

(1984) 04 GAU CK 0007**Gauhati High Court****Case No:** Company Petition No. 4 of 1979

Tube Investment of India Ltd.

and Another

APPELLANT

Vs

Everest Cycles Ltd.

RESPONDENT

Date of Decision: April 24, 1984**Acts Referred:**

- Companies Act, 1956 - Section 433

Citation: (1984) 56 CompCas 165**Hon'ble Judges:** K.N. Saikia, J**Bench:** Single Bench**Advocate:** A. Sarma, N.N. Saikia and B. Dutta, for the Appellant; B.K. Goswami, P.K. Kalita and L.M. Kshetry, for the Respondent**Judgement**

Saikia, J.

The petitioners sold and delivered goods to the respondent company worth Rs. 1,77,425.84 pursuant to their orders but the latter did not pay the value. The goods being entrusted to the respondent company's agent and carriers, the documents of title were sent through bank, but the respondent company did not pay the value of the goods into the bank and the documents of title were returned to the petitioners dishonoured by the bank. By its letter dated March 30, 1977, the respondent company admitted the entire liability and proposed to pay the amount but having failed or neglected to pay, the petitioners filed a suit being C.S. No. 176/77 in the High Court Judicature at Madras, against the respondent company for recovery of a sum of Rs. 1,77,425084 towards principal and Rs. 59,794.16 towards interest at the rate of 16.5% per annum from the date of invoice. Thus, the total claim was Rs. 2,38,220 and further interest from the date of plaint till the date of realisation. In the said suit before the Hon'ble Madras High Court, though the respondent company was served with suit summons several times, it did not appear in the court and the petitioners filed an application No. 22/79, for passing a decree under Order 12, Rule

6, CPC, on the basis of the admission made by the respondent company in a letter written by it before filing of the suit; and in that application and the suit an order/decrees and judgment was passed by the High Court on February 21, 1979, for Rs. 2,90,723.59 with further interest at 6% per annum on the principal decreed sum of Rs. 1,77,425.84 from the date of decree till realisation. The decree has now become final as no appeal has been filed. The petitioner caused an advocate's notice dated March 10, 1979, to be sent to the respondent company demanding the decretal amount, but the latter has not paid nor has it replied to the statutory notice within the time allowed in the notice. In this petition u/s 433(e) and (f) and Section 434(1)(a) and (b) of the Companies Act, 1956 (hereinafter referred to as "the Act"), the petitioners have submitted, inter alia, that on account of the wilful default and failure on the part of the respondent company to meet the demands based on admitted and liquidated liability within three weeks of the service of the said advocate's notice dated March 10, 1979, the respondent company should be deemed to be unable to pay the debt and is, therefore, liable to be wound up by this court.

2. A notice of the application was ordered to be served on the respondent company by order dated November 23, 1979, but as none appeared on behalf of the respondent company, on January 23, 1980, the petition was ordered to be put up for hearing on February 1, 1980, on which date a notice was ordered to be issued to the Registrar of Companies, Shillong, and a direction was given for advertisement of the petition as per Rule 99 of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules"). The advertisement was directed to be published in one issue, each, of the Assam Tribune, Gauhati, the Dainik Asom, Gauhati, and also in the Assam Gazette. The notice for advertisement of the petition in Form No. 5 of the Rules was published in the Assam Gazette of June 18, 1980. The notice was also published in the Assam Tribune and the Dainik Asom on June 17, 1980. On July 24, 1980, an application was filed by Mr. B.K. Goswami, for the Assam Financial Corporation, and on July 25, 1980, he was given three weeks' time to file an affidavit-in-opposition. The Assam Financial Corporation, a creditor, filed its affidavit-in-opposition on September 8, 1980, stating, inter alia, that "the company is not liable to be wound up on account of the inability of the company to pay the decretal amount. The Everest Cycles factory has sufficient assets, from which the decretal amount, if any, may be realised by the petitioner company; but the petitioner-company not having made any attempt to realise the amount by levying execution is not entitled to invoke the provisions of Section 433 of the Companies Act". The corporation showed that a total amount of Rs. 34,75,000 was due to it by the respondent company and that the land and the plants and machineries of the respondent company were mortgaged to the corporation which had its first charge over the same and if the company was wound up the corporation was likely to suffer loss.

3. An affidavit-in-opposition was filed on behalf of the respondent company on September 12, 1980, by its executive director stating, inter alia, that it is correct that

the respondent company obtained the materials to the extent of Rs. 1,77,425.84 and that a letter of confirmation was also sent, but he denied liability to pay interest. It was further stated that the respondent is only liable to pay the principal amount and not the interest which was not within any condition of contract between the petitioners and the respondent company and that the latter has no intention to defer the payment. It has been further stated that since, after the establishment of the respondent company, it was managed by the then board of directors, but the financial position of the company began to deteriorate some time in 1975 due to various factors, for example, high cost of raw materials, difficulties in procuring capital, and high cost of finished products which was beyond the control of the company and it was on the verge of closure on or about 1975 and, at that time, the State Government of Assam took sympathy on the respondent company to safeguard the interest of the employees/labourers, but the financial condition of the company further deteriorated as its financier-bank voluntarily withdrew from rendering financial accommodation to the respondent company. However, the State Government reconstituted its board of directors and nominated a representative as the executive director and the reconstituted board of directors have been looking after the affairs of the company and taking appropriate measures to discharge its liabilities. It has further been stated that to liquidate the liabilities, as claimed by the petitioners, may require some, time inasmuch as the respondent company will have to make its ways and means for its repayment, and that there has even been several correspondence between the respondent company and the Industrial Reconstruction Corporation of India. It has categorically been stated in para. 13 of the affidavit-in-opposition that "the respondent is always willing to pay its liabilities but for the various difficulties, the liabilities are still outstanding for which the company is trying its level best to find out the early ways and means for discharge of its liabilities. It has further been stated that correspondence is going on between the company and the authorities of the Government for making reconstruction of the company so that the liabilities can be discharged with all its possible means; that the question of winding up of the company as prayed for by the petitioners is not warranted under the facts and circumstances of the case ; that there is no just and equitable ground for winding up of the company and, therefore, no relief can be granted u/s 433 or Section 434 of the Act; and that the petition for winding up has not been made bona fide and for just and equitable cause and, therefore, it is liable to be rejected.

4. The petition was first ordered to be heard on July 25, 1980. After several adjournments it was fixed for hearing on August 27, 1983. On December 8, 1983, Mr. N.C. Das, the learned counsel appearing for the respondent company, stated that there had been further developments in respect of the State Government guaranteeing credit to the respondent company and that the Industrial Reconstruction Corporation of India had also since written to the State Government to take over the interest of the respondent company. Mr. Das was directed to file a

supplementary affidavit-in-opposition stating the up-to-date state of affairs of the respondent company vis-a-vis the State Government of Assam and the Industrial Reconstruction Corporation of India within six weeks. On January 28, 1984, time was further extended for ten days for filing the affidavit. As no such affidavit was filed, this petition was heard on February 21, 1984, and April 5, 1984.

5. The liability is thus admitted by the respondent company. Though it questions the liability to pay interest, it cannot be said that the liability itself is disputed. The respondent company's explanation is that due to various difficulties it has not been able to discharge the liability towards the petitioners but it is still trying. Though the Government has appointed an executive director, who has affirmed the affidavit, Mr. Das has not been able to give any idea of the present state of affairs, in terms of taking over or reconstruction of the respondent company's business. This company petition was filed as far back as on November 15, 1979, and the petition was also advertised as far back as in June, 1980. Even so, the present state of affairs has not been placed before this court. Will a winding up order be justified under the above facts and circumstances of the case ?

6. Mr. A. Sarma, the learned counsel for the petitioners, has submitted that the company's inability to pay the debt is beyond doubt. The delay and the reasons given in the respondent company's affidavit lead to no other conclusion. This being a clear case of the company being unable to pay its debts, it has to be wound up by the court u/s 433(e) of the Act. He further submitted that the question whether it is just and equitable that the company should be wound up under Clause (f) of that section does not arise. .

7. Mr. N.C. Das, the learned counsel for the respondent company, tried to refute by submitting that the petitioners being decree-holders have the alternative remedy of executing the decree, but instead they have filed this petition to pressurise the respondent company. He relies on Sub-section (2) of Section 443 of the Act, which provides that where the petition is presented on the ground that it is just and equitable that the company should be wound up, the court may refuse to make an order of winding up, if it is of opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. Lastly, Mr. Das submitted that the efforts at reconstruction of the company's business are likely to succeed whereafter it would be possible for the company to repay its debt to the petitioners. Mr. Sarma replied that this petition is not under Clause (f) of Section 433. This submission is not correct, inasmuch as the petition is shown to be both under (e) and (f). Even so, as was held in [Rajahmundry Electric Supply Corporation Ltd. Vs. A. Nageswara Rao and Others](#), the words " just and equitable " are not to be construed " ejusdem generis " with the preceding words of the enactment, and where nothing more is established than that the directors have misappropriated the funds of the company, an order for winding up would not be just or equitable, because if it is a sound

concern such an order must operate harshly on the rights of the shareholders.

8. The inability of the respondent company to pay its debt to the petitioners is not in doubt. Where in spite of demands by a creditor, the company neglects to pay, it is *prima facie* evidence of inability to pay. The petitioners are decree-holders and the decree is a final one not being challenged in appeal. If instead of executing the decree dated February 21, 1979, they resort to this petition for winding up, can their prayer be refused ? As was observed in Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another, the winding up petition is not a legitimate means of seeking to enforce a payment of debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure to pay a disputed debt will be dismissed, and, under certain circumstances, may even be stigmatised as a scandalous abuse of the process of the court. But, in the instant case, the respondent company does not bona fide dispute the debt. Mr. Das states that the company still has assets far exceeding its liabilities. However, that by itself would not be sufficient to hold the company not to be unable to pay its debt, if otherwise, it is plainly and commercially insolvent--so that its assets are such, and its existing liabilities are such, as to make it reasonably certain--as to make the court feel satisfied--that the existing and the probable assets would be insufficient to meet the existing liabilities. In such cases, the question is not whether the company can pay all its debt, whether presently due or payable in future, but whether it is able to meet its current demands and whether the existing probable assets would suffice to meet the future demands.

9. It may also be relevant to consider whether the other creditors are opposed to the making of the winding up order. In the instant case, the Assam Financial Corporation in its affidavit opposed the prayer for winding up stating that such winding up would injure its interest as the respondent company owes to it about Rs. 34 lakhs, but at the hearing, Mr. Kalita has stated that the corporation is not opposed to the winding up of the company provided its interest is safeguarded and that the corporation has already instituted proceedings for realisation of its charges.

10. Despite general notice, the workers of the respondent company have not filed any objection to the winding up petition. In National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others, it has been held that the workers of a company are entitled to appear at the hearing of the winding up petition whether to support or to oppose it so long as no winding up order is made by the court. The workers have a locus to appear and be heard in the winding up petition both before the winding up petition is admitted and an order for advertisement is made as also after admission and the advertisement of the winding up petition until an order is made for winding up the company. It has further been held that if a winding up order is made and the workers are aggrieved by it, they would also be entitled to prefer an appeal and contend in the appeal that no winding up order should have been made by the company judge. But when a winding up order is made and it has

become final, the workers ordinarily would not have any right to participate in any proceeding in the course of winding up of the company though there may be rare cases where in a proceeding in the course of winding up, the interest of the workers may be involved and, in such a case, it may be possible to contend that the workers must be heard before an order is made by the court. In the instant case, as the workers have not taken any objection to the winding up petition, it would not be reasonable to refuse a winding-up order on the ground of the workers being not heard.

11. The petitioners are judgment creditors. A creditor is a person who could enforce his claim against the company by an action of debt. They have obtained judgment against the company for an ascertained sum of money and the judgment itself created a debt entitling the petitioners to the petition for winding up. The fact that the decree may be executed in the civil court is not a sufficient ground for refusing a winding-up order. As has been held in Unique Cardboard Box Mfg. Co. Pvt. Ltd., In re In Re: Unique Cardboard Box Mfg. Co. P. Ltd., it is not necessary that the decree should be executed before the presentation of a winding up petition. A winding up petition can be admitted if made on the basis of an unfiled award as was held in Kalyani Spq. Mills Ltd. Vs. Shiva Trading Co., and Dalhousie Jute Co. Ltd. Vs. Mulchand Lakshmi Chand. Admittedly, the decree has not been executed and the decretal amount has not been realised in the instant case. The Act has not prescribed any minimum amount of debt to enable a creditor to petition for winding up. The decretal amount of Rs. 2,90,723 59 cannot be said to be so paltry as to unjustify this petition for winding up. The contributories have not objected to this petition. The major creditor, the Assam Financial Corporation, though initially objected in its written statement, has not seriously objected to the petition at the hearing. There is no escape from the conclusion that the respondent company is presently unable to pay its debts taking into account its liability towards the petitioner as well as the Assam Financial Corporation, not to speak of its contingent and prospective liabilities, if any. In other words, it is in a state of commercial insolvency. As we read in Pennington's Company Law, 3rd Edn., p. 675, there are two tests of insolvency. " A company will be unable to pay its debts if it cannot pay them as they fall due out of cash or readily realisable assets in its hands, and it is immaterial that it could pay them over a lengthy period by a steady realisation of all its assets. The company will also be unable to pay its debts if it has no reasonable prospect of paying all of them, both accrued and prospective, by a steady realisation of all its assets, and in this case it will be immaterial that it can pay its accrued debts out of its liquid resources ". As was held in Re Globe New Patent Iron and Steel Co. [1875] 20 Eq.LR 337, proof by a creditor that his debt has not been paid is prima facie evidence that the company is insolvent, as also is an admission by the directors that the company has no assets on which the creditor may levy execution, but the company may rebut the presumption of insolvency which thereby arises by proving that it can in fact pay its debts.

12. This company petition was registered as far back as on November 16, 1979, and till today there has not been any serious attempt to settle the liability. Bearing in mind the guidelines to be found in the decisions in National Conduits (P) Ltd. Vs. S.S. Arora, , Harinaqar Sugar Mills Ltd. Vs. M.W. Pradhan, , Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , Hind Overseas Private Limited Vs. Raghu Nath Prasad Jhunjhunwalla and Another, , National Textile Workers" Union and Others Vs. P.R. Ramakrishnan and Others, and Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, I find no justification for refusing to pass the winding up order. In the result, I order that the respondent company, namely, M/s. Everest Cycles Ltd., be wound up under the provisions of the Companies Act, 1956, and the Companies (Court) Rules, 1959. The parties shall bear their own costs. Let steps be taken according to law.