(2014) 04 MAD CK 0300

In the Madras High Court

Case No : C.P. No. 148 of 2014 and C.A. No. 456 of 2014

P. Vijay Krishna Prasad APPELLANT

Vs

Auro Mira Biopower India P. Ltd. RESPONDENT

Date of Decision : 08-04-2014

Acts Referred:
Companies Act, 1956 — Section 433, 433(e)

Citation : (2014) 186 CompCas 326

Hon'ble Judges : R. Sudhakar, J

Bench : Single Bench

Judgement

R. Sudhakar, J.—This petition has been filed under section 433(e) and (f) of the Companies Act, 1956, stating that the respondent-company is unable to pay the debts due to the petitioner and, therefore, has to be wound up by appointing the official liquidator to take charge of the affairs of the company. Heard learned counsel appearing for the petitioner.

2. After having gone through the typed set of papers filed by the petitioner, I find no good reason to issue notice in the winding up petition in a running company, which had made an income of Rs. 31 crores for the year ending March 31, 2013 and had made Rs. 15 crores for the year ending March 31, 2012. The balance-sheet of the company for the year 2012-13 is annexed at page 35 of the typed set of papers, which shows the financial position of the company sought to be wound up. There, of course, appear to be certain financial difficulties with the carry forward loans. However, that by itself may not justify the cause for winding up the company. The liability, no doubt, is admitted by the respondent, but the petitioner in this case can always get the relief by proceeding in the appropriate mode for recovering the amount, as there is an alternative remedy available for admitted liabilities. This court does not find any justification to hold that the company is not in a position to pay its debts. The ingredients of section 433 of the Companies Act have not been satisfied.

3. An argument may be advanced that the court is not justified in dismissing the

company petition without issuing notice to the respondent. I am unable to accept the plea that in all cases notice should be sent to the respondent, when the petitioner has not made out a prima facie case for issuing notice. It is to be borne in mind that the winding up petition is like a death warrant to a company. A notice in a winding up petition is initiation of winding up proceedings. The respondent-company will have to incur the cost of litigation, besides being engaged in prolonged litigation to defend its case. A petition under section 433 of the Companies Act can at the best be considered as a resort to wind up a company which apparently appears to be company which is a chronic defaulter and situation warrants the winding up of the company. The courts have been consistently taking the view that while bona fide litigations should be encouraged, misconceived and superfluous litigating procedures should be curbed. A petition for winding up of a company should not be entertained as a matter of course. Only in circumstances which clearly establish that the company is suffering from a situation which attracts the provisions of section 433 of the Companies Act, the question of admitting the case and issuing notice will arise. If a notice of the court in a case of winding up catches the wind, it will reach the body of other creditors and will immediately trigger the panic button and the same would lead to disastrous consequences to all concerned. Several stakeholders will be affected. Therefore, the court should be cautious while issuing a notice in the petition filed for winding up. One of the tests that have been laid down in various decisions of the court in a petition filed under section 433 of the Companies Act is complete disclosure in the petition, the details that are relevant for the court to consider issuing a notice. The court will have to consider all such particulars before exercising its discretion to issue notice. If the petition does not prima facie establish a case under section 433 of the Companies Act, the court is justified in dismissing the petition at the threshold. It is not a matter of right for the creditor to lay a petition for winding up on a mere debt. Something more is required.

4. This view of the court is fortified by a decision of a Division Bench of the Gujarat High Court in Tata Iron and Steel Co. Vs. Micro Forge (India) Ltd., , wherein it has been held as follows (page 540) :

"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...

(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...

(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...

(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...

(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...

(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 pressurizing 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...

(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."

The above parameters stand against the petitioner.

5. In the case on hand, as already stated, the details as to the insolvency of the respondent-company are not filed. It is for the petitioner to come out with all relevant and prima facie evidence to prove that the existing and probable assets of the respondent company are insufficient to meet the existing liabilities and that the company is heavily indebted. The pleadings in the present case are not supported by any materials. That apart, this petition is filed under section 433(e) and (f) of the Companies Act and it is for the petitioner to convince the court that there is no alternative remedy open to it. No such plea is also made and proved by the petitioner. The financial status does not appear to be bad. Issuing notice in a winding up petition, without any material evidence, is a drastic step which should be avoided, more so in this case. The respondent-company need not be summoned to answer issues that are nothing but a mirage. Notice need not be issued as a matter of course. For the foregoing reasons, this company petition is dismissed. Consequently, connected company application is also dismissed.