

(2001) 12 AP CK 0090

In the Andhra Pradesh High Court

Case No : OSA No. 5 of 1998 and CP No's. 165 and 166 of 1999

M. Suryanarayana and Others

APPELLANT

Vs

Stiles India Ltd. and Others

RESPONDENT

Date of Decision : 28-12-2001

Acts Referred:

Companies Act, 1956 — Section 433, 433(2), 434(1), 439, 483
Debtors Act, 1869 — Section 13, 3(1)

Citation : (2002) 2 ALD 185

Hon'ble Judges : S.R. Nayak, J; L. Narasimha Reddy, J

Bench : Division Bench

Advocate : S. Ravi and D. Vijay, for the Appellant; V.S. Raju and P.V. Rama Raju, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Nayak, J.—O.S.A.NO. 5 of 1998 is directed against the Judgment and order passed by the learned single Judge dated 12.8.1997 passed in C.P. No. 71 of 1996 dismissing the company petition filed by the appellant.

2. M/s. Stiles India Limited, the respondent herein, is a company incorporated under the Companies Act, 1956 (for short, the Act), having its registered office at Hyderabad and it is carrying on business activities at Lakshminagaram, Konangivaripalli, Tirupati-Chittoor Highway. Chandragiri Mandal, Chittoor District. The authorized capital of the respondent-company is Rs. 9 crores divided into 90 lakh equity shares of Rs. 10/- each. The main object of the respondent-company is to carry on business of manufacture and dealing in Ceramic and Stoneware tiles. Mr. M. Suryanarayana, the appellant herein, and the petitioner in C.P. No. 71 of 1996, had worked as General Manager (Finance) in the respondent-company till the end of December, 1994 and left the company with effect from 1.1.1995. According to him, he is entitled to receive arrears of salary for a period of five months i.e., for the period from August 1994 to December 1994 at the rate of Rs. 18,500/- per month. According to him, he is also entitled for some

other amounts from the respondent-company towards Provident Fund contribution, encashment of leave salary and medical reimbursement etc., to a tune of Rs. 1,18,900/-. Thus, according to the appellant, he is entitled to receive a total sum of Rs. 2,11,400/- from the respondent-company. Since the respondent-company did not pay the outstanding dues, the appellant issued a notice dated 17.7.1995 to the respondent-company u/s 433(e) of the Act demanding payment of a total sum of Rs. 2,11,400/- towards the outstanding dues due from the respondent-company, and -as the respondent-company did not respond to the said notice nor pay the outstanding amounts to the appellant he filed C.P. No. 71 of 1996 under Sections 433(e) and Section 439 of the Act for winding up of the respondent-company on the ground that the respondent-company is unable to discharge its debts.

3. Notice before admission was ordered to the respondent- company and the respondent-company filed its counter-affidavit denying the allegations made in the Company Petition and contending that the respondent company was taken over by M/s Spartek Ceramics India Limited on the basis of the valuation done as on 30.11.1994, that even prior to that date, the appellant was not at all attending the office regularly and that he was working in some other organisation. In the counter-affidavit, it was also claimed that the respondent-company was closed for more than six months preceding 30.11.1994 when its Management was taken over by M/s Spartek Ceramics India Limited. The respondent)-company also claimed that the claim made by the appellant relates to the period during which he did not work, and when the factory was closed down. In the counter-affidavit, the respondent- company also disputed the claim of the appellant as regards Provident Fund contribution, encashment of leave salary, medical reimbursement. LTC etc., by contending that he is not entitled to receive any money under those heads. It was also contended in the counter-affidavit that the appellant, while leaving the services of the company, did not hand over the cash balance, books of accounts, minutes books and other statutory records, and that he took away a sum of Rs. 20,000/- as advance from the respondent-company and he did not account for the same subsequently. So alleging the Management of the respondent- company contended that the Company Petition filed by the appellant is incompetent and liable to be dismissed in limine.

4. The appellant filed reply to the counter filed by the respondent-company.

5. The learned single Judge, after hearing the loomed counsel for the appellant and the respondent-company, came to the conclusion that the necessary condition to entertain the Company Petition u/s 433(e) of the Act does not exist, and there is a bona fide dispute between the appellant and the respondent-company regarding the claims made by the appellant, and therefore, the company petition filed by the respondent is not maintainable. Accordingly, the learned single Judge by his order dated 12.8.1997 dismissed C.P. No. 71 of 1996 at the admission stage itself. Hence this Appeal under Clause 15 of the Letters

Patent Act and Section 483 of the Act.

6. It is stated, the question whether "arrears of salary" or "salary due" to an employee by the respondent-company, can be treated as a "debt" within the meaning of that term u/s 433(e) of the Act arises in C.P. Nos. 165 and 166 of 1999 also. Hence the above Company Petitions were ordered to be heard along with the OSA by the order of the Court dated 19.4.2001. Accordingly the OSA as well as the above Company Petitions were placed before this Bench for hearing. Hence all the matters were clubbed and heard together and they are being disposed of by this common order.

7. We have heard the learned counsel for the parties.

8. Sri S. Raju, learned counsel appearing for the appellant in O.S.A. No. 5 of 1998 would contend that admittedly the appellant/petitioner is entitled to receive the arrears of salary at least for a period of four months from August, 1994 to November, 1994 totaling to Rs.78,000/- apart from other amounts from the respondent-company towards Provident Fund Contribution, encashment of leave salary, LTC and medical reimbursement etc., to a tune of Rs. 1,18,900/-, and in that view of the matter the learned single Judge erred in law in dismissing the Company Petition by observing that there is a bona fide dispute between the appellant and the respondent-company as regards arrears of salary and other claims. The learned counsel would further contend that the distinction made by the learned single Judge between "salary" and "debt" placing reliance on the judgment of the Madhya Pradesh High Court in Pawan Kumar Khullar Vs. Kaushal Leather Board Limited, , is not well founded. The learned counsel would further maintain that salary, which has become due to an employee or officer of the respondent-company, would be a debt within the meaning of that term u/s 433(e) of the Act. The learned counsel would also contest the correctness of the observation of the learned single Judge that the appellant has not placed any trustworthy material on record to show that he is entitled to receive his arrears of salary and other claims -from the respondent-company. The learned counsel would also contend that the learned single Judge has failed to appreciate the fact that the appellant-petitioner got issued a legal notice dated 17.7.1995 to the respondent-company putting forth some claims and the respondent-company" failed to give any reply to the notice, and in that view of the matter, the learned single Judge ought to have held that the claim put forth by the appellant-petitioner in the notice and the Company Petition is an established right.

9, Sri V.S. Raju, learned counsel appearing for the respondent-company, on the other hand, would contend that in the counter filed by the 1st respondent-company before the loomed single Judge, the claims put forth by the appellant were specifically denied and that it was also contended that the appellant did not serve the company during the period in respect of which he has claimed arrears of salary. The learned counsel, drawing our attention to the averments made in the counter-affidavit, would maintain that each and every claim of the appellant-petitioner is specifically denied and, therefore, the learned single Judge is

justified in observing that there is a bona fide dispute between the appellant-petitioner, or and the respondent-company relating to the claims made by the appellant. The learned counsel would contend that a company petition u/s 433(e) of the Act is not meant to establish a claim and such a petition could be filed only for enforcement of an established right in respect of a debt incurred by the company in question. The learned counsel would maintain that "arrears of salary" or "salary due" to an employee by the company cannot be considered as a "debt" within the meaning of that term u/s 433(e) of the Act. The learned Counsel would maintain that the decision of the Madhya Pradesh High Court in Pawan Kumar Khullar's case (supra) is good law and, therefore, no exception can be taken to the opinion arrived at by the learned single Judge adopting the ratio of the Judgment of the Madhya Pradesh High Court in Pawan Kumar Khullar's case (supra).

10. Sri D.Vijaya, learned counsel appearing for the petitioners in C.P. Nos. 165 and 166 of 1999 would adopt the arguments advanced by Mr. S.Ravi, learned counsel for the appellant in OSA. No. 5 of 1998.

11. Sri P.V. Rama Raju learned counsel for the respondent-company in C.P. Nos. 165 and 166 of 1999 would contend that under no circumstance "salary due" or "arrears of salary" to an employee or an officer of the company can be treated as a "debt" within the meaning of that term u/s 433(e) of the Act so as to enable such an employee or officer to file an application u/s 433(e) of the Act for winding up of the company, and if the petitioners are entitled to arrears of salary or salary dues, they should work out their legal remedies before other Forums or the Courts, and that on that count they are not entitled to institute the Company petitions u/s 433(e) of the Act for winding up of the company. In all other respects, Sri D. Venkata Subbaiah, learned Counsel, would adopt the arguments of Sri V.S. Raju, learned Counsel for the respondent-company in OSA. No. 5 of 1998.

12. In the light of the rival contentions raised by the learned Counsel for the parties, it is appropriate to deal with the basic question whether "salary due" to an employee by the respondent-company can be treated as a "debt" within the meaning of that term u/s 433(e) read with Section 434(1)(a) of the Act in the first instance because it goes to the root of the matter. Section 433(e) of the Act provides that a company be may wound up by the Court if the company is unable to pay its debts. Clause (a) of Sub-section (1) of Section 434 provides--

"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 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;"

Inability on the part of the company to pay debts is a condition precedent to invoke the jurisdiction of the Company Court u/s 433(e) of the Act. The word "debt" is not defined under the Companies Act. Therefore, the word debt" should be understood in the way it is understood in ordinary commercial parlance. The word "debt" as defined in Black's Law Dictionary, 5th Edition, is as follows:

"Debt. A sum of money due by certain and express agreement. A specified sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment.

A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a still more general sense, that which is due from one person to another, whether money, goods, or services. In a broad sense, any duty to respond to another in money, labour or service: it may even mean a moral or honorary obligation, unenforceable by legal action. Also, sometimes an aggregate of separate debts, or the total sum of the existing claims against a person or company. Thus, we speak of the "natural debt", the "bonded debt" of a corporation etc."

13. In *Rawley v. Rawley*, 1 QBD 460, the word "debt" is defined as "a sum payable in respect of a liquidated money demand, recoverable by action." In *Webster v. Webster*, 31 Bea 393, it was held that a "debt" is a liquidated money obligation for which, generally speaking, an action will lie. In *Webb v. Stenton*, (1883) 11 QBD 518 Lindley L.J., held that an obligation arising out of debt may be either legal or equitable. The learned Judge said "a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in praesenti solvendum in future." In *Booth v. Trail*, 12 QBD 8, Coleridge, C.J., has held that speaking generally a money in the hands of a man who cannot refuse to pay it somehow to another, is a "debt", and if so, it can be attached. In *R v. Leon*, (1945) KB 136 interpreting the word "debt" occurring in Section 13 of the Debtors Act 1869, the Court held that there is some authority for saying that the word "debt" in a statute means" an actionable debt and a fortiori it would appear to be so in a penal section such as Section 13 of the Debtors Act 1869. In *BP Exploration Co. (Libya) v. Hunt*, (1982) 1 All.ER 925 while construing the words "any debt or damages" occurring in c. 41, Section 3(1)(c), it was held that those words should be construed in the widest sense and they cover any sum of money which is recoverable by one party from another either at common law or in equity or under a statute, such as Law Reform (frustrated Contracts) Act 1943. As per Bouvier's Law Dictionary, 8th Edition, 1984, the word "debt" in contracts, means a sum of money due by certain and express agreement; all that is due a man under any form of obligation or promise.

14. In *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, , the Supreme Court held--

"a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation: debitum in praesenti, solvendum in future."

15. In Union of India (UOI) Vs. Raman Iron Foundry, , Bhagwati, J, speaking for the Supreme Court and dealing with the concept of "debt", observed as under in para 7 of the Judgment:

"It would be profitable in (his connection to refer to the concept of a "debt", for a sum due is the same thing as a debt due. The classical definition of "debt" is to be found in Webb v. Stenton (1883) 11 QBD 518 (supra), where Lindley L.J., said.... A debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation. There must be debitum in praesenti; solvendum may be in praesenti or in future that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the Judgment of the Supreme Court of California in People v. Arguelio (1869) 37 Cal 521 which was approved by this Court in Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, , clearly brings out the essential characteristics of a debt:

"Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due."

In Newfinds (India) v. Vorion Chemicals and Distilleries Ltd., (1976) 46 Comp Cases 87 the Madras High Court held that a debt for the purpose of winding up of the Company clearly means a definite sum viz., exceeding Rs. 500/- and it includes only liquidated damages or a sum of money capable of being ascertained. In the context of Section 433(e) of the Act, the Rajasthan High Court in Registrar of Companies, Rajasthan v. S. Sohanmull Golcha Private Limited, (1972) 42 Comp Cas 316 (Raj) and the Gujarat High Court in Registrar of Companies, Gujarat v. Kavita Benefit Private Limited, (1978) 48 Comp Cases 231 and the Punjab High Court in Registrar of Companies v. Atlas Transport Private Limited, (1974) 4 Comp Cas 496 (P & H) have held that when a debt becomes absolutely due, in the sense that the creditor is entitled to claim its payment presently, it is a debt which is payable by the company within the meaning of Section 433(e) of the Act.

16. In the light of the above enunciation and interpretation of the concept "debt" generally and in the context of Section 433(e) of the Act in particular, it becomes quite clear that in order to attract the provisions of Section 433(e) read with Section 434(1)(a) of the Act, the debt in question should exceed Rs. 500/- and such a debt has become absolutely due and the creditor is entitled to claim its payment presently, and if these two conditions co-exist, such creditor can invoke the provisions of Section 433(e) of the Act and file a petition for winding up of the company. Therefore, the question in the context of this case is whether the appellant/ petitioner in O.S.A. No. 5 of 1998 was entitled to claim his payment on

the date of the company petition and whether the debt claimed by the petitioner-appellant was a liquidated claim or an unliquidated claim.

17. Before dealing with this specific question, the larger question raised by the learned counsel for the respondent-company that under no circumstance salary due to an employee or officer of the company could be a "debt" in the context of Section 433(e) of the Act has to be considered for it goes to the root of the matter. This contention, in our considered opinion, is required to be noticed only to be rejected. It is trite that an employee or officer of the company, on completion of the wage period or salary period and after serving the company, acquires a right to claim wage/salary, as the case may be, and he assumes the character of a creditor and the company becomes a debtor. It cannot be gainsaid that an employee of the company, after serving a company for a wage period or salary period, say for a month, if he or she acquires a right to claim for payment of salary and if the company does not pay the salary within the stipulated-time under the contract or the relevant regulations governing terms and conditions of service, undoubtedly the employee can bring a legal action to enforce his/her right to recover the salary due to him or her against the company. The definition of the word "debt", as understood in the well-known treatises as well as English and Indian Courts, to put it pithily, means a sum of money which is presently payable. In other words, there must be debitum in presenti. There are no good reasons to take out "salary due to an employee" from the company from the meaning of the word "debt" in the context of Section 433(e) of the Act. However, the learned counsel for the respondent- company, placing strong reliance on the Judgment of the Madhya Pradesh High Court in Pawan Kumar Khullar's case (supra), would contend that the salary payable to a person or an employee in lieu of his services rendered by him/her by the company is a remuneration and, therefore, it can never be treated as a "debt" within the meaning of that term in the context of Section 433(e) of the Act. It is true that in the above Judgment of the M.P. High Court, a learned single Judge of that Court in para (4) held-

"There is difference between debt salary. The salary is the remuneration paid to a person or employee in lieu of services rendered by him/her whereas debt is not remuneration. Debt is something which is borrowed by a person on settled terras and conditions and settled rate of interest and can be re-settled between the parties."

It needs to be emphasized that the learned single Judge in recording that opinion has not at all referred to or considered any of the decisions of the Courts or how the term "debt" is understood generally or in the context of Section 433(e) of the Act. With great respect, we are not in in position to accept the opinion of the learned single Judge of the M.P. High Court recorded in paragraph 4 of the above Judgment as correct position in law. A learned single Judge of this Court, Krishna Saran Shrivastava, J., in Capt. B.S. Demagry Pilot, VIF Airways Pvt. Ltd, Ameerpet, Hyderabad v. VIF Airways Limited, rep. by its Chairman and Managing Director, Hyderabad, 1998 (1) A.WR 743 had occasion to consider the question

whether the unpaid salary of an employee from the company could be a "debt". The learned Judge, after referring to the Judgment of the Madhya Pradesh High Court in Pawan Kumar Khullar's case (supra), has held--

"In the case of Kesoram Industries & Cotton Mills Ltd v. CWT (supra), the apex Court after discussing various decisions has observed that--

"a debt means a sum of money which is now payable or will become payable in future by reason of present obligation, *deburra in presenti, solvendum in future*.

"A debt involves an obligation incurred by the debtor and the liability to pay a sum of money in present or future. The liability must, however, be to pay a sum of money i.e., to pay an amount which is determined or determinable in the light of factors existing on the date when the nature of the liability is to be ascertained."

The claim of short delivery of materials has been held to be debt in the case of Kudremukh Iron Ore Co. v. Kooky Roadways Pvt. Ltd (1990 69 Comp Cas 178). The unpaid salary of an employee is liable to be recovered from the employer, because the employer is obliged to pay it to the employee for the services rendered by it. As noted above, debt is a sum which is to be recovered from a person who is obliged to pay the same and therefore, no line of demarcation can be drawn between a remuneration due to be recovered and a sum which is to be recovered because a person has to pay for the price goods which has been purchased by him on credit. With respect, I am unable to agree with the view taken by the learned single Judge of MPHC in the case of Pawan Kumar Khullar Vs. Kaushal Leather Board Limited, "

We are in respectful agreement with the view taken by the learned single Judge of this Court in the above Judgment. In deciding the question whether arrears of salary could be a "debt", in our considered opinion Section 530(1)(b) of the Act also in a way suggests that arrears of salary payable to an employee of the company can be treated as a debt Section 530 deals with preferential payments in the matter of clearing the outstanding debts of the company. Section 530(1) (b) reads:

Section 630. Preferential payment:- (1) In a winding up, subject to the provisions of Section 529A, there shall be paid in priority to all other debts-(a) xxxx

(b) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any employee, in respect of services rendered to the company and due for a period not exceeding four months within the twelve months next before the relevant date, subject to the limit specified in Sub-section (2):

Section 530(1)(b) speaks of wages in respect of services rendered to the company as a preferential charge. If wages and salary payable to an employee of the company in respect of services rendered to it is made a preferential charge

under the Act, there is no good or sound reason to take out the arrears of salary or salary already due to an employee of the company from the definition or meaning to the concept "debt" in the context of Section 433(e) of the Act. Therefore, we hold that in a given case, even arrears of salary due to an employee of the company which is sought to be wound up can be a "debt" within the meaning of that term u/s 433(e) of the Act and it cannot be said as a general rule, that under no circumstance, arrears of salary or salary due to an employee of the Company can be a "debt".

18. This takes us to the question whether the appellant/petitioner has made out any case that he is entitled to receive a total sum of Rs. 2,11,400/- from the respondent company towards arrears of salary for the months from August, 1994 to December, 1994 and towards provident fund contribution, encashment of leave salary, Leave Travel Concession, Medical reimbursement etc. Sri S.Ravi, learned Counsel for the appellant would contend that admittedly as reflected in para (12) of the counter affidavit filed by the company, the respondent company had to pay a sum of Rs. 78,200/- to the appellant towards salary as on 30.11.1994 and since there is absolutely no evidence produced by the company to show that as a matter of fact that sum of Rs. 78,200/- was paid to the appellant, it is reasonable to hold that the respondent company is unable to pay its debts to the appellant and therefore the petition filed by the appellant u/s 433(e) of the Act is maintainable. The respondent company traversing the allegations of the appellant-petitioner in its counter has stated in, paras (7), (8) and (12) as under:

"7. As regards allegations in para (6) of the petition it is submitted that M/s. Karvy & Co., Chartered Accountants, Hyderabad before take over of the Company as on 30th November, 1994, has carried out detailed audit for the purpose of determining the value of assets and liabilities to be taken over by M/s. Spartek Ceramics Ltd., from the respondent company. As per the said statements the net salary due and payable to the petitioner by the respondent company was shown as Rs. 78,200/-. It is further submitted that the respondent company was taken over by M/s. Spartek Ceramics India Ltd., on the basis of valuation done as on 30.11.1994. Even before 30th November, 1994, the petitioner was not at all attending the office regularly and it was stated by the erstwhile management of the respondent company that the petitioner was working in some other organization or was staying in his native place. Since the respondent company was closed for more than 6 months in the year 1994-95, no production was made during that period preceding 30.11.1994. The claim of the petitioner is therefore was not because of his attending office but his claim was for the period when the factory is closed whom he has not attended the office. Apart from the above the petitioner had not regularly attended the office during the period August 1994 to December 1994 for which records were not made available by the erstwhile management. The salary structure of the petitioner was not even produced. A copy of the appointment order issued by the erstwhile management of the respondent company was not produced by the petitioner. Additional

benefits such as leave salary, LTC etc., are not correct claims, as all the employees have been claiming them and paid as and when they were due. Even in the Statement of Liabilities prepared by the Auditors, the respondent company do not owe any amounts to the petitioner towards leave salary, gratuity etc.

8. It is further submitted that the petitioner himself was a Company Secretary of the respondent company and there was a declaration to that effect that there was no statutory dues payable and no violation of provisions of various enactments including Income Tax and other employees dues as on 30.11.1994. A copy of the certificate given by the petitioner that payments due to the employee have been paid is annexed hereto. In these circumstances it is very strange that the petitioner claims the P.P. deductions made by the respondent company but not remitted to the Provident Fund Authorities for 6 months. If it is so, being a person in-charge of statutory deductions and remittances he alone was responsible for such defaults. The petitioner cannot get any benefit or claim out of his own default.

12. Even the salary due as per the audited statement as on 30.11.1994 amounting to Rs. 78,200/- to the petitioner was collected by the previous management by way of two cheques - one cheque No. 98235 dated 31.3.1995 for Rs. 15.50 lakhs, and another cheque No. 98236 dated 31.3.1995 for Rs. 16.00 lakhs including the claim of amount of unsecured loans from the promoters amounting to Rs. 31.50 lakhs. It is further submitted that as per the letters dated 28.4.1995 and 13.5.1995 (Copies annexed) received from the Account of the Company there was no salary due to the petitioner. If at all there was no any claims or grievances he must seek remedy from the previous promoters who had already collected this amount."

From the extracted averments in the counter affidavit, it is quite clear that the claim put forth by the appellant-petitioner is squarely denied. It is specifically pleaded that the salary claimed by the appellant-petitioner relates to the period during which the factory was closed and the appellant did not work. It is also specifically pleaded that the appellant himself at the Secretary of the respondent company made a declaration that during the relevant time, there was no statutory dues payable. Further, the petitioners claim relating to provident fund contribution, encashment of leave salary, Leave Travel Concession, medical reimbursement etc., to the tune of Rs. 1,18,900/- is also specifically denied. Since the respondent company has denied the claim put forth by the appellant-petitioner, the onus is shifted to the appellant-petitioner to establish that, as a matter of fact, he is entitled to a sum of Rs. 92,500/- towards salary and a sum of Rs. 1,18,900/- towards other claims by producing satisfactory materials and proof. The question is whether the petitioner has produced any such evidence or materials before the learned single Judge. The petitioner did not produce any satisfactory proof in support of his claim. Therefore, having regard to the totality of the circumstances and the want of proof in support of the claim of the petitioner, it cannot be said that the learned single Judge has erred in law in

opining that there is a bona fide dispute between the petitioner and the management of the 1st respondent company regarding claim made by the appellant/petitioner, and therefore, the petition u/s 433(e) of the Act is not maintainable.

19. Section 433 does not confer on any person a right to seek an order that a company shall be wound up, but it confers power on the court to pass an order of winding up in appropriate cases. However, the right to petition u/s 433(e) of the Act, being a statutory right the power vested in the Court to wind up a company has to be exercised reasonably, fairly and on valid statutory grounds. The machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a company. This position is well settled by a catena of Judgments in *Bukhtiarpur Bihar Light Railway Co. Ltd. Vs. Union of India (UOI)* and *Another, re, Bengal Flying Club*, (1966) 2 Comp Cas 213 LJ ITC Ltd., v. *Fomento Hotels and Resorts Ltd.*, (1991) 70 Comp Cas 459 (Bom.) *Ambey Flour Mills (P) Ltd. v. Vimal Chand Jain*, (1991) 70 Comp Cas 561 = (1990) 1 Comp.LJ 289 (Delhi) *UCO Bank v. Jagatia Paper Mills P. Ltd.*, (1988) 2 RLR 357 (Raj.) to cite the few.

20. In *Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another*, the Supreme Court quoted with approval the following passage from *Buckley on the Companies Acts*, (13th Edn., p.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 stigmatized 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 petitioner 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 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".

21. The above opinion of the Apex Court was followed in *Vishwanathan (B.) v. Seshasayee Paper & Boards Ltd.*, (1992) 73 Com. Cas 136.

22. In case of alleged inability of the company to pay its debts, the Court is to be doubly cautious. It is trite to state that a petition to wind up shall not be mere expedient substitute for recovery of monies. In all cases where such actions are based on refusal or inability of the company to pay, the court has to be satisfied, atleast prima facie, that the liability does exist and refusal or inability of the

company is made out. In *K. Appa Rao v. Sarkar Chemicals (P) Ltd.*, (1998) 84 Comp Cas 670 this Court held that in cases where the company has a prima facie sustainable defence or a bone fide dispute of its obligations to discharge the alleged debts or liabilities, the court may not entertain proceedings for winding up, much less order winding up. In *Piara Singh (S.) v. S.H.R. Properties Pvt. Ltd.*, (1993) 10 C LA 83 (Delhi) *Syed Murtasa Ali Khan Vs. Stressed Concrete Constructions Private Ltd.*, , *Amalgamated Commercial Traders (P) Ltd. v. Krishnaswami (A.C.K.)* (supra), *Paramjit Lal Badhwar Vs. Prem Spinning and Weaving Mills Co. Ltd.*, ; *Lakshmi Sugar Mills Co. Private Ltd. Vs. National Industrial Corporation Ltd.*, *New India Corporation v. Nandavan Manufacturers and Traders (Pvt.) Ltd.*, (1983) 54 Comp Cases 32 (Kar) *Shenoy (U.V.) v. Karnataka Engg. Products Co. Pvt. Ltd.*, (1983) 54 Comp Cas 40 *K.S.Trivedi & Co. v. Ashok Leyland Ltd.*, (1989) 3 Comp Cas 35 (Mad) *Goyal Electri-Steels Castings (P.) Ltd. Vs. Didwana Chemicals Ltd.*, ; *Suresh Shenoy Vs. Cochin Stock Exchange Ltd.*, and *Mangal Finance Ltd. v. Express Confectioners*, (2000) 100 Comp Cases 399 (Pat) where the courts found that the debt was bona fide disputed by the concerned company and where the court was satisfied with the company's defence, winding up orders were refused. In *Seawind Tankers Corpn. V. Bayoll SA*, (1999) 1 A1I.ER 374 = (2000) CLC 216 (CA) where the genuine cross claim of the company exceeded the debt claimed by the petitioner, the petition was dismissed exercising discretion in favour of the company. Of course, when the company disputes the claim of the petitioner, the court requires to be convinced that the denial is not for the sake of denial only and it is bona fide and well grounded one with a reasonable prospect of success. In *Softsule (P.) Ltd., Re*, (1977) 47 Comp Cas 438 (Bom) some of the well- established principles on the point have been restated by the Bombay High Court as follows:

"It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of s debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order.

Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 434(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.

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 u/s 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

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.

See also Rajasthan Spinning and Weaving Mills Ltd. Vs. Textool Company Ltd., ; Newfinds (India) Vs. Vorion Chemicals and Distilleries Ltd., ."

23. After carefully going through the pleadings of the parties and materials placed before the Court, we find that there is a bona fide dispute between the appellant-petitioner and the respondent company as regards the claims made by the appellant-petitioner and, therefore, it cannot be said that the learned single Judge has erred in law or acted with material irregularity in dismissing the company petition at the stage of admission itself and the order made by the learned single Judge does not call for our interference.

24. The other contention of the learned counsel for the appellant that the omission on the part of the respondent company to reply to the legal notice dated 17.7.1995 tantamounts to admission of the claim of the appellant-petitioner, is not acceptable to us. The mere omission by the respondent company either to reply or to comply with the statutory notice does not mean that the company has admitted its liability. In N.L. Mehta Cinema Enterprises (P.) Ltd. v. Pravinchandra P. Mehta, (1991) 70 Comp Cas 31 (Bom) the respondent company failed to raise any objection to the demand notice until it filed its affidavit in reply to the petition. The court held that the failure to raise objections earlier will not affect the merits of the company's defence or constitute an estoppel against the company. In Wimco Ltd. Vs. Sidvink Properties (P.) Ltd., it was held that omission on the part of the company to reply to the statutory notice issued u/s 434(1) of the Act would not amount to admission of the claim of the petitioner.

25. In the result and for the foregoing reasons, we dismiss O.S.A. No. 5 of 1998 with no order as to costs. Further, we direct that C.P.Nos. 165 and 166 of 1999 be placed before the learned single Judge for disposal in accordance with law and in the light of this judgment.