
(2017) 12 AP CK 0002
In the Andhra Pradesh High Court
Case No : 33 of 2017

MW High Tech Projects India Private Limited	APPELLANT
Vs	
M/s. Grauer & Weil (India) Limited	RESPONDENT

Date of Decision : 06-12-2017

Acts Referred:

Code of Civil Procedure, 1908, Section 2(9), Order 43Rule 1 - Definitions
Contract Act, 1872, Section 56 - Agreement to do Impossible act<B

Citation : (2017) 12 AP CK 0002

Hon'ble Judges : Sanjay Kumar, J. Uma Devi

Bench : DIVISON BENCH

Advocate : S. Ravi, Avinash Desai, S. Niranjan Reddy, T.Sujan Kumar

Judgement

1. Aggrieved by the admission of Company Petition No.231 of 2015, filed for its winding-up under Section 433(e) read with Sections 434(1)(a) and 439 of the Companies Act, 1956 (for brevity, the Act of 1956), the respondent company therein is in appeal under Section 483 of the Act of 1956 read with Clause 15 of the Letters Patent.

2. The order under appeal was passed by the learned Company Judge on 25.10.2017 admitting the company petition and directing the respondent, the petitioner therein, to publish notice of its admission in Business Standard English Newspaper and Andhra Bhoomi Telugu Newspaper. Admittedly, advertisement of the admission of the company petition has already been carried out in terms of the order under appeal.

3. Sri S.Niranjan Reddy, learned senior counsel appearing for Sri Avinash Desai, learned counsel for the appellant company, would however contend that, notwithstanding the advertisement being published in the newspapers, this appeal would still survive for consideration on merits as various other consequences would flow from the admission order which would be adverse to

the interests of the appellant company. He would point out that by virtue of the admission, any disgruntled creditor of the appellant company may come forward to support the winding-up petition under Rule 34 of the Companies (Court) Rules, 1959, and that apart, the commercial credibility and reputation of the appellant company would be put at risk though it is financially solvent as on date and provides employment to several people.

4. Per contra, Sri S.Ravi, learned senior counsel appearing for Sri T.Sujan Kumar, learned counsel for the respondent, the petitioner in the company petition, would submit that as advertisement of the admission order has already been carried out in the newspapers as directed, it would be appropriate for the appellant company to face trial in the company petition and that the discretionary order of admission, having already been given effect to by publication of the advertisement, ought not to be interfered with now.

5. It would be appropriate at this stage to refer to case law on the issue of maintainability of this appeal. In VIJAY KUMAR KARWA V/s. OFFICIAL LIQUIDATOR, ROHTAS INDUSTRIES LTD. , the Supreme Court considered the scope of an appeal under Section 483 of the Act of 1956 and observed that every order which may reasonably be considered to be a judicial order, distinct from a mere administrative order, would be appealable under Section 483 of the Act of 1956. Reference was made to SHAH BABULAL KHIMJI V/s. JAYABEN D.KANIA , wherein it was held that the intention of the givers of the Letters Patent was that the phrase judgment therein should receive a much wider and more liberal interpretation than the phrase judgment used in the Code of Civil Procedure, 1908, but at the same time, it cannot be said that every order passed by a trial Judge would amount to a judgment; otherwise there would be no end to the number of orders which would be appealable under the Letters Patent. It was therefore held that the word judgment has undoubtedly a concept of finality in a broader, and not a narrower, sense and before an order can be said to be appealable, its adverse effect on the party concerned must be direct and immediate rather than indirect or remote, In other words, every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to such parties.

6. Earlier, on the same lines, in CENTRAL MINE PLANNING AND DESIGN INSTITUTE LTD. V/s. UNION OF INDIA , the Supreme Court observed that the definition of judgment in Section 2(9) CPC has no application to the Letters Patent and to determine the question whether an interlocutory order falls within the ambit of judgment for the purposes of the Letters Patent, the test is to see whether the order is a final determination, affecting vital and valuable rights and obligations of the parties concerned.

7. In MIDNAPORE PEOPLES COOP. BANK LTD. V/s. CHUNILAL NANDA , the Supreme Court classified interlocutory orders passed during the pendency of a case into the following categories: (i) Orders which finally decide a question or

issue in controversy in the main case.

(ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case.

(iii) Orders which finally decide a collateral issue or question which is not the subject-matter of the main case.

(iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties.

8. It was observed that the term judgment occurring in Clause 15 of the Letters Patent would take into its fold not only judgments as defined in Section 2(9) CPC and orders enumerated in Order 43 Rule 1 CPC, but also other orders which, though they may not finally and conclusively determine the rights of parties with regard to all or any matters in controversy, may have finality with regard to a collateral matter, which will affect vital and valuable rights and obligations of the parties. Interlocutory orders which would fall under categories (i) to (iii) above, are, therefore, judgments for the purpose of filing appeals under the Letters Patent, but on the other hand, orders falling under categories (iv) and (v) are not judgments for filing such appeals.

9. In *WESTERN INDIA THEATRES LTD. V/s. ISHWARBHAI SOMABHAI PATEL* , a Division Bench of the Bombay High Court observed that there could be no doubt that an order advertising a petition for winding-up would have serious consequences for the company which is sought to be wound up as such an advertisement may seriously impair its credit and affect its reputation. Therefore, there can be no doubt that such an order affects the company and is one with regard to which the company can be legitimately aggrieved. It was argued that the learned Company Judge had not decided anything but the Division Bench did not concur and held that if the learned Company Judge could neither dismiss the petition nor pass any other effective order, then undoubtedly it could be said that he had not decided anything but having directed advertisement of the company petition, the learned Judge had decided something and his decision was that the petition should not be dismissed, that the petition disclosed a prima facie case, and that the case should be tried. The Division Bench accordingly opined that looking to the wide language used in the provision, the order of advertisement made by the Company Judge was appealable. The Division Bench then observed that it is one thing to say that an order is appealable but another to say that the Court of appeal should interfere with a discretionary order passed by the learned Company Judge. The Division Bench held that except in a very gross case where the petition was not clearly maintainable, the Court of appeal would be loathe to interfere with the discretion exercised by the learned Company Judge, because all that the learned Company Judge says at this stage is that he has considered the matter and it appears to him that there is a prima facie case and it requires

further inquiry and investigation. In that sense, it may be said that the learned Company Judge has not made up his mind, but has taken a prima facie view of the petition and the materials before him and felt that such materials would not justify summary dismissal of the petition and more materials, more inquiry and more investigation is necessary before he ultimately makes up his mind as to whether the petition should be allowed or dismissed. The Division Bench therefore concluded that it would require a very strong case indeed to induce the Court of appeal to interfere with the discretion exercised by the learned Company Judge in ordering the advertisement of the admission of the winding-up petition.

10. In *ATALANTA PUMPS P. LTD. V/s. MRS.KUNDA J. MAJLI* , a Division Bench of the Karnataka High Court was considering an appeal arising out of an order of the learned Company Judge, which read thus: Admit.

Advertisement deferred.

11. Significantly, this was not a case where advertisement of the admission was permitted and the appeal was directed only against the admission of the winding-up petition. It was argued on behalf of the company petitioner that a mere order of admission was not an appealable order in terms of Section 483 of the Act of 1956 as admission of the case was essentially a procedural aspect; that it was not, in the true sense, a judicial order which was capable of being appealed against under Section 483 of the Act of 1956; that as admission was essentially a matter for the Court; and that it was only if such order was followed by an order for advertisement, it would affect the interests of the respondent company in the company petition. The contention therefore was that the appeal was not only premature but was also untenable in law. The Division Bench, upon consideration of precedential law, opined that even an order of admission of a company petition under Section 432(e) and (f) of the Act of 1956 could affect the interests of the respondent company to a considerable extent and could be the subject matter of an appeal.

12. In our opinion, the issue of maintainability of this appeal stands settled by the decisions of the Supreme Court in *PRADESHIYA INDUSTRIAL & INVESTMENT CORPORATION OF U.P. V/s. NORTH INDIA PETROCHEMICALS LTD.* and *M/S IBA HEALTH (I) P. LTD. V/s. M/S INFO-DRIVE SYSTEMS SDN. BHD* . The former was a case where the learned Company Judge had concluded that a prima facie case was made out for admission of the company petition filed for winding-up but suspended the advertisement thereof till further orders. The appeal preferred by the company sought to be wound up was dismissed by the Division Bench. However, the Division Bench overruled the objection taken as to maintainability of the appeal on the ground that the order of the learned Company Judge was likely to require the company to face winding-up proceedings and therefore, the appeal was held to lie under Section 483 of the Act of 1956. Significantly, the Supreme Court did not disagree with the finding of the Division Bench of the High Court as to the maintainability of the appeal despite the fact that the order under appeal did not require advertisement of the admission to be carried out.

The Supreme Court ultimately held on facts that there was no justification whatever for admitting the winding-up petition and that admission of the winding-up petition was fraught with serious consequences so far as the company was concerned. In *M/S IBA HEALTH (I) P. LTD.*⁸, the Supreme Court was considering a case where the Company Judge admitted the company petition for winding-up holding that the petitioner had established a prima facie case and ordered the matter to be re-listed for hearing arguments on the publication of the advertisement. The learned Company Judge also directed the parties to appear before the Mediation Centre for settling the dispute amicably. Aggrieved thereby, the company sought to be wound up filed an appeal, but the Division Bench of the Karnataka High Court dismissed the same. Aggrieved thereby, the said company approached the Supreme Court. Thus, this was also a case where the advertisement had not been caused and the appeal was directed against the mere order of admission. However, the appeal was treated as maintainable and was adjudicated on merits by the highest Court of the land.

13. In *AIRWINGS PRIVATE LTD. V/s. VIKTORIA AIR CARGO GMBH*, a Division Bench of the Karnataka High Court was dealing with the procedure to be followed by the Company Court before admitting and ordering advertisement of a winding-up petition. Quoting *PRADESHIYA INDUSTRIAL & INVESTMENT CORPORATION OF U.P.*⁷, the Division Bench observed that the same put the controversy beyond the pale of doubt that, in the case of a company which is a going concern and which is actually functioning, even the order of admission of a company petition under Section 433(e) of the Act of 1956 may prove disastrous, leaving aside the advertisement order which would be still more pernicious, for, even at that stage, it has to be decided whether the petitioner is a creditor of the company; whether any definite amount of debt is due to him from the company; whether the defence of the company in that connection is valid and not mere moonshine; and whether it is prima facie shown that the company is plainly commercially insolvent or, in other words, its existing and probable assets would be insufficient to meet its existing liabilities.

14. Maintainability of this appeal is therefore established beyond doubt. The facts, relevant for the purpose of this appeal, are as under:

The appellant company was awarded a contract by *M/s. Surana Ventures Limited* to set up a 35 MW per annum capacity photo-voltaic cell manufacturing plant at Fab City, Hyderabad. In turn, the appellant company engaged services of several sub-contractors and suppliers for discharging this contractual obligation. The respondent herein, the petitioning creditor, was one amongst the sub-contractors upon whom Purchase Order dated 15.04.2011 was placed by the appellant company for manufacture and supply of certain water and waste-water plant components for use in the proposed manufacturing plant. The total value of the work awarded thereunder to the respondent was Rs.2,75,00,000/-. The Purchase Order dated 15.04.2011 contained the terms and conditions of the contract and in addition thereto, supplemental terms and conditions for installation of the

works were agreed upon. Supplies were made by the respondent under various invoices, aggregating to Rs.1,09,14,250/-. In terms of Clause 2 of the said Purchase Order, the appellant company paid Rs.1,05,00,000/- for the material supplied by the respondent and the balance due, according to it, stood at Rs.4,14,250/-. While so, M/s.Surana Ventures Limited shelved the project in August, 2011. Thereupon, the appellant company requested all its suppliers and sub-contractors to wait for further instructions and not to proceed with procurement or supplies. Emails dated 22.08.2011 and 26.08.2011 were issued by it to the respondent requesting it to withhold dispatches. As its contract with M/s.Surana Ventures Limited stood frustrated, the appellant company claimed that it could not proceed further thereafter, in so far as Purchase Order dated 15.04.2011 placed with the respondent was concerned. The appellant company informed the respondent vide email dated 13.05.2013 that it wanted to settle the account by paying the balance due of Rs.4,14,250/-. This was also reiterated in its reply dated 13.01.2015 to the statutory notice dated 17.12.2014 issued by the respondent.

15. It would now be apposite to look at the terms and conditions of the contract between the parties. The Purchase Order contemplated that time was the essence of the work and all deliveries/works had to be completed, including but not limited to supply, installation/commissioning and handing over of the entire system, by 28.08.2011. 10% advance against the Purchase Order had to be paid by the appellant company. 10% was to be released by it against the drawings approval by its project team. 70% of the payment was to be made against pro-rata delivery of the material at site, with 20 days credit. The last 10% was to be released on completion of the defects liability period. Clause 14 of the Purchase Order, which is of relevance, reads as under: 14) Termination for Convenience: This order may be terminated by Buyer at his convenience in accordance with this clause in whole or in part at any time or from time to time whenever Buyer shall elect. Any such termination shall be effected by delivery to Seller a Notice of Termination specifying the extent to which the works is terminated and the date upon which such termination is effective. Upon receipt of any such notice, Seller shall unless the notice required otherwise, (i) immediately discontinue the works on the date and to the extent specified in the notice, (ii) place no further orders for material other than as may be necessarily required for completion of such portion of the works that is not terminated; (iii) promptly make every reasonable effort to either obtain cancellation on terms satisfactory to Buyer; and (iv) assist Buyer upon request in the maintenance, protection and disposition of property acquired by Buyer under this order. If termination occurs at the convenience of the owner, then the amounts to be paid to Seller shall be conditioned on payment by the owner to Buyer of the amount payable to Seller on account of the goods and/or services delivered.

16. The aforesaid clause demonstrates that the Purchase Order was terminable by the appellant company at its convenience in whole or in part by effecting delivery of a notice of termination upon the respondent specifying the extent to

which the work was terminated and the date upon which such termination was effective. It further made it clear that once the termination occurred, the amounts to be paid to the respondent would be conditioned on payments by M/s.Surana Ventures Limited to the appellant company of the amount payable to the respondent on account of the goods already delivered.

17. Admittedly, the appellant company paid 10% of the Purchase Order amount to the respondent on 07.06.2011. Thereafter, it paid another 10% on 04.07.2011, upon approvals. Invoices dated 26.07.2011 (for Rs.55,15,000/-), 27.07.2011 (for Rs.13,78,750), 29.07.2011 (for Rs.6,89,375/-) and 30.07.2011 (for Rs.33,31,125/-), in all for a sum of Rs.1,09,14,250/-, were raised by the respondent for the supplies made. It is also an admitted fact that most of this amount, but for the balance of Rs.4,14,250/-, was remitted to the respondent by the appellant company.

18. Now, a look at the exchange of correspondence between the parties. Email dated 22.08.2011 was issued by the appellant company requesting the respondent to hold all dispatches until further clearance and that this was a universal alert issued to all its vendors due to non- readiness of the site. In reply, the respondent addressed email dated 22.08.2011 acknowledging receipt of the appellant companys request to put on hold further material dispatches and stating that it was ready to hold the dispatch up to the end of August. On 23.08.2011, the appellant company addressed another email to the respondent stating that an unexpected development had taken place and that the project progress details were not available with it. In reply, the respondent, vide its email dated 26.08.2011, informed the appellant company that it had supplied 60% of the material on site and that the balance material was also ready for dispatch. It further stated that it had already paid its vendors to get the material on time and was facing a serious cash flow. The respondent requested the appellant company to release the balance payment. On the same day, the appellant company emailed the respondent stating that the top management had been informed of the payment issue and requesting the respondent not to dispatch any more material to the site. Having kept quiet thereafter for a long time, the respondent addressed email dated 05.02.2013 to the appellant company and at that, in response to its call, stating that a sum of Rs.2,02,17,150/- was due to it from the appellant company, as per its accounts. In reply, the appellant company emailed the respondent stating that it would look into only the outstanding amount and not the material lying in the factory or with the supplier. It further stated that as it had settled with M/s.Surana Ventures Limited at only 50% of its outstanding dues and had not got everything, it wanted to deal with its vendors in all fairness and that was the reason why the respondent had been told about the settlement. On the same day, the respondent again addressed an email to the appellant company stating that it had invested its entire monies into the project and kept the plant ready and was at the disposal of the appellant company. The respondent requested the appellant company to try to help it as much as possible. A remainder email was

issued by the respondent on 18.02.2013. In reply, the appellant company addressed an email on the same day to the respondent informing it that the balance amount payable to the respondent was Rs.4,14,250/- and that it would arrange for the payment once it heard from the respondent. The answer of the respondent, vide its email dated 18.02.2013, was that the appellant company should reconsider its request and oblige by making payment for the entire balance amount. The respondent further stated that the material in its factory, worth Rs.1.5 crore, was about to be despatched but a day before, it was asked not to do so. The respondent stated that if it had already despatched it to the site a day earlier, the appellant company would have had to pay as the material would have been at site. The respondent impressed upon the appellant company that it had invested equivalent funds in getting raw material and manufacturing the plant and although it wished to reuse the material as much as possible in other projects, it had limitations due to applications. An example was cited to the effect that the entire control panel could not be used elsewhere and similarly, the Fluoride Analyzer could not be used in general water treatment plants. On 28.03.2013, 02.04.2013 and 05.04.2013, the respondent emailed the appellant company seeking information as to the status of its settlement. Thereafter, on 17.12.2014, more than a year and a half later, the respondent issued the statutory notice under Sections 433 and 434 of the Act of 1956 calling upon the appellant company to pay the balance amount of Rs.2,03,17,150/-, with interest thereon at 18% per annum. By its reply notice dated 13.01.2015, the appellant company denied liability to pay the aforestated amount and offered to pay the outstanding sum of Rs.4,14,250/-.

19. Thereupon, the company petition for winding-up the appellant company was presented by the respondent on 01.05.2015.

20. Perusal of the order under appeal reflects that the learned Company Judge took note of the fact that the completion date, in terms of the Purchase Order dated 15.04.2011, was 28.08.2011 and that the appellant company requested the respondent to stop dispatches just six days before the said date, that is, on 22.08.2011. The learned Company Judge then framed the following question for consideration: Whether the defence raised by the respondent to the claim of the petitioner in the company petition is bonafide and in good faith?

21. The learned Company Judge took note of the plea of the appellant company in its reply dated 13.01.2015 that it was compelled to shelve the project at a very preliminary stage and opined that this was a false plea as four dispatches had already been received by the appellant company on 30.07.2011 itself, to the tune of Rs.1,09,14,250/-. The learned Company Judge opined that as the plea of the respondent in its statutory notice that it had supplied 60% of the equipment was not denied by the appellant company in its reply and as the respondent had performed the contract to that extent and the appellant company had requested it to hold further dispatches just six days before the end of contract period, it could hardly be said that the project was shelved at a very preliminary stage.

The learned Company Judge further found that the appellant company never terminated the contract under Clause 14 of the terms and conditions of the Purchase Order dated 15.04.2011 or Clause 22 of the supplemental terms and conditions for installation of the works. The learned Company Judge further observed that he did not wish to make any observation on the issue as to whether there was breach of contract by the appellant company in respect of its obligation under the Purchase Order in taking delivery of the plant and machinery which the respondent had made ready to dispatch as on 22.08.2011, when it addressed the email requesting the respondent not to make further dispatches. As the respondent was asking for the price of the entire plant and machinery already made ready by it for dispatch, having delivered 60% of the total material due, the learned Judge opined that its claim could not be said to be for damages, based on breach of contract. Further, the learned Company Judge held that the plea of the appellant company that the contract stood frustrated on account of M/s.Surana Ventures Limited shelving the project could not be accepted as the theory of impossibility of performance of contract could not be applied to commercial transactions. The plea of limitation taken by the appellant company was also found to be without merit as the respondent sought payment of the balance due, for the material lying at its factory, on 05.02.2013, 18.02.2013 and 08.05.2013 through emails and the appellant company informed the respondent on 05.02.2013 that it was looking into the outstanding amount and not for the materials lying at the factory. The learned Company Judge therefore opined that even in the year 2013, the appellant company was communicating with the respondent through emails in relation to the issue and, therefore, the company petition filed on 01.05.2015 could not be said to be time-barred. In summation, the learned Company Judge opined that the defence of the appellant company was not a substantial one and the dispute raised by it was not bonafide. Further, the learned Company Judge opined that when the quantum of the liability alone was being disputed by the appellant company, the winding-up petition could not be rejected. Holding so, the learned Company Judge admitted the company petition and directed publication of its admission.

22. Sri S.Niranjana Reddy, learned senior counsel, would contend that once Clause 14 of the Purchase Order recorded in categorical terms that it was determinable at the convenience of the appellant company, Section 14(1)(c) of the Specific Relief Act, 1963 (for brevity, the Act of 1963) would come into play and no specific performance could be sought of such a contract. He would submit that the endeavour of the respondent by way of the winding-up petition was exactly to achieve such relief. He would further state that in terms of Section 56 of the Indian Contract Act, 1872 (for brevity, the Act of 1872), the contract between the parties stood frustrated and the learned Company Judge erred in appreciating the actual impossibility of performance of the contract as opposed to a mere commercial difficulty in doing so. Learned senior counsel would further state that the claim of the respondent was hit by the law of limitation, being beyond the period of three years, and mere exchange of correspondence

between the parties by itself would not extend such limitation, without there being an acknowledgement by the appellant company of the debt claimed by the respondent. Learned senior counsel would state that the email dated 22.08.2011 issued by the appellant company, calling upon the respondent to stop all supplies and dispatches, amounted to a notice of termination under Clause 14 of the Purchase Order and that the same was also understood by both parties to mean the same. He would point out that the respondent did not raise any issue from October 2011 to February 2013, accepting the termination of the contract by the appellant company. Learned senior counsel would further point out that the demand made thereafter by the respondent under its email dated 05.02.2013 was far in excess of what could be claimed by it in terms of the total contract value of the Purchase Order and this clearly showed its lack of bonafides. He would further point out that by its email dated 18.02.2013, the appellant company clearly informed the respondent that it was liable to pay only a sum of Rs.4,14,250/- and that it was willing to clear the said dues, if accepted by the respondent. The respondent thereupon changed its tune and claimed in the company petition that a sum of Rs.1.70 crore was due and payable by the appellant company.

23. Learned senior counsel would further state that the learned Company Judge committed certain errors while dealing with admission of the company petition. Firstly, the learned Judge did not take note of the fact that the entire project with M/s.Surana Ventures Limited stood shelved and therefore, the works contracted with the sub-contractors, such as the respondent, stood automatically hit by the doctrine of frustration of the contract. Secondly, the claim of the respondent that 60% supplies had been made had to be tested in the context of the value of the supplies made, which admittedly stood at Rs.1,09,14,250/-. As per the Purchase Order, the balance supplies to be made were to the tune of Rs.1,65,85,750/-. Therefore, the learned Judge ought to have taken note of the monetary value of the supplies that still remained to be made by the respondent. Thirdly, the learned Judge adopted a hyper-technical approach in interpreting Clause 14 of the Purchase Order, inasmuch as there was clear understanding between the parties that the contract stood terminated, going by the conduct of the respondent itself, as it did not even lift a finger from October 2011 to February 2013. Learned senior counsel would point out that there was no prescribed format in terms of the said clause and that the same had to be construed broadly in the circumstances. Lastly, the learned senior counsel would point out that the appellant company is very much solvent as on date and that it was raising a bonafide dispute as to the dues claimed by the respondent.

24. Sri S.Ravi, learned senior counsel, on the other hand, would contend that in terms of the law laid down by the Supreme Court in VIJAY INDUSTRIES V/s. NATL TECHNOLOGIES LIMITED , there is no legal requirement that the entire debt must be definite and certain and even if a part of the amount stands admitted, the winding-up petition would be maintainable. He would further submit that as the advertisement has already been carried out, it would mean

that the proceedings are now in rem and that the appellant company should address all issues during the trial. Learned senior counsel would state that once the order of admission did not suffer on the ground of perversity, the appellate Court should not go in for re-appreciation of the evidence, when the learned Company Judge only formed a prima facie opinion as to the admissibility of the petition.

25. As rightly pointed out by the learned Company Judge, admission or otherwise of the winding-up petition essentially turned upon the nature of the dispute raised by the appellant company in the context of the debt claimed by the respondent.

26. In this regard, it would be useful to refer to AMALGAMATED COMMERCIAL TRADERS (P) LTD. V/s. A.C.K.KRISHNASWAMI , wherein the Supreme Court held that a winding-up petition is not the legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the company and a petition presented ostensibly for a winding-up order, but really to exercise pressure, would be dismissed.

27. This edict was followed in M/S.MADHUSUDAN GORDHANDAS AND CO. V/s. MADHU WOOLLEN INDUSTRIES PRIVATE LIMITED , wherein the Supreme Court was considering a case where the Company Court had dismissed the petition for winding-up of the company under Section 433(e) of the Act of 1956. Dealing with the scope and ambit of a petition under Section 433(e) of the Act of 1956, the Supreme Court observed that where the debt is undisputed, the Court would not act upon the defence that the company has the ability to pay the debt but chooses not to pay it. If the exact amount of the debt is disputed, the Court would still make a winding-up order without requiring the creditor to quantify the debt. The principles on which the Court acts in refusing a petition for winding-up are: firstly, 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. On facts, the Supreme Court found that the Company Court was correct in refusing the order of winding-up as the company had raised valid defences. Though this decision related to a case where refusal of the winding-up petition was after its trial, wherein the company raised a valid defence, the underlying principle would be equally applicable even at the stage of admission of the winding-up petition, if the company is able to show that it has a valid and substantial defence.

28. Again, in MEDIQUIP SYSTEMS (P) LTD. V/s. PROXIMA MEDICAL SYSTEM GMBH , the Supreme Court observed that an order under Section 433(e) of the Act of 1956 is discretionary and there must be a debt due and the company must be unable to pay the same. It was further observed that a debt under this provision must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression unable to pay its debts in Section 433(e) of the Act of 1956 should be taken in the

commercial sense and that the machinery for winding-up should not be allowed to be utilised merely as a means for realising debts due from a company.

29. In *M/S IBA HEALTH (I) P. LTD.*⁸ the question posed for consideration by the Supreme Court, on facts, was as to whether there was a substantial dispute as to the liability in question and if so, whether the creditor could prefer an application for winding-up for failure to discharge such liability. It was observed that it is settled law that if the creditors debt is bonafide disputed on substantial grounds, the Court should dismiss the petition and leave the creditor to establish his claim in an action, lest there is danger of abuse of the winding-up procedure. The Supreme Court cautioned that a party to a dispute should not be allowed to use the threat of winding-up as a means of forcing the company to pay a bonafide disputed debt. It was held that if the debt is bonafide disputed, there cannot be neglect to pay within the meaning of Section 434(1)(a) of the Act of 1956 and if there is no neglect, the deeming provision does not come into play and the claim for winding-up on the ground that the company is unable to pay its debts is not substantiated. It was further observed that if there is no dispute as to the companys liability, its solvency might not constitute a stand-alone ground for setting aside a notice under Section 434(1)(a), meaning thereby, if the debt is undisputedly owing, then it has to be paid and if the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. On facts, the Supreme Court concluded that there was a bonafide dispute with regard to the claim made by the petitioner in the company petition, which was substantial in nature and the Company Court, while exercising powers under Sections 433 and 434 of the Act of 1956, would not be in a position to decide as to who was at fault in that case. It was held that the Company Court should act with circumspection, care and caution and examine as to whether an attempt is being made to pressurise the company to pay a debt which is substantially disputed and should guard against such vexatious abuse of process and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere.

30. In effect, the issue presently is whether the defence raised by the appellant company before the learned Company Judge was a valid and substantial one and whether the learned Company Judge was justified in holding that the petitioning creditor, the respondent herein, had otherwise made out a prima facie case for admission of the winding-up petition.

31. Perusal of the terms and conditions of the Purchase Order dated 15.04.2011 indicates that the work entrusted by the appellant company to the respondent was to be completed by 28.08.2011 and time was stipulated to be the essence of the contract. Liquidated damages were stipulated in the event the respondent failed to complete the work within the time fixed. However, no such provision was made for payment of damages to the respondent in the event the appellant company terminated the contract prematurely. This was obviously because Clause 14 of the terms and conditions stipulated that the very Purchase Order

could be terminated by the appellant company at its convenience in whole or in part at any time or from time to time, whenever the appellant company elected. The mode of such termination was by delivering to the respondent a notice of termination specifying the extent to which the work was terminated and the date upon which such termination was effective. Upon receipt of such notice, the respondent was required to immediately discontinue the works on that date and place no further orders for material other than as may be necessarily required for completion of such portion of the work that is not terminated. The clause further stipulated that if the termination occurred at the convenience of M/s.Surana Ventures Limited, then the amounts to be paid to the respondent would be conditional upon payment by M/s.Surana Ventures Limited to the appellant company of the amount payable to the respondent on account of goods and/or services delivered.

32. Significantly, Clause 5 of the terms and conditions stated to the effect that all goods furnished by the respondent would become the property of the appellant company upon payment therefor or upon delivery, whichever occurred first. Therefore, it is clear that unless the supplies contemplated under the Purchase Order were actually made by the respondent to the appellant company or the appellant company paid for the same, whichever event occurred earlier, the title therein did not pass to the appellant company.

33. The finding of the learned Company Judge was that the appellant company failed to adhere to the procedure under the Clause 14 and that the email addressed by it to the respondent on 22.08.2011 was not sufficient to constitute termination of the contract thereunder. No doubt, the email dated 22.08.2011 addressed by the appellant company to the respondent did not mention the clause or the word termination and merely requested it to hold back all dispatches until further clearance from it. The appellant company however added that this was a universal alert issued to all its vendors due to non-readiness of the site. However, the exchange of correspondence between the parties thereafter puts it beyond doubt that the respondent company was well aware of the fact that M/s.Surana Ventures Limited had shelved the project and that the appellant company went in for a settlement with M/s.Surana Ventures Limited. The respondent, in fact, asked the appellant company to try and help it out as much as possible and stated that it was at its disposal. This was under the email dated 05.02.2013. This aspect of the matter was clearly understood by both the parties and having accepted the same, the respondent kept quiet from October 2011 till February 2013. The question would arise as to whether the respondent can now fall back on literal interpretation of Clause 14 of the Purchase Order dated 15.04.2011 and insist upon the appellant company paying it in full for the supplies not even made by it. The couching of the terms and conditions raises several issues in this regard as Clause 5, as already stated, does not even contemplate passage of title in the goods till either the appellant company pays for it or they are actually delivered by the respondent. This aspect was very well understood by the respondent as it referred to the fact that had it already

effected the supplies before 22.08.2011, the appellant company would have been bound to pay for the same. The respondent therefore acknowledged that there was no passage of title to the appellant company in so far as the supplies yet to be made were concerned. Further, Clause 14 put it beyond doubt that when the termination of the contract was, in effect, attributable to M/s.Surana Ventures Limited, payment by the appellant company to the respondent for the supplies delivered would be conditioned upon payments being made to the appellant company by M/s.Surana Ventures Limited.

34. As rightly pointed out by Sri S.Niranjan Reddy, learned senior counsel, the issue of limitation would also arise inasmuch as the appellant company never acknowledged the debt now claimed by the respondent. All along, the exchange of correspondence demonstrated that the appellant company stipulated that its liability stood at Rs.4,14,250/- only and expressed its willingness to make the said payment if the respondent accepted the same. This is clear from the email dated 18.02.2013 and the reply dated 13.01.2015 sent in response to the statutory notice dated 17.12.2014. In the absence of actual acknowledgement of the liability for the balance amount claimed by the respondent, there can be no assumption that the statutory notice dated 17.12.2014 was within the period of limitation. Be it noted that under this notice, the respondent called upon the appellant company to pay a sum of Rs.2,03,17,150/-, being the total outstanding amount along with interest at 18% per annum, whereas in the company petition, the respondent claimed that the liability of the appellant company was to the tune of Rs.1,70,00,000/- being the outstanding amount along with interest at 18% per annum. This demonstrates that there is no clarity on the part of the respondent as to how much it is claiming as due and payable by the appellant company.

35. As regards the finding of the learned Company Judge that the appellant company was incorrect in claiming that the project was shelved at a very preliminary stage, Sri S.Niranjan Reddy, learned senior counsel, would point out that the project in question was not just the sub-contract given by the appellant company to the respondent, in as much as the main project with M/s.Surana Ventures Limited was the setting up of the 35 MW per annum capacity photo-voltaic cell manufacturing plant. The Purchase Order entered into by the appellant company with the respondent, per the learned senior counsel, constituted only a part of this larger project and the shelving of this larger project by M/s.Surana Ventures Limited was at its preliminary stage. Learned senior counsel would further point out that though the respondent claimed that 60% of the supplies had already been made, the fact remained that the supplies were made only to the tune of Rs.1,09,14,250/- out of the total value of supplies of Rs.2,75,00,000/-. We find merit in these submissions.

36. Further, once the Purchase Order, in terms of the language used therein, was determinable by the appellant company, Section 14(1)(c) of the Act of 1963 barred any claim for its specific performance by the respondent. In INDIAN OIL

CORPORATION LTD. V/s. AMRITSAR GAS SERVICE , the Supreme Court considered a contract which stated to the effect that either party thereto could terminate the agreement by 30 days notice to the other party without assigning any reason for such termination. Construing this contractual clause, the Supreme Court affirmed that the contract in question was revocable and Section 14(1)(c) of the Act of 1963 would squarely apply. In the present case, Clause 14 is unequivocal in its import and intent that the Purchase Order could be terminated by the appellant company at its convenience in whole or in part at any time or from time to time whenever it shall elect. That being so, the Purchase Order cannot be specifically enforced by the respondent but the aim of the respondent by way of the present winding-up petition is exactly that. This aspect of the matter was not at all considered by the learned Company Judge.

37. The finding of the learned Company Judge that the theory of impossibility of performance cannot be applied is also unsustainable on facts. The judgments cited by the learned Company Judge in this regard related to cases of commercial difficulties, inconvenience or hardships in the performance of contracts and not cases of total frustration of the contract. When it is an admitted fact that the Purchase Order placed upon the respondent by the appellant company was in consequence to the award of the larger contract by M/s. Surana Ventures Limited to the appellant company, in relation to setting up a photo-voltaic cell manufacturing plant, and it is not in dispute that the said project was shelved by M/s. Surana Ventures Limited, Section 56 of the Act of 1872 would squarely apply and the doctrine of frustration would come into play. This was therefore not a case of any commercial difficulty, inconvenience or hardship on the part of the appellant company, leading to break down of the contract.

38. Further, if the respondent was seeking damages for breach of the contract on the ground that it was prevented from continuing the supplies just six days before the completion date, it is well-settled that any such claim for damages cannot be made the basis for a winding-up petition. Significantly, though the Purchase Order contemplated liquidated damages being paid by the respondent in the event it failed to make the supplies within time, no such provision was made as to damages, liquidated or unliquidated, being payable by the appellant company if it terminated the contract prematurely.

39. In this regard, reference may be made to GREENHILLS EXPORTS (PRIVATE) LIMITED, MANGALORE V/s. COFFEE BOARD, BANGALORE , wherein a Division Bench of the Karnataka High Court observed that unless there is adjudication, be it by a civil Court or by an Arbitrator, that the company committed breach and incurred pecuniary liability, amounts claimed by way of reimbursement of losses allegedly incurred as a consequence of breach committed by the company would not constitute a debt for the purpose of maintaining a winding-up petition.

40. In GANGOTRI ENTERPRISES LIMITED V/s. UNION OF INDIA , the Supreme Court quoted with approval the following observations of a Division Bench of the

Bombay High Court in IRON AND HARDWARE (INDIA) CO. V/s. SHAMLAL AND BROS. :

41. In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party. As already stated, the only right which he has is the right to go to a court of law and recover damages. Now, damages are the compensation which a court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the court. Therefore, no pecuniary liability arises till the court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the court is doing is ascertaining a pecuniary liability which already existed. The court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.

42. Losing sight of the above principle, the learned Company Judge observed that he did not intend to go into the issue as to whether there was breach of contract by the appellant company in terms of the Purchase Order. This was a crucial aspect which was raised by way of a bonafide dispute by the appellant company and required to be addressed at the threshold to assess as to whether the respondent made out a prima facie case for admission of the winding-up petition. The respondent practically admitted that the supplies that were yet to be made by it did not, as yet, belong to the appellant company. Therefore, even if the respondents claim is accepted that there was no proper termination of the contract by the appellant company under Clause 14, it would amount, at best, to breach of the contract by it and the respondent could only seek damages on the strength of such breach, if at all, and cannot claim any amount as of right under Clause 2 for merely making ready such supplies.

43. Though Sri S.Ravi, learned senior counsel, would contend that once the appellant company admitted its outstanding dues of Rs.4,14,250/-, the same would be sufficient to constitute a debt outstanding, for the purpose of maintaining the winding-up petition, we are unable to agree. The appellant company expressed its willingness time and again to pay the said amount and settle the account but it was the respondent which failed to act upon the same. Having none to blame but itself in failing to accept, without prejudice, the offer made by the appellant company to clear these dues, the respondent cannot now state that the failure of the appellant company to make good this payment would constitute a debt for maintaining the winding-up petition.

44. On the above analysis, we are of the considered opinion that several debatable issues were raised by the appellant company constituting a bonafide

dispute as to its liability to pay the amount claimed by the respondent. We therefore find that the very admission of the company petition was unwarranted, on facts and in law, and beseeches interference in appeal.

45. The OSA is accordingly allowed setting aside the order of admission dated 25.10.2017. Company Petition No.231 of 2015 shall stand dismissed in consequence. This order shall however not preclude the respondent herein, the petitioner in the said company petition, to work out its remedies before the appropriate forum in accordance with law. Needless to state, observations made hereinabove are meant only for the purposes of this order and shall not influence any adjudication undertaken by such appropriate form in accordance with law. Pending applications in this OSA shall stand closed in the light of this final order. No order as to costs.