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**(1999) 03 BOM CK 0091**  
**In the Bombay High Court**  
**Case No : Co. Petition No. 725 of 1991**

Mahesh Enterprises, Mumbai

APPELLANT

Vs

Argus Industries Pvt. Ltd., Thane

RESPONDENT

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**Date of Decision :** 12-03-1999

**Acts Referred:**

Companies Act, 1956 — Section 431(1)(c), 433(c), 433(e), 433(f), 434

**Citation :** (1999) 03 BOM CK 0091

**Hon'ble Judges :** F. I. Rebello, J

**Bench :** Single Bench

**Advocate :** Satish S. Shetye with Ayaz Bilawala instructed by M/s Bilawala and Co, for the Appellant; P. R. Diwan with B. B. Parekh, for the Respondent

**Final Decision :** Dismissed

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## Judgement

1. The Petitioners claim from the Company an amount of Rs. 17,73,167.39 Ps. as set out in Exhibit "A" to the Petition. It is the case of the Petitioners that the said amount is in respect of the goods sold and supplied by the Petitioners to the Company. As the Company failed to pay the amount a statutory notice was served on the Company dated 30th August, 1991 at its registered address being Plot No. A-264, Road No. 26, Wagle Estate, Thane-400 606. The Company has received the said letter and replied to the same by their letter dated 2nd October, 1991. The Company did not disown its liability to pay. The Company, however, pointed out that Mr. M. K. Bagadia who was the partner of M/s Mahesh Enterprises had joined as a Director from 1st September, 1990 and it had been agreed at the time of joining that he would supply lamination material and contribute by giving loan whenever required. Similar arrangements were made by the other Directors. The Company set out that money could be paid in installments at the maximum amount of Rs. 1 lakh starting from November, 1991. As the Company failed and neglected to pay the amount, Petitioners were forced to file Company Petition. It is the case of the Petitioners that in spite of statutory notice the Company after admitting the amount has failed and

neglected to pay the Petitioners or secure them and in that light of the matter the Petitioners have made out a case that the Company was deemed to be unable to pay its just debt and consequently should be wound up. In paragraph 11 of the Petition, the Petitioners have averred that the Company is unable to pay its debts within the meaning of section 434 of the Companies Act. The Company has also failed to meet its liability within 21 days of receipt of the said notice.

2. The Company in reply filed an affidavit of Shri Mohit Anil More. In paragraph 13 it is averred that no notice was served at the registered address of the Company. By affidavit dated 18th February, 1999, the Petitioners have filed a xerox copy of the certified copy issued by the Registrar of Companies of Form No. 18. The said form shows that the registered address of the Company with effect from 1st July, 1989 was 5, Wavel House, Dhobi Talao, 1st Lane, Bombay-400 002 and from 25th June, 1992 was at 8, Raghuraj Bhavan, Gokhale Road (South), Dadar (West), Mumbai-400 028. In reply it was contended that the Petitioners were not a registered partnership. It has also been pointed out that till the date of filing of the reply the Company had paid to the Petitioners a sum of Rs. 10 lakhs under the present proceedings. It has been contended that there was a settlement between the parties and as the Petitioners had backed out of the settlement the Petitioners were liable to repay the said amount. In paragraph 11 there is a conditional offer made therein. On 26th February, 1998, a rejoinder has been filed by the Petitioners. There are certain averments made therein about professional conduct of lawyers engaged by the Petitioners. That to my mind is irrelevant insofar as the present petition is concerned. The remedy for the Petitioners if and at all will be elsewhere. The Petitioners have denied what has been set out in the affidavit in reply specially the allegation that false bills had been created.

The Petitioners have also filed additional affidavits dated 6th February, 1991 and 25th February, 1999. The Company has filed additional affidavits in reply dated 18th February, 1999 and 25th February, 1999. By these additional affidavits the Petitioners seek to contend that the Company has taken huge bank loan and other loans aggregating to Rs. 1,62,43,896/-. Attention is also invited to the book losses suffered by the Company and other details as set out thereunder. It is therefore contended that if not section 434(1)(a) the Company should be wound up in terms of section 434(1)(c) of the Companies Act.

3. Both sides have relied on various Judgments which will be dealt with while disposing of the contentions of the parties.

4. The first contention on behalf of the Company may be considered namely that the amount of Rs. 10 lakhs should be brought back if the Petitioners are not willing to abide by the settlement. For that purpose reliance has been placed on the Judgment of the Single Judge of this Court in the case of Bombay Castwell Engineering Pvt. Ltd., In re : (1984) 55 Comp Cas 75. In that case Consent Terms were filed whereby the company agreed to make payment in installments.

Default was committed in payment of last installment. Petition was filed for winding up of the Company. At the hearing of the Petition cheques were issued for payment of the installment. The same were rejected by the Petitioners. At the hearing of the Petition, learned Single Judge directed that the amounts paid to the Petitioners by the Company pursuant to the Consent Orders should be brought back if the Company Petition was to proceed with as the said amount can enure for the benefit of all the Creditors and not the Petitioners alone. In the instant case payment has not been made by the Company to the Petitioners pursuant to any Consent Terms or Orders of this Court. In these circumstances, it would not be appropriate at this stage to consider the said application. As in the event the Company is wound up it will relate back to the presentation of the Petition and the said money will have to be accounted for. The application of the Company at this stage is therefore rejected.

5. That takes us to the second contention namely whether the Company is liable to be wound up on the ground that in spite of statutory notice served u/s 434(1) (a) as the Company failed to make payment within the time stipulated, it is deemed to be unable to pay its just debts. The requirement of the deeming fiction is that the statutory notice must be served at the registered address of the Company. It is no doubt true that the notice sent was received by the Company and has been replied to. However, the notice was served at an address which was other than the registered address as can be seen from the Form No. 18, filed with the affidavit of Shri Rahul More dated 18th February, 1999. As the notice was not served at the registered address, the deeming fiction which otherwise would arise u/s 434(1)(a) would not arise. Consequently, the said contention is rejected.

6. That leaves us with the other contentions raised by the Petitioners that the Company being unable to pay its debts must be wound up in terms of section 433(e) read with section 434(1)(c) of the Companies Act. Counsel points out that there are sufficient averments pleaded in the Petition. At any rate it is pointed out that inspection of document was sought which was refused; that the Petitioners have placed material before the Court which the Court should consider. If the said material is concerned, it would be seen that the Company is not in a position to pay its just debts and in this light of the matter the Company should be wound up.

The only averment in the petition to which my attention is invited for the aforesaid purpose apart from paragraph 7 which is the claim of the Petitioners against the Company is paragraph 11. Paragraph 11 needs to be reproduced as those are the only averment as found for the contention made by the Petitioners under sub-section (1)(c) of section 434.

"The Petitioners submit that the said company is, therefore, indebted to the Petitioners in sum of Rs. 17,73,167.39 due under the said invoices and under the writing/letter dated 6th August, 1991. The Petitioners, therefore, submit that the said Company has failed to pay the said amount of Rs. 17,73,167.39, which is

admitted and liquidated demand in money. The said Company is, therefore, unable to pay its debt within the meaning of section 434 of the Companies Act, 1956. The said company has also failed to meets its liability within 21 days of receipt of the said notice."

7. Before proceeding further, some of the Judgments relied on by the parties need to be dealt with to the extent that they are relevant. In *Darjeeling Bank Limited, In re.*, (1949) 19 Comp Cas 1, a learned Judge of the Calcutta High Court was considering the provisions of the Companies Act as then in force. By an application dated 29th January, 1947 the Company applied for stay of all proceedings and suits until the Scheme proposed by the Company was disposed of. On 10th February, 1947, the Petitioners before the Court applied for modification of the stay and leave to present the Company Petition for winding up. The Petition was admitted but advertisement was deferred. The Company failed to make payment in terms of the scheme. It is in that context that the learned Judge proceeded to hold that as a scheme proposed by the Company itself could not fructify the Court could on the ground that is just and equitable wound up the Company. In *C. Hariprasad Vs. Amalgamated Commercial Traders Private Ltd.*, , the Division Bench of the Madras High Court noted the distinction between clauses (a) and (c) of section 434 (1) of the Companies Act. In *Sree Shanmugar Mills Ltd., by Managing Agents Sri Alagai Ltd. Vs. S.K. Dharmaraja Nadar and Another*, , another Division Bench of the Madras High Court while considering when the Company was deemed to unable to pay its debts held that the value of building and machinery could not be considered while finding out whether the Company was able to pay its debts. In *Paramjit Lal Badhwar vs. Prem Spinning and Weaving Mills Co. Ltd. and others*, (1986) 60 Comp Cas 420, a learned Judge of the Allahabad High Court held that even if statutory notice was invalid for any reason, there is a discretion with the Court to rely on other ground outside section 434(1)(a). The learned Single Judge relied on the Judgment reported in the case of *Tripura Administration vs. Tripura State Bank Ltd.*, (1960) 30 Comp Cas 324. The last Judgment relied upon is in the case of *Modern Dekor Painting Contracts Pvt. Ltd. vs. Jonson and Nicholson (India) Ltd.*, (1985) 58 Comp Cas 255. In that case after the Petition for winding up was filed and was admitted the Petitioners applied for amendment to urge additional grounds based on just and equitable clause. The application for amendment was allowed on the facts of that case. The Court had held that the R.F. 7 facts had come to the knowledge of the Petitioners therein based on the affidavit filed by the Company and as such the order of the learned Single Judge rejecting the application for amendment on the ground that it would introduce a new case was not justified and consequently set aside.

8. On the other hand on behalf of the Company reliance is placed on the Judgment of a Division Bench of the Madras High Court in the case of *C. Hariprasad vs. Amalgamated Commercial Traders Pvt. Ltd.*, (1964) 34 Comp Cas 209. This Judgment was again referred to point out the distinction between sub-clause (a) and sub-clause (c) of section 434(1). The Court observed that in case

of winding up u/s 434(1)(c) it was open to the Court to consider the value of the existing assets and liabilities. In that contest it can be said to have deferred from earlier Division Bench view taken in the case of Jajodia Cotton Mills Ltd. that the assets including building and machineries could not be considered. The other Judgment relied upon is in the case of Associated Biscuit Co. Pvt. Ltd vs. T. L. Nambiar, (1978) 48 Comp Cas 481. A Division Bench of this Court was considering an order of the Company Court allowing an application for amendment. The amendment was sought to be made when the matter came up for hearing. The ground sought was u/s 433(f) in addition to the original prayer u/s 433(c). The Division Bench noted that the Petitioner could have filed a Petition on both the grounds. At that stage itself it was open to the Company to oppose the admission of the Petition on the ground sought to be introduced by virtue of the amendment and in these circumstances held that it would not be fair to permit amendment of the petition and consequently set aside the order. One of the points considered by the Court is that if the Petition had been admitted on that ground the party would have right to file an appeal to oppose the petition and satisfy the Court that on the facts as they stood the petition on that ground ought not to be admitted.

9. Considering the above background, the case of the Petitioners will have now to be considered. The first requirement for consideration is whether there are sufficient pleadings in the petition warranting consideration by the Court u/s 434(1)(c). For the above the following observations of the Apex Court in the case of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., needs to be reproduced:-

"An allegation that the substratum of the company is gone is to be alleged and proved as a fact. The sale of the machinery was alleged in the petition for winding up to indicate that the substratum of the company had disappeared. It was also said that there was no possibility of the company doing business at a profit. In determining whether or not the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into. In the present case, the company alleged that with the proceeds of sale, the company intended to enter into some other profitable business. The mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future and the court is reluctant to hold that it has no such prospect."

10. Therefore what is essential is that there must be pleadings which the Company must be called upon to meet. Paragraph 11 of the Petition has been reproduced above. No material has been pleaded in the said paragraph which would result in considering the winding up of Company on the touchstone of the requirement of section 431(1)(c). Apart from that as held by the Division Bench of this Court in the case of Associated Biscuit Co. Pvt. Ltd. (supra), it would be unfair to permit a fresh pleading to be raised at the time of hearing as the case of the Company would have to be considered on the date of filing of the Petition.

In the instant case there is no amendment of the Petition. However, by affidavit reliance is sought to be placed of subsequent events to indicate that the Company is unable to pay its just debts. To my mind in the absence of clear specific pleading which pleading the Company ought to have knowledge and information for meeting the contentions, it will not be possible to accept the additional material which is now sought to be placed in furtherance of the contention that it is just and equitable that the Company be wound up u/s 433(e) read with section 434(1)(c). In that light of the matter, I find that the Petition as filed does not have the necessary pleadings to entertain the contentions as was sought to be argued by placing the additional material with the additional affidavits.

11. Considering the above, Company Petition dismissed.
12. No order as to costs.
13. Issuance of certified copy expedited.