
(2017) 03 CHH CK 0018
In the Chhattisgarh High Court
Case No : 13 of 2012

M/s Rajlaxmi Enterprises

APPELLANT

Vs

M/s Monnet Ispat & Energy Ltd.

RESPONDENT

Date of Decision : 09-03-2017

Acts Referred:

Companies Act, 1956, Section 439, Section 434, Section 433, Section 557, Section 433(e) - 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 - Meetings to ascertain wishes of creditors or contributories. - Circumstances in which company may be wound up by Tribunal
Companies (Court) Rules, 1959, Rule 24, Rule 96

Citation : (2017) 03 CHH CK 0018

Hon'ble Judges : Prashant Kumar Mishra

Bench : Single Bench

Advocate : Rana Mukherjee, ?D. Verma, J.K. Chumbak, Prafull?Bharat, Anand Shukla, Abhay?Gupta, Anoop Nair, Abhishek Sinha,?Ravindra Agrawal, B.P. Singh, ?Vikas Bhaskar, Anumeh Shrivastava,?Vaibhav Shukla, Ankit Singhal

Final Decision : Dismissed

Judgement

1. The present batch of company petitions have been preferred by the creditors/sellers or service providers for winding up of the respondent M/s Monnet Ispat & Energy Limited (henceforth "the respondent company") under Section 433 (e) of the Companies Act, 1956 (for short "the Act") for its inability to pay the debt to the petitioners.
2. The alleged debt or the amount due in each of the company petition are as follows : i. In Company Petition No.13 of 2012 the petitioner M/s Rajlaxmi Enterprises was awarded the work of construction of two drifts at Milupara Coal Mines, Raigarh. Out of the total amount the company made payment of Rs.71,31,667/-, however, the final bill amounting to Rs.3,54,816/- and the

service tax remains to be paid by the company. It also failed to pay Rs.3,93,312/- towards security deposit and Rs.3,89,844/- towards cost of cement capsules. Upon addition of accursed interest, the total outstanding against the respondent company, as averred in the petition, is Rs.14,31,682/-.

ii. In Company Petition No.3 of 2016 the petitioner Mjunction Services Limited, a public limited company, claims that the respondent company is indebted to the petitioner for a sum of Rs.60,92,828=80 towards availing the services of the petitioner in providing e-sourcing for procurement of diverse goods and services.

iii. In Company Petition No.4 of 2016 preferred by the petitioner Kotak Mahindra Bank Limited, the respondent Company is alleged to have made default in repayment to the tune of Rs.63,36,49,785=08 as on 11-2-2016.

iv. In Company Petition No.6 of 2016 the petitioner Alpha Services has been obtaining orders for supply of cranes, refurbishment of cranes, spare parts, erection and commissioning, etc. from the respondent company since the year 2011. As on the date of filing of the company petition, the respondent company was indebted to the petitioner to the tune of Rs.28,35,361/-.

v. In Company Petition No.7 of 2016 the petitioner Renoir Consulting (India) Pvt. Ltd. was providing assistance in improving output for mining operations at Milupara, Chhattisgarh. The respondent company paid various amounts involved in invoice 1 to 12, however, it failed to pay the amount of bill aggregating to Rs.47,19,120/-.

vi. In Company Petition No.12 of 2015 preferred by the petitioner UPJ Ventures, the respondent company awarded the work of preparation of master plan of the project, preparation of detailed structural design and working drawing, preparation of detail service (electrical, sanitary, plumbing, water supply, drainage and sewerage) design including working drawing for a total consideration of Rs.21,85,000/-, however, it failed to pay the entire amount and on the date of filing of petition the respondent company remained in debt to the petition for a sum amounting to Rs.12,53,939/-.

vii. In Company Petition No.21 of 2015 preferred by the petitioner State Bank of Travancore, the respondent company defaulted in repayment of Rs.5,99,87,196=79 as on 28.7.2015. Out of which the company paid an amount of Rs.1.50 crores on 30.7.2015 and Rs.6,01,258/- on 31.7.2015, therefore, for the balance amount the respondent company petition is in debt towards the petitioner.

viii. In Company Petition No.20 of 2015 preferred by the petitioner South Eastern Carriers Pvt. Ltd., the respondent company obtained transport facility for supply of goods manufactured by it, to its customers/purchasers, however, the respondent company failed to make payment to the tune of Rs.63,86,688/- on the date of filing of the company petition.

3. All the company petitions for winding up under Section 433 (e) being directed

against the same company, they were heard together on the question of admission and issuance of gazette notification.

4. For adjudication of the company petitions, the pleadings and documents filed in Company Petition Nos.21 of 2015 & 4 of 2016 have been referred.

5. Shri Rana Mukherjee, learned senior counsel appearing with Shri D. Verma & Shri J.K. Chumbak, learned counsel in Company Petition No.4 of 2016, would submit that in response to the Bank's notice to the respondent company, the debt has been acknowledged, however, it neglected to pay the debt, therefore, the company is either unable to pay the debt or it has neglected to pay the debt and hence it deserves to be wound up. Referring to the documents filed by the respondent, it is highlighted that the total liability of the company towards the lenders being about Rs.9000.00 crores, it is impossible for the company to repay the debt because the operations of the company is either closed or extremely minuscule yielding no income. It is put forth that the petitioner Bank is not a member of Joint Lenders' Forum and is, thus, not part of Strategic Debt Restructuring Scheme (for short "SDR Scheme"), therefore, its claim is independent and distinct from those members of the Joint Lenders' Forum (for short "JLF") and, as such, the SDR Scheme is not applicable to the petitioner.

6. Shri Prafull Bharat, learned counsel appearing with Shri Anand Shukla, learned counsel for the petitioner in Company Petition No.21 of 2015, would submit that the petitioner is not part of SDR Scheme, therefore, the allotment of equity shares to the Banks who are members of JLF has not been applied to the petitioner. He would further submit that even if the petitioner refused to be a part of JLF in the meeting dated 22-8-2015, the respondent company should have taken steps to repay the debt. It is also put forth that the respondent company is not carrying out any manufacturing or other operations, therefore, it deserves to be wound up and the respondent company should be directed to repay the debt. Shri Bharat would further submit that in response to the statutory notice served on the respondent company it deposited Rs.1.00 crore, thus acknowledged the debt, therefore, since it has neglected to repay the amount thereafter, the respondent company is liable to be wound up.

7. Shri Rana Mukherjee, learned senior counsel and Shri Prafull Bharat, learned counsel would pray that the petitions be admitted; gazette notification be issued; and provisional liquidator be appointed and in the alternative the petitions be kept pending. They have referred to the decisions of the Supreme Court rendered in *M/s Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.*, (1971) 3 SCC 632 & *Kotak Mahindra Bank Limited v. Hindustan National Glass & Industries Limited and Others*, (2013) 7 SCC 369.

8. Shri Anoop Nair & Shri Abhishek Sinha, learned counsel appearing in two other company petitions would submit that their respective petitioners were not informed about the SDR Scheme nor they were invited in the meeting of JLF. Both the petitioners being unsecured creditors their interest is not taken care of

in the SDR Scheme, therefore, the petitions deserve to be admitted; gazette notification be issued; and provisional liquidator be appointed.

9. Defending the respondent company in all the company petitions, Shri Satish Agrawal, learned counsel appearing with Shri Vaibhav Shukla and Shri Ankit Singhal, learned counsel, would submit that the company is still in operation and is carrying out manufacturing activities at its industrial unit i.e. Integrated Steel Plant of 1.5 Million Tons capacity and IPP (in subsidiary) of 1050 MW in Angul (Odisha) with further submission that at present more than 5000 workers and employees (both on roll and contractual) are working in the plant & office and salary/wages approx. Rs.13.00 crores is paid per month to them. The company has already filed its annual report for the year 2014-15 wherein they have suffered a net loss of Rs.796.00 crores, therefore, a meeting of the joint lenders was convened on 22-8-2015 in terms of new guidelines/circular dated 8-6-2015 issued by the Reserve Bank of India (for short "the RBI") for considering the SDR Scheme. In the said meeting 81.42% lenders in terms of value and 65% of lenders in terms of number consented to the SDR Scheme and pursuant to the decision taken in the meeting preferential shares have been allotted and every effort is going on to revive and bring back the company into profit and the company is confident that it will start generating profit in due course, therefore, it is not in the interest of anybody, particularly the employees and labourers who are not arrayed in these petitions, to wind up the company.

10. Shri Agrawal would refer the RBI policy dated 8-6-2015 and the minutes of the meeting dated 22-8-2015. He would also refer to the decision rendered by the Supreme Court in IBA Health (India) Private Limited v. Info-Drive Systems Sdn. Bhd., (2010) 10 SCC 553 and the decisions of this Court in Budhia Auto Associate Pvt. Ltd., COMP No.11 of 2015 (decided on 8-8-2016), Bombay High Court in Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. & Ors., Arbitration Petition No.800 of 2014 and Other connected matters and the Delhi High Court in M/s Advance Television Network Ltd. v. The Registrar of Companies, Co.Pet.316/2006 & Co.Appl.1478/2006 (4-7-2011), to contend that the company may be wound up by the Court, if in the opinion of the Court, it is just and equitable that the company be wound up, which is not the case here because the company has already initiated exercise and is in the process of implementing the SDR Scheme.

11. In the present batch of company petitions the respondent company does not appear to dispute its liability towards the petitioner companies, although the exact amount under the liability is not stated, but yet, there is no denial of the transaction between the parties. The respondent company is engaged in manufacturing activity having integrated steel plant and power plant, which is presently under operation and not idle, therefore, before proceeding to issue advertisement in terms of Rule 96 read with Rule 24 of the Companies (Court) Rules, 1959 (for short "the Rules"), this Court has heard learned counsel for the parties at length because, according to the respondent company, issuance of

advertisement would adversely impact the company's good will and marketability of its product. Similarly, it has been put forth that keeping the petitions pending would distract its prospective buyers.

12. Under Rule 96 of the Rules it is provided that after presentation of the company petition it is to be heard for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served and the Court may, if it thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition meaning thereby that before directing issuance of advertisement also the respondent company may be required to show cause and defend at this stage. Under Rule 24 the advertisement is required to be published in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned.

13. In the backdrop of submissions made by the learned counsel appearing for the respective parties, the provisions contained in the Rules and the language employed in Section 433 of the Act, it requires appreciation as to whether the present would be a fit case to proceed further for winding up of the respondent company and for that, issue advertisement in terms of Rule 96 read with Rule 24 of the Rules referred above.

14. Circular issued by the RBI on 26-2-2014 provides framework for revitalising distressed assets in the economy ? guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP). The circular says that before a loan account turns into a NPA, banks are required to identify incipient stress in the account by creating three sub-categories under the Special Mention Account (SMA) category mentioned in the circular. The borrower may request the lender/s, with substantiated grounds, for formation of a JLF on account of imminent stress. When such a request is received by a lender, the account should be reported to Central Repository of Information on Large Credits (CRILC) as SMA-0, and the lenders should also form the JLF immediately if the Aggregate Exposure (AE) is Rs.1000 million and above. The circular provides Corrective Action Plan (CAP) to be taken by the JLF, which includes, rectification, restructuring and recovery in that order. Clause 4.3 of the circular provides for restructuring by JLF whereas clause 4.4 speaks about restructuring referred by the JLF to the CDR Cell. The RBI has, thereafter, issued a circular dated 8-6-2015 providing for SDR Scheme referring to the previous circular dated 26-2-2014. The scheme provides for conversion of debt into equity. It is informed by the respondent company that since beginning of the SDR Scheme and upon conversion of the debt into equity, the accounts of the respondent company are supervised/operated by the JLF. Meeting of the JLF was convened on 22-8-2015 wherein out of 37 lenders, 24 lenders consented to the SDR Scheme. It appears 4 more lenders also agreed to the scheme, therefore, in the meeting of Allotment Committee of the Board of Directors of the respondent company held on 31-12-2015, the equity shares

have been allotted to 28 lenders.

15. Subsequently, a meeting of the Monitoring Committee was held on 6-9-2016. The minutes of the meeting records that the product prices have started improving from early August with expected pick up in construction activity post monsoon and have since been maintaining uptrend and during this period iron ore prices have rather reduced. Resultantly margins have improved, despite increase in landing cost of coal and as per the current market indications uptrend in product prices is likely to continue. The Monitoring Committee was, thus, informed by the respondent company that the company is likely to improve its performance in the current financial year i.e. 2016-17.

16. In *M/s Madhusudan Gordhandas & Co. (supra)*, referred by the petitioners, the Supreme Court has observed that 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 *Re. A Company* 94 S.J. 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 *Re. Tweeds Garages Ltd.* 1962 Ch 406. The principles 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.

17. The Supreme Court in *M/s Madhusudan Gordhandas & Co. (supra)* further observed that 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. Under section 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 *Re. P. and J. Wacrae Ltd.*

18. In *Budhia Auto Associate Pvt. Ltd. (supra)*, this Court has referred to the

decisions rendered by the Supreme Court in *Satish Chandra v. Union of India*, (1994) 5 SCC 495 and *M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja and Another*, (2008) 6 SCC 750, to decide as to when the company Court, in its judicial discretion, should direct winding up of the company.

19. A winding up petition under Section 433 of the Act can be entertained by the Court on the following five contingencies :

- a) if the company has, by special resolution, resolved that the company may be wound up by the Court;
- b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;
- c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;
- e) if the company is unable to pay its debts;

20. Even if any of the above stated five contingencies has arisen in a given case, it is still the discretion of the Court to direct or refuse winding up in view of language of Section 433 which says the company may be wound up by the Court, if the Court is of opinion that it is just and equitable that the company should be wound up.

21. In *Dundappa Shivalingappa Adi v. S.G. Motor Transport Co. P. Ltd. and Others*, (1966) 36 Com Cases 606 (Mysore) (DB), it is held that the provision does not confer on any person a right to seek an order that a company shall be wound up. It confers power on the court to pass an order of winding up in appropriate cases.

22. Similarly, in *New Swadeshi Mills of Ahmedabad Ltd. v. Dye- Chem Corporation*, (1986) 59 Com Cases 183 (Guj) (DB), *Rishi Enterprises, In re*, (1992) 73 Com Cases 271 (Guj). and in *Navjivan Trading Finance P. Ltd., In re.*, (1978) 48 Com Cases 402 (Guj) it has been held that a company will not be wound up merely because it is unable to pay its debts so long as it can be revived or resurrected by a scheme or arrangement or when it has still prospects of coming back to life. Although a petition can be filed by the company itself for winding up on any of the grounds mentioned under Section 433 of the Act, the motive behind the filing of the petition is also irrelevant as held in *Bombay Metropolitan Transport Corporation Ltd. v. Employees of Bombay Metropolitan Transport Corporation Ltd. (CIDCO) and Others*, (1991) 71 Com Cases 473 (Bom) (DB). It is the duty of the company Court to consider the entire facts situation before proceeding to exercise its judicial discretion to direct winding up.

23. In *Satish Chandra (supra)* the Supreme Court held that the power of winding up, conferred by Section 433 of the Act, is drastic. A winding up petition, praying

for the economic death of a running and live commercial organisation, is an extreme remedy to be resorted sparingly.

24. Similarly, in *M.S.D.C. Radharamanan (surpa)* it has been held that winding up of a company is not the interest of the applicant but the interest of the stakeholders of the company as a whole and the basic principle is to stave off the winding up of a company as far as possible and an order of winding up is to be resorted to only as a last course. All efforts are to be made for saving the company from being wound up. (Also see: *Ranjana Kumar v. Indian Dyestuff Industries Ltd.*, (2001) 107 Com Cases 579 (Bom)).

25. In *Tata Capital Financial Services Ltd. (supra)* the Bombay High Court observed that the consequences of jeopardizing the CDR Scheme involving secured creditors whose financial exposure exceeds over Rs.3900 crores as compared to Rs.25 crores owed to the petitioner, by granting the reliefs prayed for by the petitioner, are outrageous and disproportionate to the prejudice to be suffered by the petitioner in the absence of these reliefs. It is a basic norm of RBI guidelines for a CDR package that no account can be taken up for restructuring by the banks unless the financial viability of the borrower company is established and there is a reasonable certainty of repayment from the borrower, as per the terms of the restructuring package. It was further observed that SDR Scheme is a bona fide effort to assist the company to get back on track, in the interest of all stakeholders and the CDR Cell established under the guidelines of RBI is an expert body, who, after assessing the merits of the restructuring proposal, has approved a final CDR package, therefore, any effort to jeopardizing the CDR Scheme without any compelling reason is not in the interest of the company nor its creditors.

26. Implementation of the CDR Scheme, is not a bar and one should not read any such bar as it is not reflected in any of the provisions contained in Sections 433, 434 or 439 of the Act, however, at the same time, when winding up of a company petition can only be ordered when in the opinion of the Court, it is just and equitable that the company should be wound up, an effort to revive and bring back the company on track has significant relevance in the decision making process of the company Court.

27. In the SDR Scheme presently in operation or execution in respect of the respondent company there are 28 creditors, who, as members of JLF, have consented to the SDR Scheme and are participating in the process of revival of the respondent company. Statement on oath has been made by the respondent company that there are about 5000 workers and employees (both on roll and contractual) and the operation of the integrated steel plant and the power plant 1050 MW is in production, therefore, majority of the creditors who have stakes of 81.42% in terms of value to mean 81.42% of Rs.9000 crores (approx.) having consented to the scheme, the petitioners' stakes being only 63.00 crores of Kotak Mahindra Bank Limited and Rs.7.00 ? Rs.8.00 crores of other petitioners, is a minuscule percentage, therefore, at this stage, it will not be a sound exercise

of judicial discretion to proceed further in the company petitions directing issuance of advertisement in view of observations made by the Supreme Court in IBA Health (India) Private Limited (supra) that A creditor's winding up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the Newspaper of the filing of winding up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of the public at large.

28. To sum up, in the facts and circumstances of the case, all the company petitions deserve to be and are hereby dismissed, however, liberty is reserved in favour of the petitioners to apply for winding up of the respondent company on the same facts as are urged in these company petitions in the event the SDR Scheme fails and cannot be implemented in respect of the respondent company.