a debt; and

(2) the company must be unable to pay the same. An order under Clause (e) is discretionary.

A debt under this section must be a determined or a definite sum of money payable immediately or at a future date.

What then is inability when the section says "unable to pay its dues"? That should be taken in the commercial sense, in that, it is unable to meet current demands. As stated by William James, V.C.; it is "plainly and commercially insolvent--that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain--as to make the court feel satisfied--that the existing and probable assets would be insufficient to meet the existing liabilities. (European Life Assurance Society, In re (1869) L.R. 9 Eq. 122, 128 : V.V. Krishna Iyer Sons v. New Era Manufacturing Co. Ltd. (1965) 35 Comp Cas 410 ker 422 (Ker)).

While dealing with the scope of section 433(e), this Court had occasion to hold the following (at page 131 in Madhusudan Gordhandas and Co. Vs. Madhu Wollen

Industries Pvt. Ltd., , the case relied on by the learned Solicitor-General):

Two rules are well-settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable (see *London and Paris Banking Corporation, In re* (1874) L. R. 19 Eq. 444). Again, a petition

for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed (see *Brighton Club and Norfolk Hotel Co. Ltd., In re* (1865) 35 Beav. 204).

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (see *A Company, In re* (1894) 2 Ch. 349; 94 369). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (see *Tweeds Garages Ltd., In re* (1962) 32 Comp Cas 795 (Ch. D) : (1962) Ch. 406). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding up order by the creditors the court will consider their wishes and may decline to make the winding up order. u/s 557 of the Companies Act, 1956, in all matters relating to the winding up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in *Palmer's Company Law*, 21st edition, page 742, as follows:

This right to a winding up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order.

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well-settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case (see *P. and J. Macrae Ltd., In re* (1961) 31 Comp Cas 424 (CA)).

It is beyond dispute that the machinery for winding up will not be allowed to be utilised merely as a means for realising its debts due from a company. In *Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another*, this Court quoted with approval the following passage from Buckley on the Companies Acts, 13th edition, page 451:

It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court.

Examined in the light of the above, we are unable to uphold the judgments of the court below on the facts narrated above. Our reasons are as under:

(1) The basis of the claim of the first respondent for Rs. 72.50 lakhs is the promoters' agreement dated July 1, 1988. This agreement has been cancelled by the appellant by notice dated October 31, 1992. Though the learned single judge of the High Court referred to this aspect he had not pursued it further. He has not considered as to what would be the consequence. Unfortunately, the Division Bench has overlooked this aspect when it held thus:

In the present case, there is an allegation in the petition that there was an agreement between the company and Dalmia Dairy Industries for promoting the petitioner-company and that under the terms of that agreement the company had to pay certain amounts. There is nothing on record to suggest that such an agreement was not entered into.

(2) The first respondent is not a creditor. The appellant is not a debtor because it is a financial institution for an amount which is agreed to be subscribed. Neither the learned single judge nor the Division Bench has decided this important question whether there is a debt and the company has either neglected or is unable to pay.

(3) The same claim is the subject-matter of arbitration which is pending adjudication. Therefore, there is no definiteness about it.

(4) In view of all these, there is no prima facie dispute as to the debt.

(5) The defence raised is a substantial one and not mere moonshine. We find it difficult to appreciate the reasoning of the learned single judge when he holds that there are arguable issues and, therefore, the winding up petition has to be admitted. On this aspect the courts below failed to note that the admission of the winding up petition is fraught with serious consequences as far as the appellant is concerned.

18. A Division Bench of this Court in O.S.A. No. 319 of 2003 (*Rediffusion-Dentsu, Young and Rubicam P. Ltd. v. Solidaire India Ltd.* (dated September 4, 2008) (2008) 145 Comp Cas 693, considered similar issue with regard to the pendency

of the suit between the parties and whether winding up petition can be maintained. In paragraph 15 the Division Bench held as follows (page 701):

15. Whenever a company petition is filed seeking winding up, the court must consider the circumstances in every case and come to a necessary conclusion. Needless to say that granting of the relief of winding up is a discretionary relief; but, the court when exercise this discretionary power, it must be governed by justice and equity. The court must exercise its discretion judiciously also. It is well-settled principle of law that if there is any substantial defence put forth by the respondent, the same has got to be decided by the court only on appreciation of evidence. Having filed a suit calling the respondent, the third defendant therein, as the agent of the first defendant and necessary issues having been framed touching the liability of all the defendants, filing a company petition like this was nothing but a device to pressurise for payment of the said sum by the third defendant. It is well-settled that the winding up petition cannot be made as a device to pressurise the respondent to make payment as per the demand. In view of the pendency of the suit with the above said specific averments and seeking a decree for recovery of money against all defendants jointly and severally, which is exactly the subject-matter in the company petition and the fact that pursuant to the substantial defence, necessary issues have also been framed in that suit, this Court is of the considered opinion that at no stretch of imagination, an order of winding up could be made and hence this Court is unable to see any reason to interfere in the order of the learned single judge.

19. In *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, , the Supreme Court in paragraphs 24 to 27 held as follows (page 483):

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

(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;

(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 decide such a dispute before the civil court and in such an eventuality, the company court itself is competent to decide such a dispute in the winding up proceedings; and

(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 and Co. Vs. Madhu*

Wollen Industries Pvt. Ltd., . 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:

- (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.

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 with 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.

In view of all these, there is no 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.

20. The Bombay High Court in the decision reported in (2001) 107 Comp Cas 288 (Manipal Finance Corporation Ltd. v. CRC Carrier Ltd.), held that when arbitration proceedings are pending, no company petition can be admitted.

21. When the dispute is pending with regard to payment of debt no winding up can be ordered is the view taken by the Supreme Court in the following decisions:

(a) In the decision reported in C. Hariprasad Vs. Amalgamated Commercial Traders Private Ltd., a Division Bench of this Court held that a company can be wound up for its inability to pay after proper demand, on the petition of the creditor.

(b) In (1972) 42 Comp Cas 125 (Madhusudan Gordhandas and Co. v. Madhu Woollen Industries P. Ltd.), the honourable Supreme Court held that where the petition for winding up of a company is based on the ground of inability of the company to pay its debts, it is well-settled that if the debt is bona fide dispute and the defence is a substantial one, the court will not order winding up. The honourable Supreme Court has stipulated the following principles to be followed:

- (1) That the defence of the company is in good faith and one of substance;
- (2) That the defence is likely to succeed in point of law; and
- (3) That the company adduces the prima facie proof of the facts on which the defence depends.

(c) In the decision reported in (1965) 35 Comp Cas 456 (Amalgamated Commercial Traders P. Ltd. v. A.C.K. Krishnaswami), the honourable Supreme

Court held as follows (page 463):

It is well-settled that "a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order. (Vide Buckley on the Companies Acts, 13th edition, page 451).

We are satisfied that the debt in respect of which notice was given u/s 434 was bona fide disputed by the appellant-company. The appellant-company had received legal advice and it had acted on it. On the facts it seems to us clear that the appellant-company did not dispute the debt in order to hide its inability to pay debts. Further we are satisfied that the question whether the declaration of dividend dated December 30, 1959, is valid or not raises a substantial question as to the interpretation of Section 207 of the Companies Act. Further, whether the declaration dated December 30, 1959, is severable or not is also a substantial question. We do not propose to decide whether the declaration of dividend was valid or not or whether it was severable or not, because in these proceedings we are only concerned with the question whether the debt was bona fide disputed by the company on substantial grounds. If the debt was bona fide disputed, as we hold it was, there cannot be "neglect to pay? within Section 434(1)(a) of the Companies Act. If there is no neglect, the deeming provision does not come into play and the ground of winding up, namely, that the company is unable to pay its debts is not substantiated.

(d) In *Rajearajeswari Packaging Products Vs. Dev Fasteners Ltd.*, , this Court held that specific plea of inability to pay the admitted debt is to be proved for maintaining winding up petition.

(e) Same is the view taken by this Court in the decision reported in *Neg. Micon A/ s Alsvoj 21 DK 8900 Rangers Denmark Vs. NEPC India Limited 1678 Trichy Road Ramanathapuram Coimbatore - 641045*, .

22. The decision cited by the petitioner, i.e., *Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd.*, , has no relevance to the facts of the case as the issue in that case was whether winding up petition (company petition) can be referred to arbitration proceeding. Here the respondent is not praying for the same.

23. Applying the above decisions to the facts of this case and having regard to the undisputed fact that the petitioner has already filed application u/s 11 of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator to resolve the dispute arising out of bill dated February 22, 2008, I am of the view that the

company petition filed for winding up of the respondent-company is not maintainable.

24. There is no merit in the company petition and the same is dismissed. No costs. Connected C.A. No. 671 of 2009 is also dismissed.