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## **Modern Gears Pvt. Ltd. Vs IL and FS Investment Ltd.**

**C.P. No. 53 of 2004**

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**Court:** Calcutta High Court

**Date of Decision:** May 19, 2004

**Acts Referred:**

Companies Act, 1956 " Section 433

**Citation:** (2006) 129 CompCas 337

**Hon'ble Judges:** Ashim Kumar Banerjee, J

**Bench:** Single Bench

**Advocate:** Aniruddha Roy, Debjani Ghosh and Sennit Rudra, for the Appellant; Mukti Ghosh, Chowdhury, Chandranath Dutta and Alokesh Mallik, for the Respondent

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### **Judgement**

Ashim Kumar Banerjee, J.

The petitioning creditor had done certain share transactions on behalf of the company under an agreement

dated November 8, 2000 appearing at pages 15-16 of the winding up petition. Three bills were raised on February 8, 2001, February 12, 2001

and February 27, 2001, amounting to Rs. 1,94,342.25, Rs. 4,43,592.50 and Rs. 4,30,999.50 respectively aggregating to Rs. 10,68,934.25.

2. These bills remain outstanding. The petitioning creditor on the other hand was holding a sum of Rs. 3,04,511.10 on the part of the company. As

the company did not make payment of the aforesaid three bills, they adjusted the said amount of Rs. 3,04,511.10 and claimed the balance sum of

Rs. 7,64,423.15. Repeated letters/reminders were given on and from April 2, 2001, till December 9, 2002. Those letters remain unreplied. The

petitioning creditor served a statutory notice of demand on May 7, 2003, through their advocate which was replied to by the company on May 23,

2003, appearing at pages 41 and 42 of the petition. For the first time in reply to this statutory notice of demand the company raised two disputes

firstly, the first two bills were settled for a sum of Rs. 3,04,511.10 as identical amount was being held by the petitioning creditor on behalf of the

company that stood adjusted against the first two bills. Secondly, the third bill amounting to Rs. 4,30,999.50 represents a consignment which was

never received by the company. In the affidavit-in-opposition the company echoed their stand taken earlier in reply to this statutory notice of

demand.

3. Mr. M. C. Ghosh learned Counsel appearing for the company while opposing the application for winding up submitted as follows :

(i) Since for the self-same cause of action the petitioning creditor has filed a suit before this Court which is still pending the winding up proceeding

being parallel proceeding should not continue.

(ii) The claim of the petitioning creditor is barred by laws of limitation.

(iii) Since the first two bills stood adjusted by way of full and final settlement there cannot be anything due and payable.

(iv) Since the subject consignment pertaining to the third bill was not received by the company and the company seriously disputed the signature

appearing at the said consignment note, the third bill is not payable.

4. In support of his first submission Mr. Ghosh has cited three decisions :

(i) State Trading Corporation of India Ltd. Vs. Punjab Tanneries Ltd., .

(ii) N.N. Consultants Pvt. Ltd. Vs. Khatema Fibres Ltd., .

(iii) The Bank of Nova Scotia Vs. RPG Transmission Limited, .

5. Citing the aforesaid decisions Mr. Ghosh has contended that the prayer for winding up being a discretionary relief should not be granted in the

instant case because of the pendency of a parallel proceeding on the selfsame cause of action.

6. On the plea of limitation Mr. Ghosh has contended that although the bills were raised on or after February 8, 2001, since the winding up petition

has been filed on February 6, 2004, the claim might be held as barred by limitation, upon a regular trial being made, as according to him, limitation

is a mixed question of fact of law.

7. On the issue of the first two bills, according to Mr. Ghosh since the said two bills stood adjusted against the amount payable to the company by

the petitioning creditor, there cannot be anything due and payable on that account.

8. On the issue of the third bill according to Mr. Ghosh a serious dispute has arisen because of the fact that the signature appearing at the

consignment note according to the company, is a forged signature and the company has in fact not received the said consignment note and there

cannot be any due on that account.

9. Let me first deal with the first contention raised by Mr. Ghosh. In the case of State Trading Corporation of India Ltd. Vs. Punjab Tanneries

Ltd., , the learned single judge of the Punjab and Haryana High Court held that on a mere plea that the debt was not paid, the winding up of the

company is not a matter of course specially when the petitioner had already resorted to a civil suit for recovery of ""disputed debt"". His Lordship

further held that the machinery for winding up could not be allowed merely as a means for realising a debt due from the company. In the case of

N.N. Consultants Pvt. Ltd. Vs. Khatema Fibres Ltd., , the learned single judge of the Allahabad High Court held that when allegations and

counter-allegations had been made by both the parties alleging fraud, forgery and manipulation of documents and it was evident that the directors

of both the companies were relations who had fallen out and serious disputes had emerged resulting in the filing of a suit and a company petition,

the winding up petition failed solely on the said ground. In the case of The Bank of Nova Scotia Vs. RPG Transmission Limited, another learned

single judge of the Delhi High Court held that since a recovery proceedings by the bank was pending before the Debts Recovery Tribunal on the

self-same cause of action the winding up petition was not maintainable. In that decision, his Lordship also considered the 1993 Act and came to a

conclusion that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is a more efficacious remedy than that of winding up

proceedings.

10. Considering the above, in my view none of the decisions cited by Mr. Ghosh can be made applicable, in the instant case. I have failed to

appreciate any dispute whatsoever raised either in the opposition or in the statutory notice. Mere raising of dispute would not term it as a dispute

which could resist admission of winding up proceedings. There are decisions to the contrary where parallel proceedings were allowed. Pendency

of a suit cannot operate as a bar to maintain a winding up proceeding. In a suit the plaintiff claims decree for the amount payable by the defendant

whereas in a winding up proceedings, the petitioning creditor prays for winding up of the company. One is the legal relief, other is the statutory right

granted to a creditor under the provisions of Section 433 of the Companies Act, 1956.

11. Hence, with due respect I am unable to agree with the proposition that mere pendency of a civil suit can itself be a ground for resisting a

winding up proceeding. The first contention of Mr. Ghosh is thus rejected.

12. On the second issue I am unable to appreciate the contention of Mr. Ghosh that from a plain reading of pleadings it appears that the bills were

raised on and from February 8, 2001 and the winding up petition was filed on February 6, 2004. How it could be barred by limitation is a question

whose answer is not known to me.

13. On the third issue Mr. Ghosh has not been able to draw my attention to any contemporaneous evidence to show that the first two bills stood

adjusted against the amount payable to the company by the petitioner. On the contrary there are series of correspondence made by the petitioning

creditor demanding the aforesaid sums which stood unreplied by the company until a statutory notice of demand was served upon them. Hence I

am unable to accept the contention of Mr. Ghosh on that score.

14. On the fourth and the last question I am also unable to agree with Mr. Ghosh that there has been bona fide dispute raised by the company on

the third bill. In case the consignment note was not raised by the company what could prevent them from making a clarification to that effect when

series of correspondences were made by the petitioning creditor demanding payment of the bills including the third bill ? It is true that the winding

up is a discretionary relief. There has been also a view to the effect that this is an equitable mode of execution. In a winding up petition by a

creditor whose debt has not been paid by the company he is entitled to apply for winding up of the company u/s 433(e) of the Companies Act,

1956. To resist such winding up proceedings the company has to raise a bona fide dispute. In case the court finds that there is no bona fide dispute

raised by the company the order of admission is a matter of course. Whether the company would be wound up ultimately after it takes a

representative character could be seen at the appropriate stage.

15. Since I am convinced that the company has failed to raise any bona fide dispute, in my view, an order of admission is a matter of course. The

winding up petition thus is admitted for a sum of Rs. 7,64,423.15 together with interest at the rate of 6 per cent, per annum. The petitioning

creditor would be entitled to publish advertisement one in Sambad Pratidin and another in The Hindusthan Times. Publication in the Calcutta

Gazette is dispensed with. Returnable date of winding up petition is fixed six weeks from the date of advertisement. Both the advertisements must

be published on a particular date. The company is, however, given liberty to make payment of the aforesaid sum together with interest at the rate

of 6 per cent, per annum from the respective due dates of the bills in 12 equal monthly instalments commencing from July 1, 2004 and thereafter on

the first day of the each succeeding month. However, in default of payment of any one instalment the petitioner would be at liberty to make

publication in terms of the liberty granted herein. In case the amounts are paid the winding up petition would remain permanently stayed.

16. Mr. Aniruddha Roy learned Counsel appearing for the petitioning creditor has prayed for agreed interest in terms of clause 10 of the customer

agreement appearing at pages 15 and 16 of the winding up petition. Since I have exercised my discretionary power in admitting the winding up

proceeding I have granted interest at the rate of 6 per cent. Balance interest would be decided in the pending suit, if pressed by the plaintiff.

17. Urgent xerox certified copy of this judgment, if applied for, be supplied to the parties as expeditiously.