

(2015) 01 GAU CK 0037

In the Gauhati High Court

Case No : Co. Pet. Nos. 25 and 26 of 2012

Pradip Kumar Dev Mahanta

APPELLANT

Vs

Agile Hospitals Pvt. Ltd.

RESPONDENT

Date of Decision : 06-01-2015

Acts Referred:

Companies Act, 1956 — Section 433, 433(e), 434, 434(1)(a), 439

Citation : (2015) 1 GLT 503

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : U. Barua, M.P. Goswami and T. Barua, for the Appellant; R. Dubey, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.—Both the company petitions being interrelated were heard together and are being disposed of by this common judgment and order. The two petitions were heard on 28.11.2014 and 08.12.2014 was fixed for delivery of judgment For unavoidable circumstances, judgment could not be delivered on 08.12.2014 and accordingly judgment is delivered today. Company Petition No. 25/2012 has been filed by Dr. Pradip Kumar Dev Mahanta whereas Company Petition No. 26/2012 has been filed by Dr. Kalpana Mahanta.

2. Both the petitions have been filed under sections 433, 434 and 439 of the Companies Act, 1956 for winding up of Agile Hospitals Private Limited, a private limited company incorporated under the provisions of the Companies Act, 1956. In Company Petition No. 25/2012 Dr. Pradip Kumar Dev Mahanta has stated that Agile Hospitals Private Limited ("company" hereafter) had taken loan of Rs. 36,00,000/- from the petitioner. But the company has failed to repay the same. As on 16.07.2012, a sum of Rs. 45,76,868/- was due and payable by the company to the petitioner. On the other hand, in Company Petition No. 26/2012 petitioner Dr. Kalpana Mahanta had paid a sum of Rs. 17,00,000/- to the company towards share application money for allotment of 17000 fully paid up

equity shares but the company failed to allot any share to her. She therefore requested the company for refund of the said amount with interest But there is no repayment by the company. As on 16.07.2012 a sum of Rs. 21,14,850/- was due and payable by the company to the petitioner Dr. Kalpana Mahanta, which included both principal amount and interest calculated @ 18% per annum.

3. Both the petitioners are husband and wife.

4. For the sake of convenience, facts of Company Petition No. 25/2012 are narrated hereunder.

5. The company was incorporated under the Companies Act on or about 19.04.1995 as a private limited company. In the 3rd week of December, 2010, the company approached the petitioner (Dr. Pradip Kumar Dev Mahanta) for temporary financial assistance. After several representations by the company, petitioner provided temporary financial assistance to the company to the tune of Rs. 36,00,000/-. The payment was made by way of four cheques, the particulars of which are as under:--

Company assured the petitioner that the said amount would be repaid within 6 months.

6. Though the period of 6 months expired long back, the company failed to repay the dues. Letter of the petitioner dated 06.06.2012 to the company failed to elicit any response.

7. Finally the petitioner through his advocate issued notice dated 17.07.2012 under sections 433, 434 and 439 of the Companies Act requiring the company to make payment of the said amount of Rs. 36,00,000/- alongwith interest thereon. The company received the notice on 19.07.2012. However, the company failed not only to respond to the notice but also to repay the dues within 3 weeks from the date of receipt of the notice.

8. It is under such circumstances that the company petition has been filed for winding up of the company for being unable to pay its debts.

9. Contention of the petitioner is that the company is unable to pay its dues. It has lost its financial viability. As such it is commercially insolvent The company has lost its commercial substratum and its existence has become a threat to the commercial world. Therefore, it would be just and equitable to wind up the company under the provisions of the Companies Act.

10. On receipt of notice, the company entered appearance and filed counter affidavit through its Managing Director Dr. Anup Baro. At the outset, the company has stated that there is gross suppression of material facts. Petitioner was himself a promoter and a Director of the company which had taken loans from financial institutions including the Vijaya Bank. The promoters and Directors including the petitioner failed to repay the debts and were unable to run the company profitably. The erstwhile management of the company which included

the petitioner was not interested to continue the business of the company. Therefore, an agreement dated 05.01.2011 was entered into between the petitioner and the other Directors on the one hand and the transferees on the other hand for transferring 76% of the shares of the company and for handing over the management of the company to the transferees. Subsequently, the transferees took over the management of the company. As per the agreement, the transferees were required to liquidate the dues of MDP Brick Industries and Vijaya Bank. In terms of the agreement, no other dues were required to be paid by the transferees. Petitioner ceased to be a Director of the company from 10.03.2011. After signing of the agreement on 05.01.2011 and before taking over the management of the company by me transferees, petitioner issued the four cheques to the company without intimation to the transferees. The cheques were deposited in the Escrow account of the company maintained in the Allahabad Bank, Jawahar Nagar Branch, Guwahati, being Account No. 20706647403. Existence of this account was never disclosed to the transferees by the petitioner who continued to operate this account even after the management of the company was taken over by the transferees. When the cheques got honoured, petitioner withdrew the amounts since the said account was maintained and operated by the petitioner himself. It is contended that the company petition has been filed for recovery of the said amounts deposited by the petitioner in the Escrow account of the company in the Allahabad Bank which were in fact withdrawn by the petitioner himself. Bank statement of the Escrow account for the period 01.04.2010 to 31.03.2011 has been annexed to the affidavit in support of the above contention. In the above circumstances it is contended that the claim of the petitioner is wholly untenable and there is no liability of the company towards the petitioner. The alleged debt is bonafide disputed on substantial grounds. The company is solvent and the commercial substratum of the company is intact. Company petition has not been filed bonafide. Therefore, the company petition is liable to be dismissed.

11. After filing of the counter affidavit by the company, a number of affidavits have been filed by both the sides. Without adverting to the contents of the individual affidavits separately, the sum and substance of the rival contentions as expressed through the said affidavits may be briefly noted.

12. According to the petitioner, in order to pay off the dues of the Vijaya Bank by the company, petitioner had entered into the agreement dated 05.01.2011. Petitioner as the Managing Director alongwith three other share holders of the company holding 76% shares had entered into the agreement dated 05.01.2011 to pay off the company's dues of Vijaya Bank and that of MDP Bricks Industries. Company had maintained an Escrow account with the Allahabad Bank, Jawahar Nagar Branch, Guwahati since about the year 2004-05. The said account is duly reflected in the balance sheet of the company. New management was made aware of the said account. At the time of execution of the agreement dated 05.01.2011, the Vijaya Bank account was non-operational on account of exceeding the cash credit limit and only the Escrow account was operational.

Board of Directors of the company in its meeting held on 28.01.2011 decided that the old management would run the company till 15.02.2011 and the new management would take over with effect from 16.02.2011. It was also decided to accept money from the petitioner as loan to clear the dues of the company. The Board of Directors authorized the petitioner to operate the Escrow account till the transfer of management was complete and liabilities of the company settled. The Board of Directors in its meeting held on 20.02.2011 approved acceptance of the payment of Rs. 36,00,000/- by the petitioner to the Board as unsecured loan as well as acceptance of the other amount from the second petitioner. New management took over charge of the company w.e.f. 16.02.2011. The new Board of Directors in its meeting held on 11.03.2011 accepted the resignation of the petitioner as Managing Director w.e.f. 10.03.2011. As per decision of the Board dated 28.01.2011, petitioner continued to operate the Escrow account till 10.03.2011 when he retired from the management of the company. In the scrutiny of the Escrow account by the auditor, no irregularity has been found. This is evident from the balance sheet of the company submitted before the Registrar of Companies alongwith the auditor's report.

13. On behalf of the company it is stated that after the management of the company was taken over by the new Board of Directors, the company became profitable in the year ending 31st March, 2012 as would be reflected from the profit and loss account and the balance sheet of the company. The same trend is also reflected in the subsequent year ending 31st March, 2013. Income-tax returns for the said years have been annexed to one of the affidavits. The company is very much a solvent company and capable of meeting its debts and liabilities. It is not liable to be wound up. Claim of the petitioner is a fabricated one and is not at all tenable. Company has not taken any loan from the petitioner and therefore it has no liability towards the petitioner. Till 31.03.2011 the Escrow account was operated by the petitioner which fact is supported by the bank statement. The fact about petitioner's dues and the alleged corresponding liabilities of the company were not made known to the new management by the petitioner either at the time of execution of the agreement on 05.01.2011 or at the time of handing over the management of the company. New management is liable to meet the liabilities of the company as per the deed of agreement dated 05.01.2011 and nothing beyond. Question has been raised about the genuineness of certain documents including the minutes of the meetings of the Board of Directors held on 28.01.2011 and 20.02.2011 alleging the same to be manufactured. These documents were not annexed to the company petition. It is reiterated that only after taking over the management of the company, the new management came to know about the Escrow account in July, 2011. Petitioner had also filed a grievance petition before the income tax authority alleging that amounts paid to the company by the two petitioners were not reflected in the audited balance sheet of the company as on 31.03.2011. Order dated 26.03.2014 has been passed by the income tax authority which clearly indicates that the Escrow account was operated by the petitioner himself at least till

24.03.2011.

14. Heard Ms. U. Baruah, learned Counsel for the petitioners and Mr. R. Dubey, learned Counsel for the respondent

15. Submissions made by learned Counsel for the parties are on pleaded lines and therefore it is considered not necessary to refer to in details the submissions made. However, the submissions made have been duly considered.

16. At the outset, it would be useful to refer to the relevant provisions of the Companies Act Section 433 deals with the circumstances in which a company may be wound up. One of the circumstances is when the company is unable to pay its debts. Thus, as per Section 433(e), a company may be wound up if it is unable to pay its debts. Section 434 explains the circumstances when a company shall be deemed to be unable to pay its debts. Under Section 434(1)(a), a company shall be deemed to be unable to pay its debt if a creditor to whom the company is indebted in a sum exceeding 1 lakh rupees has served on the company a demand requiring the company to pay the sum so due and the company neglects to pay the sum so due for 3 weeks to the reasonable satisfaction of the creditor. Section 439 provides for filing of application for winding up of the defaulting company. Such an application can be filed by any creditor or creditors, amongst others.

17. Therefore, from a conjoint reading of the aforesaid provisions, it is evident that a creditor whose credit to me company has not been settled even after 3 weeks from the date of receipt of the notice of payment of the creditor because the company neglected to pay the sum due to the reasonable satisfaction of the creditor would be entitled to file a petition for winding up of the company. The above provisions have been the subject matter of scrutiny of the Courts including the Apex Court over the years. In the context of Section 433(e), the Apex Court in the case of *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, AIR 1971 SC 2600 : (1972) 42 CompCas 125 : (1972) 1 CTR 193 : (1971) 3 SCC 632 : (1972) 2 SCR 201 held that if the debt is bonafide disputed and the defence is a substantial one, the Court will not wind up the company. Therefore, firstly, the defence of the company must be in good faith and one of substance; secondly, the defence is likely to succeed on a point of law and thirdly, the company adduced prime facie proof of the facts on which the defence depends. Moreover, if there is opposition to the making of the winding up order by the creditors, the Court will consider the same and may decline to make the winding up order. A winding up order will also not be made on a creditor's petition if it would not benefit him or the company's creditors generally.

18. In an earlier decision in the case of *Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another*, (1965) 35 CompCas 456 , the Apex Court held that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the company. It was held that a petition filed ostensibly for a winding up order but really to put

pressure on the company for settlement of the debt will not be entertained and may be treated as a scandalous abuse of the process of the Court.

19. In *Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another*, (1994) 79 CompCas 835 : (1994) 2 CompLJ 50 : (1994) 1 JT 579 : (1994) 1 SCALE 526 : (1994) 3 SCC 348 : (1994) 1 SCR 815 , the Apex Court examined the provision contained in Section 433(e) and held that an order under clause (e) is discretionary. The debt must be a determined or a definite sum of money payable immediately or at a future date. Inability to pay the debt must be understood in the commercial sense. The Court must be satisfied that the existing and probable assets of the company would be insufficient to meet the existing liabilities. The Apex Court reiterated the principles laid down in *Madhusudan Gordhandas and Amalgamated Commercial Traders (P) Ltd.* and categorically held that it is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means of realizing the debts due from a company.

20. Again, in the case of *IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd.*, (2010) 159 CompCas 369 : (2010) 4 CompLJ 481 : (2010) 10 SCALE 151 : (2010) 10 SCC 553 : (2010) 9 UJ 4729 , the Apex Court once again reiterated the above principles and held as under :--

"20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt."

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"31. Where the company has a bona fide dispute, the petitioner cannot be regarded as a creditor of the company for the purposes of winding up. "Bona fide dispute" implies the existence of a substantial ground for the dispute raised. Where the Company Court is satisfied that a debt upon which a petition is founded is a hotly contested debt and also doubtful, the Company Court should not entertain such a petition. The Company Court is expected to go into the

causes of refusal by the company to pay before coming to that conclusion. The Company Court is expected to ascertain that the company's refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated by a trial in a civil court."

The Apex Court explained that if a debt is bonafide disputed, there cannot be any neglect to pay within the meaning of section 434(1)(a) of the Companies Act. If there is no neglect, the deeming provision that the company is unable to pay its debts would not come into play. The Apex Court also sounded a note of caution by observing that a party to the dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bonafide disputed debt In this connection it was observed as under:--

"33. We may notice, so far as this case is concerned, there has been an attempt by the respondent Company to force the payment of a debt which the respondent Company knows to be in substantial dispute. A party to the dispute should not be allowed to use the threat of winding-up petition as a means of enforcing the company to pay a bona fide disputed debt A Company Court cannot be reduced as a debt collecting agency or as a means of bringing improper pressure on the company to pay a bona fide disputed debt Of late, we have seen several instances where the jurisdiction of the Company Court is being abused by filing winding- up petitions to pressurize the companies to pay the debts which are substantially disputed and the courts, are very casual in issuing notices and ordering publication in the newspapers which may attract adverse publicity. Remember, an action may lie in appropriate court in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company and later dismissed when a proper defence is made out on substantial grounds. A creditor's winding-up petition implies insolvency and is likely to damage the company's creditworthiness or its financial standing with its creditors or customers and even among the public.

34. 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.

35. We have referred to the above aspects at some length to impress upon the Company Courts to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed. A Company Court, therefore, should be

guarded from such vexatious abuse of the process and cannot function as a debt collecting agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere."

21. Having noticed the relevant legal provisions and the related legal aspects as explained by the Apex Court, the facts of the present case may now be adverted to.

22. From the pleadings and documents on record what has surfaced is that the petitioner himself was the Managing Director of the company. He along with three other Directors as the first party had entered into an agreement with 5 persons viz., Smti. Queen Tahikdar Baishya, Dr. Bedabrata Pathak, Dr. Arindam Barman, Dr. Hirumoni Saikia and Ms. Jyotika Das as the second party stating that the 1st party who was running the Agile Hospitals, Guwahati belonging to the company was not interested to continue with the hospital business, more so, due to failure to repay the dues of Vijaya Bank and another party. Accordingly, the 1st party agreed to transfer 76% shares to the parties as per the list of transferees and also agreed to a change in the constitution of the Board of Directors. As per the said agreement, the new management would take steps to clear the dues of Rs. 1,10,00,000/- of MDP Bricks Industries as well as the term loan and cash credit dues of Vijaya Bank. The 1st party agreed to clear all the liabilities of the company except the Vijaya Bank dues. In this agreement there is no mention of the Escrow account of the company maintained with the Allahabad Bank. After this agreement was executed on 05.01.2011, petitioner issued the four cheques in favour of the company, cheque dated 08.01.2011 for Rs. 20,00,000/-, cheque dated 12.01.2011 for Rs. 5,00,000/-, cheque dated 13.01.2011 for Rs. 5,00,000/- and cheque dated 28.01.2011 for Rs. 6,00,000/-.

23. It has further come on record that the above four cheques were deposited in the Escrow account of the company which was being managed and operated by the petitioner himself during the month of March, 2011. The order of the Income Tax Officer, Ward- 3(1), Guwahati (Assessing Officer) dated 26.03.2014 makes interesting reading. This order was passed by the Assessing Officer on a grievance petition filed by the petitioner himself alleging that Rs. 36,00,000/- paid by him as unsecured loan and Rs. 17,00,000/- paid by Dr. Kalpana Mahanta as share application money to the company were not reflected in the audited balance sheet of the company as on 31.03.2011 i.e. for the assessment year 2011-1-2. After making due enquiry, a finding has been recorded that petitioner was operating the Escrow account maintained at Allahabad Bank, Jawahar Nagar Branch even after his resignation from the post of Managing Director of the company on 10.03.2011. All the cheques relating to the Escrow account during the month of March, 2011 were issued under the signature of the petitioner. In fact even on 24.03.2011 there was a cash withdrawal of Rs. 10 lakhs from the Escrow account by a self cheque signed by the petitioner even though he had resigned from the post of Managing Director by then. The Assessing Officer observed that petitioner was regularly signing cheques relating to the Escrow

account even after his resignation. The order discloses that the petitioner had admitted before the Assessing Officer that he had no evidence to substantiate that his loan to me company was an unsecured loan. It further appears that books of accounts, minutes of Board's meetings etc. of the company upto the previous year 2010-11 (relevant for the assessment year 2011-12) were missing for which the company had lodged FIR before the Basistha Police Station. The Assessing Officer observed that in the absence of books of accounts, bills, vouchers etc. it was not possible to verify the transactions claimed by the petitioner.

24. What has therefore emerged is that the four cheques issued by the petitioner in favour of the company were deposited in the Escrow account which was operated on behalf of the company by the petitioner himself. From the statement of account of the Escrow account it is clearly evident that the said cheques were deposited in the Escrow account. The statement of account discloses substantial withdrawals from the said account immediately after credit of the said cheques. On 13.01.2011 there is withdrawal on the debit side of Rs. 20 lakhs; on 18.01.2011 there is entry of Rs. 20 lakhs on the debit side; on 19.01.2011 there is an entry of Rs. 4 lakhs on the debit side; Rs. 10 lakhs on the debit side on 22.01.2011; Rs. 5 lakhs on the debit side on 17.02.2011; Rs. 1 crore 10 lakhs on the debit side on 18.02.2011; Rs. 10 lakhs on 24.03.2011 etc. These are the major withdrawals from the Escrow account. Besides these, there are numerous other transactions in the said account during the months of January, February and March, 2011.

25. What is therefore manifestly clear is that the cheques issued by the petitioner allegedly as unsecured loan to the company were deposited in the Escrow account which was operated by the petitioner himself on behalf of the company. The amounts have been withdrawn by the petitioner. This much is very dear. What is not very clear is whether the said amounts were actually used to meet the liabilities of the company or to meet the needs of the company. The order of the Income Tax Officer as noticed above states that there was no documentary evidence in support of the alleged unsecured loan provided by the petitioner to the company. There is also no document on record stipulating the manner and method of repayment of the loan with interest by the company to the petitioner.

26. The case projected by the petitioner in the company petition is that me company approached the petitioner for financial assistance as it was suffering from financial stringency. After several representations, petitioner finally agreed to advance the loan. On a reading of the company petition, one gets the impression that petitioner had no connection or nexus with the company at all. As if he had only entered into a commercial transaction with the company at the latter's request. But from what has been discussed above, nothing can be more further from the truth. In the light of the above this Court has no hesitation to hold that the claim of the petitioner is highly controversial and disputed.

Objection of the company to the claim of the petitioner has substance and appears to the Court to be a bonafide one. Therefore, in the facts and circumstances of the case, order of winding up of the company is not called for. Accordingly, both the company petitions are dismissed. However, there shall be no order as to cost.