

(2017) 01 SHI CK 0018
In the High Court Of Himachal Pradesh
Case No : 15 of 2014

M/S Oswal Alloys Private Limited

APPELLANT

Vs

M/S Gilvert Ispat Private Limited and others

RESPONDENT

Date of Decision : 06-01-2017

Acts Referred:

[Companies Act, 1956](#), [Section 439](#), [Section 434](#), [Section 433](#) - Provisions as to applications for winding up. - Company when deemed unable to pay its debts. - Circumstances in which company may be wound up by Tribunal
[Companies \(Court\) Rules, 1959](#), [Rule 24](#), [Rule 99](#)

Citation : (2017) 01 SHI CK 0018

Hon'ble Judges : Tarlok Singh Chauhan

Bench : Single Bench

Advocate : Rahul Mahajan, Ajay Vaidya

Final Decision : Allowed

Judgement

1. The present petition has been preferred by the petitioner under Sections 433, 434 and 439 of the Companies Act, 1956 (for short the "Act") for appropriate orders of winding up of "M/S Gilvert Ispat Private Limited".

2. It is averred that the petitioner-company is a trader trading in all types of H.C. Ferro, Manganese, Silicon, Manganese and Metal Touch slag etc. (hereafter referred to as the material) and supplies the ordered material all over the country to its customers/clients, who purchase the material as per their requirements and needs. It is further averred that "M/S Gilvert Ispat" was initially a registered partnership firm, however, with effect from 27.08.2013 has been registered as a Private Limited Company under the name and style of "M/S Gilvert Ispat Private Limited" having its registered office at Village Buranwala, Post Office Barotiwala, Tehsil Kasauli, District Solan, H.P. Mr. Umesh Moudgil and Mr. Abhin Moudgil are the Directors of the respondent-company and are managing its day to day affairs and are thus responsible for the business and operation of

the respondent-company. The Certificate of Incorporation, Memorandum and Article of Association and details qua the company and its Directors have been annexed as Annexure PB with the petition.

3. The respondent-company while it was a partnership firm under the name and style of "M/S Gilvert Ispat" before being converted into a Private Limited Company from registered partnership firm had approached the petitioner-company requesting it to supply the material i.e. H.C.Ferro, Manganese, Silicon, Manganese and Metal Touch slag etc. as per its business need. The petitioner-company after negotiations of rates, terms and conditions of payment etc. supplied various materials to the respondent-company. Invoices were raised in respect of the materials supplied from time to time. Though the respondents, initially, made some payments on time in respect of the materials so supplied by the petitioner-company, however, subsequently delay started occurring in making payments and after sometime the payments were completely stopped. The respondent-company was asked several times to make the payments of the outstanding dues in respect of the material supplied vide letters and e-mails were also sent from time to time and this process continued even after the registered partnership firm had been converted into a Private Limited Company, but to no avail.

4. Resultantly, on 07.09.2012, an amount of Rs.2,03,67,020/- was still outstanding towards respondent No.1. The petitioner-company had supplied these materials from time to time and have been duly entered in their books of accounts and the audited balance sheets for the years ending 31.03.2011, 31.03.2012 and 31.03.2013 have been annexed as Annexure PE wherein the name of respondent-company has been shown as a sundry debtor. Further, the copies of C-Form of declaration issued by the Central Sales Tax have also been annexed as Annexure PF.

5. It is lastly averred that despite repeated correspondences, the respondent-company failed to make the outstanding payment constraining the petitioner-company to issue a legal notice under Sections 433 and 434 of the Act on 05.06.2014 calling upon it to pay an amount of Rs.2,03,67,020/- towards the cost of material supplied by the petitioner-company and in addition thereto to pay an amount of Rs.84,50,360/- as interest from 07.09.2012 till 31.05.2014. The notice was sent through registered post, however, the same was received back with the remarks "refused to receive".

6. Notice of the petition was issued to the respondents and repeatedly time was sought to file reply and this continued from 11.05.2015 till 13.10.2015 when this Court though extended the time to file reply by two weeks, but at the same time imposed costs of Rs.3,000/-. However, even this order was not complied with as the respondents till date have not chosen to file reply or to deposit the costs.

7. In the meanwhile, the petitioner-company filed an application i.e. Company Application No.22 of 2016 under Rule 99 of the Companies (Court) Rules, 1959

(for short "Rules") for advertising the petition in the manner as provided under Rule 24 of the Rules. This application came up for consideration and this Court on 08.12.2015 passed the following orders:- "Notice of winding up petition filed under sections 433 and 439 read with section 434 of the Company Act, 1956 before hearing be advertised by the petitioner as per rule 99 of the Company Court Rules, 1959, 14 days before the next date of hearing in E-gazette, English news paper The Tribune and Hindi News paper Dainik Bhaskar. Notice of advertisement be published in E-gazette on payment of necessary charges."

8. The notice as per Rule-99 was accordingly published in e-gazette and in the issue of English daily "The Tribune" and Hindi daily "Dainik Bhaskar", however, no one including creditors, shareholders or any other person including general public came forward to oppose this petition. Despite this, the respondent-company was again afforded an opportunity for filing objections within a period of three weeks, as would be clear from the order passed by this Court on 25.05.2016 which reads thus:- "Notice as per Rule 99 stands published in e-gazette and in the issue of English daily "The Tribune" and Hindi daily "Dainik Bhaskar", however, no one including creditor, share holder or any other person including general public has come forward nor put in appearance. Objections, if any, be filed by the respondent-Company within three weeks. List on 19th July, 2016. Publication charges Rs. 54/- in short be deposited in the Registry in the meanwhile for onward payment to the agency outsourced for the purpose."

9. As already observed above, the respondents till date have neither filed reply nor objections and when the petition came up for consideration on 30.11.2016, Mr.Umesh Moudgil, respondent No.2, appeared before the Court and stated that he will make all endeavours to have the matter settled with the petitioner and with great reluctance the case was adjourned to 04.01.2017. When the case was taken up today for consideration, it was represented by learned counsel for the petitioner that it is only interested in its money and the respondents should, therefore, come out with concrete proposal as to how and in what manner they would liquidate the outstanding amount. However, respondent No.2 was not in a position to give any sort of undertaking, leaving this Court with no other option, but to hear the petition on merits. I have heard the learned counsel for the parties and gone through the records of the case.

10. Before advertng to the merits of the case, it would be necessary to delineate on some of the factors to be kept in mind before reaching the conclusion in a winding up petition and the same have been carefully articulated by the Hon"ble Division Bench of the Gujarat High Court in Tata Iron and Steel Co. vs. Micro Forge (India) Ltd. (2001) 104 Comp. Cases 533 (Guj.) which are as under:-

"Certain important chronicles and contours to be kept in the mental radar, before reaching the conclusion in a winding up petition can be articulated as under :

(1) The remedy under section 433 in general and under clause (e) in particular is not a matter of right; as such, and it is the discretion of the company court. It

does not confer any right on any person to seek order that the company should be wound up. It is a provision empowering the court by a statutory provision to pass an order of winding up in an appropriate case.

(2) Merely because any one of the circumstances enumerated in section 433 of the Companies Act exists, the court is not bound to order winding up of the company. Nobody can aspire to wind up the company as a matter of course. The court has wide power and discretion. In this connection, inability to pay debts is required to be judged from various sets of facts and circumstances. It may also be stated that inability to pay debts in all cases, ipso facto, could not be construed as an appropriate case for winding up.

(3) A debt is money which is payable or will be payable in future by reason of a person's obligation. The expression "debt" would refer to liability to pay and it rests on certain contingencies, conditions and causalities. Even if the debt is proved and even if the inability to pay the debt is also shown, it is not a launching pad, in all cases, for a successful winding up order. Inability may arise for a variety of reasons and the court is obliged to consider whether the inability is the outcome of any deliberate or designed action or mere temporary shock and effect of economy and market. In a given case, it may happen that a party may become unable to pay its debts for a while, but that by itself is not a criterion for exercise of the power to wind up, ipso facto.

(4) It is necessary for the company court to consider the financial status, strength and substratum of the company, in the overall context. It is possible, at times, that there may be a cash crunch. It may be also, possible, at times, that there is temporary cash crisis despite high sales and heavy turnover and, therefore, in such a situation, mere disability or only on the ground of inability to pay would not constitute a ground empowering the court to wind up the company.

(5) If the company is an ongoing concern having regular business and employment of employees, the court cannot remain oblivious to this aspect. The effect of winding up would be of putting an end to the business or an industry or an entrepreneurship and, in turn, resulting in loss of employment to several employees and loss of production and effect on the larger interest of the society.

(6) Even dividend declared by the company regularly and having profit in the light of the profit and loss account, though temporarily, there may be inability to pay the debt or in the case of any eventuality, the company is unable to make the payment of dues and that by itself could not be construed as a ground to wind it up.

(7) Winding up of a company, as such, is nothing but a commercial death or insolvency and, therefore, the company court is obliged to take into consideration not only the temporary inability, or disability to make the payment of debts, but the entire status and position of the company in the market.

(8) When grounds on which the winding up order can be denied, upon an

evaluation of the facts of the case, after admission, exist from the record already placed before the court, it would be a sound exercise of discretion to reject the petition instead of admitting it. This view is very much celebrated.

(9) Inability to pay debts in terms of section 433(e) read with section 434(1)(a), demand of the debt would raise a presumption as to inability to pay its debts. But such a presumption is rebuttable. Such a presumption may be rebutted on existing material and what evidence is sufficient depends on the facts and circumstances of the case.

(10) If the company has shown considerable growth in a reasonable span and is a growth oriented enterprise, even in a case of temporary inability would not be sufficient to drive it to winding up.

(11) Though, ordinarily, an unpaid creditor may aspire for an order of winding up, the "ex debito justitiae" rule is not of inflexible mandate, but is, as such a matter of discretion of the court.

(12) Section 433 is also indicative of the fact that even if one or more grounds mentioned in section 433 exist, it is not obligatory for the court to make an order of winding up. The court has discretionary power. The court must in each case exercise its discretion in deciding whether in the circumstances of the case, it would be in the interest of justice to wind up the company. It is a well known rule of prudence that even in a case where indebtedness to the petitioning person is undisputed, the court does not pass an order for winding up where it is satisfied that it would not be in the larger interest of justice to wind up the company.

(13) It is also well settled that a winding up order shall not be made on a creditor's petition, if it would not benefit him or the company's creditors in general.

(14) The court is also obliged to consider that it would be in the interest of justice to give the company some time to come out of the momentary financial crisis or any other temporary difficulty as winding up is a measure of last resort.

(15) Winding up course cannot be adopted as a recourse to recovery of the debt.

(16) The court must bear in mind one more celebrated principle and consider whether the company has reached a stage where it is obviously and plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such as to make the court feel clearly satisfied that current assets would be insufficient to meet the current liabilities, along with other principles.

(17) It is also necessary to consider whether the respondent-company has become defunct or has closed its business, for quite some time, whether it is commercially insolvent. For the purpose of finding commercial insolvency, a mere look into the financial data is relevant to examine about its soundness. In all matters relating to winding up, the court may have regard to the wishes of the creditors and contributories and may, if necessary, ascertain their wishes

appropriately. If the company is solvent, the wishes of the contributories would carry more weight as they are persons, mainly, interested in the assets.

(18) The element of public policy in regard to commercial morality has, likewise, to be taken into account before determining the winding up issue. The court has also to consider the purpose and policy behind sections 443 and 557 of the Companies Act.

(19) Winding up is the last thing the court would do and not the first thing to do having regard to its impact and consequences. Winding up of a company would ensue:

(a) closing down of a company which is engaged in production or manufacture or which provides some services;

(b) it would throw out of employment numerous persons and result in gross hardship to the members of families of the employees;

(c) loss of revenue to the State by way of collection of taxes which otherwise should have been collected, on account of customs, excise duties, sales tax, income-tax, etc.;

(d) scarcity of goods and diminishing of employment opportunities

(20) A winding up petition has to be submitted in the prescribed form highlighting all the facts and emphasising the inability of the company to pay its debts. The form prescribed under the Companies (Court) Rules, clearly, indicates that the petitioner should, provide all the necessary material particulars. The petitioner is obliged to show that the financial status or the monetary substratum or the commercial viability of the company has gone so low and down that winding up is obviously, and evidently, unavoidable.

(21) It is a settled proposition of law that a winding up petition is not a legitimate means of seeking to enforce the payment of a debt which is disputed by the company, bona fide. A winding up petition ought not to be aimed at pressurising the company to pay the money. Such an attempt would be nothing but tantamount to blackmailing or stigmatizing the concerned company by abusing the process of the court.

(22) A winding up petition is not an appropriate mode enforcing bona fide disputed debts and it is nothing but misuse and abuse of the process of the court.

(23) A winding up petition is not an alternative form for resolving the debt dispute. In certain cases disputes are such that they are fit for resolving through the civil court rather than through the company court.

(24) What is bona fide and what is not is a question of fact. The expression "bona fide" would mean genuine, in good faith and when a dispute is based on substantial grounds or when a defence is probable and with some substance, it is a bona fide dispute. It must be strictly noted that a winding up petition is not an

alternative to a civil suit."

11. I myself in *Soni Gulati & Co. vs. JHS Svendgaard Laboratories Limited*, Company Petition No.8 of 2009, decided on 07.05.2015, after taking into consideration the comprehensive law laid down by the Hon'ble Supreme Court in (i) *Amalgamated Commercial Traders (P) Ltd. vs. A.C.K. Krishnaswami* reported in 1965 (35) Company Cases 456, (ii) *Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries (P) Ltd.* reported in 1971(3) SCC 632, (iii) *Pradeshia Industrial and Investment Corporation of Uttar Pradesh vs. North India Petro Chemical and Another* reported in 1994 (79) Company Cases 835, (iv) *Mediquip Systems (P) Ltd. vs. Proxima Medical System GmbH* reported in 2005 (7) SCC 42, (v) *Vijay Industries vs. NATL Technologies Limited* reported in 2009 (3) SCC 527, (vi) *IBA Health (India) Private Limited vs. INFO-Drive Systems SDN. BHD.* (2010) 10 SCC 553, deduced the following broad principles which are required to be borne in mind while adjudicating a petition for winding up:-

1. If the debt is bonafide disputed and the defense is a substantial one, the Court will not wind up the company. Conversely, if the plea of denial of debit is moonshine or a cloak, spurious, speculative, illusory or misconceived, the Court can exercise the discretion to order the company to be wound up.
2. A petition presented ostensibly for winding up order, but in reality to exert pressure to pay the bonafide disputed debt is liable to be dismissed.
3. Solvency is not a stand alone ground. It is relevant to test whether denial of debt is bonafide.
4. Where the debt is undisputed and the company does not choose to pay the particular debt, its defence that it has the ability to pay the debt will not be acted upon by the Court.
5. Where there is no dispute regarding the liability, but the dispute is confined only to the exact amount of the debt, the Court will make the winding up order.
6. An order to wind up a company is discretionary. Even in a case where the companys liability to pay the debt was proved, order to wind up the company is not automatic. The Court will consider the wishes of shareholders and creditors and it may attach greater weight to the views of the creditors.
7. A winding up order will not be made on a creditors petition if it would not benefit him or the companys creditors generally and the grounds furnished by the creditors opposing winding up will have an impact on the reasonableness of the case.

12. Tested on the touchstone of the exposition of law as referred to above, it would be noticed that the petitioner-company has placed on record plethora of documents including balance-sheets, invoices etc. which prove beyond reasonable doubt that the petitionercompany has supplied the material from time to time but the respondents have failed to make full payment and an amount of

Rs.2,03,67,020/- as principal is still due towards the petitioner and is, therefore, liable to pay the interest thereupon. On the other hand, the respondent-company has neither filed any reply to the statutory notice nor come out with a defence in reply to the petition itself. The only defence put-forth by the respondents during the course of hearing is that they are negotiating with the Punjab National Bank to arrive at one time settlement and as and when such negotiation is finalized, then on that stage, it would be clear that as to where the respondents stand. Obviously, this defence of the respondents cannot be accepted.

13. Thus, it appears from the records that the respondentcompany is not only closed, but has lost its financial substratum and the same also leads to only one conclusion that the respondent-company is not in a position to pay debts to its creditors.

14. Considering the aforesaid facts and circumstances, it would be just and proper to direct the respondent-company to be wound up. Accordingly, the respondent-company i.e. "M/S Gilvert Ispat Private Limited" is ordered to be wound up. The Official Liquidator attached to this Court is appointed as Official Liquidator of the respondent-company and is directed to do the needful for winding up the respondent-company as provided under the Act.

15. This petition is allowed accordingly.