# CHAPTER XI

# COMPANIES ACT

Case No. 84

2002 46 CLA 281 (Bom.)

IN THE BOMBAY HIGH COURT

Appeal No. 725 of 2001 in Company Petition No. 203 of 2001

TATA FINANCE LTD.

Vs.

KANORIA SUGAR AND GENERAL MANUFACTURING CO. LTD.

A P SHAH & D B BHOSALE, JJ

11TH October 2001

Winding up petition - company sought to be wound up seriously disputing part of the liability - remaining portion prima-facie exceeds the limit of Rs. 500/- - merely because the precise amount is under question, winding up cannot be refused.

Cases referred to: Cardiff Preserved Coal & Coke Co. v. Norton (1867) 2 Ch App. 405: Cuthbert Cooper & Sons Ltd., In re (1937) Ch 392: Goel Bros. & Co. (P) Ltd. v. Yashodan Chit Fund (P) Ltd. (1980) 50 Comp Cas 356: Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwalla AIR (1976) SC 565: Madhusudan Gordhandas & Co v. Madhu Wollen Industries (1972 042 Comp Cas 125: Ofu lynx Ltd. v. Simon Carves India Ltd (1971) 41 comp Cas 174: Pfizer Ltd.v. Usan Laboratories (P) Ltd (1985) 57 Comp Cas 236: Tweeds Garages Ltd., In re (1962) 1 Ch 406: United Western Bank Ltd., In re.(1978) 48 Comp Cas 378 and Yendidje Tabacco Co Ltd. In re. (1916) 2 Ch 426.

Appearances: Mr. DD Madon Advocate for the appellants. Mr. Dwarkandas with Mr. R.D. Dhanukha & Mr. R.D. Yadav for the respondent.

JUDGMENT

1. The appellants before us are the original petitioners in Company Petition No. 203 of 2001 and in the appeal; they impugn the order of the learned Company Judge, dismissing the petition. In order to appreciate the order and the appellants' contentions with respect thereto, a few facts may be noted.

2. The appellants and the respondent- company had entered into a lease agreement dated 30th September, 1994 whereby the appellants had leased certain machinery to the respondent- company, on the respondent agreeing to pay Rs. 1,32,30,000 as lease rentals payable in instalment of Rs. 6,61,500 each quarter extended over a period of five years effective from 16th November, 1994 till 15th November, 1999. It seems that the respondent committed default in payment of the lease rentals and according to the appellants sum of Rs. 2,70,14,476 consisting of arrears of lease rentals and service charges is due from the respondent. To the petition, the appellant annexed correspondence between the parties including the reply dated 16th December, 2000 to the statutory notice dated 17th October, 2000 wherein the respondent-company admitted its liability but shown its inability to pay the amount due to various factors.

3. It appears to have been urged before the learned Company Judge that the terms and conditions stipulated in printed agreement were oppressive, coercive and in particular a grievance was made that the Income –tax authorities disallowed the claim of depreciation on the machinery and , therefore, the appellants have increased the lease rentals to the tune of Rs. 11,85,400 instead of Rs. 6,61,500 per quarter and added thereto service charges on appears of lease rentals at the rate of 30 per cent per annum. It was contended that the petition was filed with ulterior motive to pressurise the respondent to succumb to the coercive tactics of the appellants.

4. The learned Company Judge seems to have proceeded on the basis that the entire claim was based on the fact that the Income- tax authorities have disallowed the claim of the appellants for depreciation of the leased machinery. We may mention that the learned Judge was entirely wrong in holding that the claim is based solely on disallowance of depreciation by the Income –tax department. It is conceded before us by the learned counsel for the respondent that the outstanding lease rentals are Rs. 29,46,000 and the amount of service charges as per agreement is Rs. 28,36, 544. These are figures up to end of September 2001.

5. The learned Company Judge after referring to the decision of the Supreme Court in the case of *Hind Overseas (P) Ltd. v. Raghunath Prasad Jhunjhunwalla AIR 1976SC 565* held that the appellants ought to resort to the remedy of arbitration as provided in the printed agreement to resolve dispute between the parties. The learned Judge observed that:

" The petitioners have bypassed the regular civil remedy of civil suit and also bypassed the arbitration clause in the lease agreement and have resorted to this extraordinary remedy which is to be resorted sparingly where there are no genuine dispute and the debt is an admitted liability. The petitioners have abused the process of the court and the law by filing this petition."

The learned Judge, therefore, dismissed the petition with direction to the appellants to pay costs of Rs. 25,000.

6. We are afraid we cannot agree with the view expressed by the learned Judge. In the first place, the learned Company Judge was not right in holding that the appellants ought to resort to the remedy of arbitration as per the agreement. It seems that the learned Judge has based his view on the observations of the Supreme Court in *Hind Overseas (P) Ltd. (supra)* which reads, thus:

> " 36. Section 433 (1) under which this application has been made has to be read with section 433 (2) of the Act. Under the latter provisions 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 pursing that other remedy.
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> " 37. Again under sections 396 and 397 of the Act there are preventive provisions in the Act as a safeguard against oppression in management. These provisions also indicate that relief under section 433 (f) based on the just and equitable clause is in the nature of a last resort when other remedies are not efficacious enough to protect the general interests of the company."

7. In the case of *Hind Overseas (P) Ltd. (supra),* the question that was raised before the Supreme Court related to the scope of section 433(f) of the Companies Act, 1956 ("the Act") and in particular whether the principles applicable in the case of dissolution of partnership could be invoked in the case of company. In that case a petition under section 433(f) for winding up was filed on the ground that the company was formed as a result of mutual trust and confidence and the company in substance is partnership and, therefore, the principles of partnership would be attracted. The learned single judge of Calcutta High Court relaying on an English case *Cuthbert Cooper & Sons Ltd. in re.* (1937) Ch 392 held that there was no evidence of mismanagement or misapplication either as regards share – holders or

as regards directors. It was held that directors disputes are no ground for winding up on the facts and circumstances of the case. In appeal the Division Bench relaying upon the decision in *Yendidje Tobacco Co.Ltd., In re. (1916) 2 Ch 426* held that condition Nos. 2,3 and 4 mentioned therein were unquestionably fulfilled. The Supreme Court after referring to various decisions of English courts and courts in India, held that the sixth clause of section 433 namely just and equitable is not to be read as being *ejusdem generis* with the preceding five clauses. While the five earlier clauses prescribe definite conditions to be fulfilled for the one or the other to be attracted in a given case, the just and equitable clause leaves the entire matter to the wide and wise judicial discretion of the court. The only limitations are the force and content of the words themselves, just and equitable. In this context the Supreme Court referred to sections 396 and 397 of the Act which are intended to act as safeguards against oppression in management and observed that the court may refuse to make order of winding up if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably is seeking to have the company wound up instead of pursuing that other remedy. It was held that sections 397 and 398 contain preventive provisions and those provisions also indicate that relief under section 433(f) based on just and equitable clause is in the nature of last resort when other remedies are not efficacious enough to protect the general interests of the company. These observations have no application to the present petition for winding up which is instituted under 443(1) (e) of the Act on the ground that the company is unable to pay its debt. Reliance placed on the decision of *Hind Overseas (p) Ltd. (Supra)* was, thus, clearly misconceived. The learned Judge was. therefore, not right in holding that the appellants ought to have pursued the alternative remedy of arbitration or suit.

8. It is well settled that a winding up petition should not be allowed to be taken as a means to recover debt from the company. It is not a legitimate way to enforce payment of debts which are bona fide disputed by the company and cannot be used as a weapon to pressurise and coerce the company to make payments. But it is also equally well settled that when the debt is undisputed and the defence is not bana fide and genuine, the court will not act upon defence that the company has liability to pay but chooses not to pay and the creditors will, in such case, be entitled to a winding – up order. This is clear form the following observations of the Supreme Court in *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (1972) 42 Comp Cas 125:*

" Two rules are well settled. First, if the debt is bonafide disputed and the defence is a substantial one, the court will not wind up the company. The court has

dismissed a petition for winding –up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. *(See London and the Paris Banking Corpn., Re. 4)* Again, a petition for winding–up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. *(See Brighton Club and Horfold Hotel Co. Ltd. Re. 5)*

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay the particular debt. (See A Company, Re. 6) Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages Ltd., Re.7). The principles on which the court acts are first 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."

9. In *United Western Bank Ltd., In re.* (1978) 48 Comp Cas 378 (Bom.) Kania, J, (as he then was) observed that when the defence is that the debt is disputed, the court has to see first whether the dispute on the face of it is genuine or merely a cloak to cover company's real inability to pay the debts. The inability is indicated by its neglect to pay the debt within three weeks, after proper demand was made. He added that neglect is to be assessed on the facts of each case.

10. *In Goel Bros & Co. (P) Ltd. v. Yashodan Chit Fund (P) Ltd. (1980) 50 Comp Cas 356 (Bom.)* another Single Judge of this court, Agarwal, J, held that after the creditor establishes that the debt is clear, valid in law, unimpeachable and indisputable, the creditor is entitled to a winding up order *ex debito justiae.* But if the debt is disputed and the dispute is bonafide and genuine, no winding up order can be made. He clarified that neglect to pay is not equivalent to omission to pay for it requires that such omission is without reasonable cause or valid excuse.

11. Applying now, the law as above, to the case in hand, can it be said that the defence raised by the company is legitimate and the debt of company is bona fide disputed. In the instant case, the company's case is that the total amount of more than rupees two crore is payable by the company. It is true that there is some dispute

about the claim of enhanced lease rentals on account of disallowance of claim of depreciation by the income –tax department. There is however, absolutely no dispute for the outstanding lease rentals which are in the range of nearly Rupees thirty lakhs. The terms of agreement are also very clear and in case of default, the company is liable to pay the service charges. When a part of claim made by the creditor is seriously disputed but the remaining portion is prima facie appear to exceed the limit of Rs. 500 indicated in section 434 of the Act, it would be unjust to refuse wind up order on the ground that there is dispute as to precise amount owned. *Tweeds Garages Ltd., In re. (1962) 1 Ch 406:* it was clearly held that it would be unjust to refuse a winding up order to the petitioner who has admittedly owned moneys which have not been paid merely because there is a dispute as to the precise amount owning. Almost to the same effect are the observations in *Cardiff Preserved Coal & Coke Co. v. Norton (1867) 2 Ch App. 405.*

12. the learned Single Judge of Calcutta High Court in *Ofu Lynx Ltd. v. Simon Carves India Ltd.* (1971) 41 Comp Cas 174 has observed:

> " I, therefore , hold that a notice under section 434 of the Companies Act, 1956, will not be rendered invalid only because of the fact that the amount of debt mentioned in the notice may not be exactly correct amount of the debt due, provided the amount mentioned in the notice include debt due and exceeds sum of Rs. 500."

13. The judgment of Single Judge of Calcutta High Court had been cited with approval by the Division Bench of this Court in *Pfizer Ltd.v. Usan Laboratories (P) Ltd., (1985) 57 Comp cas 236.* Therefore, merely because a part of the claim was disputed by the company, the defence cannot be said to be legitimate and bona fide.

14. Mr. Dwarkadas, learned counsel appearing for the respondent –company, stated that the company is ready and willing to pay the admitted lease rentals amounting to Rs. 29,46,000 and 25 per cent of the service charges, i.e., Rs. 7,06,000 without prejudice to its rights and contentions. He stated that above amounts will be paid within three months. Both the parties agreed that the dispute should be referred to the arbitration as per the agreement. Mr. Madon appearing for the appellants stated that the appellants have nominated Mr. A.Y Bookwalla as an arbitrator, which is acceptable to the respondent- company. In the result the order of the learned Single Judge is set aside. The respondent –company is directed to pay to the appellants Rs. 36,52,000 within three months. If the respondent- company fails to pay this said

amount within the said period the company petition shall stand admitted and the appellants will advertise the same in Free Press Journal, Loks-atta and Maharashtra Government Gazette and deposit a sum of Rs.2000.

15. All contentions of the respondent – company in respect of the service charges and enhanced lease rentals are left open. Ad interim order granted by this court to continue for a period of six weeks.

16. Appeal is disposed of.

The parties to act on an ordinary copy of this judgment duly authenticated by the sherister dar. personal secretary of this court.