

Case No. 85

2005 (1) CTC 524

IN THE HIGH COURT OF MADRAS

A. Kulasekaran, J.

Company Petition No. 193 of 2002

20.1.2005

Vivek Hire Purchase & Leasing Limited. No. 150, Luz Church Road,  
Mylapore. Chennai-4 rep. by its Vice President, Mr. Shankar. Petitioner

Vs.

M/s. Paisapower.com Private Limited, New No. 169,  
2nd Floor, T.T.K. Road, Alwarpet, Chennai-600 018. Respondent

Companies Act, 1956 - Section 433 and 434 - winding up petition - debtor company raising a dispute regarding liability - dispute must be bonafide - if dispute raised is not bonafide and made for the purpose of resisting the application, courts duty to refuse relief to the debtor company.

#### CASES REFERRED

*Lord Krishna Bank Ltd v. Express (Malayalam) (P) Ltd.. SEBI & Corporate Laws Reports-2003 (4) 148 Ker (Para 3); Viral Filaments Ltd. v. Industrial Bank Ltd.. 2001 (4) Com.LJ.44 (Bom) (Para 3); Bank of Nova Scotia v. RPG Transmission Ltd., 2003 (I) Be 270 (Para 3); NEPA Ltd v. Jnanamandal Ltd.. (107) Comp Case. 240(All.). ( P a r a s 3,11); Central Bank of India v. Sukhani Mining and Engineering Industries (P) Ltd.. 1977 (47) Camp. Case 1 (Para 3); Karam Chand Thapar and Bros. Sales Ltd. v. Acme Paper Ltd.. AIR 1994 Delhi J (Para 3); All India General Transport Corporation Ltd. v. Raj Kumar Mittal. 1978 (48) Comp Case 604 (Para 3); Lakshmi Sugar Mills Company (P) Ltd. v. National Industrial Corpora/ion Ltd.. 1968 (38) Comp Case 384 (Para 3); Madhusudan Gordhandas and Co V. Madhu Woollen industries Pvt Ltd. Mahendra B. Parikh and others. (42) Camp cases 125 (SCC) (Paras 3.15).*

Mr. KJ. Rebello, Advocate for Respondent.

Mr. T.K. Seshadri, Advocate for Petitioner.

## ORDER

1. The petitioner carries on business of hire purchase and lease financing of machineries and other materials. The respondent company approached the petitioner with a request to provide hire purchase finance in relation to purchase of eight Compaq laptop computer and Compaq server. The petitioner, after discussion, accepted the request for hire purchase of eight laptop computers and one computer server and Hire Purchase agreement No. 52071 dated 26.9.2000 was entered into between them. The total hire purchase amount was Rs. 15,60,426 repayable in 24 monthly instalments, in which the first instalment commences from 26.9.2000 and the last instalment was on 26.8.2002. The respondent is liable to pay Rs.65,018 for the first 23 instalments and Rs.65,012 towards 24th instalment. The respondent also agreed to pay penal interest at the rate of 36% per annum for delayed payments. The suppliers of the assets raised invoices directly in the name of the petitioner. The respondent paid instalments upto March 2001 and sent a letter dated 23.4.2001 requesting the petitioner for moratorium for repayment of instalments, which was also granted by the petitioner. Thereafter, the respondent failed to pay the instalments. The petitioner caused inspection of the respondent premises and found that out of 8 laptops, 4 are available in Chennai and the remaining items were stationed in other cities and the server was located at the premises of VSNL at Chennai. The petitioner sent letter dated 28.7.2001 reminding the respondent the due amount of Rs.2,72,426 as on that date. By another letter dated 25.8.2001, the petitioner called upon the respondent to voluntarily surrender the assets taken as hire purchase. A sum of Rs.20,000 was paid by the respondent by way of cheque dated 30.8.2001 enclosing a letter dated 27.8.2001 and informed that steps are being taken to bring the laptops to Chennai. By letter dated 29.8.2001, the respondent also agreed to surrender 4 laptops to the petitioner on 10.10.2001. On 20.10.2001, the respondent was called upon to pay the outstanding amount of Rs.4,09,444 and requested to surrender the other 3 laptops as agreed in their letter dated 29.8.2001, but no action was taken by the respondent. The petitioner has sent a letter dated 26.11.2001 calling upon the respondent to pay the outstanding amount of Rs.11,41,092 as on that date. On 30.11.2001 and 1.12.2001, the respondent surrendered 2 laptops to the petitioner. The petitioner also paid Rs.44,082 payable by the respondent to VSNL, as requested by the respondent company, enabling VSNL to release the server to the respondent, which was handed over to the petitioner. Another laptop was also handed over by the employee of the respondent to the petitioner, thus the petitioner had recovered 4 laptops and one server. The petitioner sold the laptops at Rs.3,50,886 and the said amount was given credit to the hire instalment payable by the respondent. The

respondent has filed a suit O.S. No. 3006 of 2002 before the XIII Assistant City Civil Court, Chennai praying for a declaration to declare that the petitioner is not entitled to seize the assets and the same is pending. On 22.6.2002. the petitioner issued a notice under Section 434 of the Companies Act. calling upon the petitioner to pay the sum of Rs.9,46,503 due as on that date. The said notice was received by the respondent, but not paid the amount nor replied to the notice.

2. The learned counsel appearing for the petitioner submits that the above said documents shows that the respondent is liable to pay undisputed sum of Rs.9,70,689 as on 7.8.2002 along with interest calculated at 30% per annum and further the respondent company is deemed to be unable to pay its debts to the petitioner herein and other creditors and prayed for winding up of the respondent company.

3. The learned-counsel for the petitioner relied on the below mentioned decisions in support of his case.

i) ***Lord Krishna Bank Ltd v. Express (Malayalam) (P) Ltd., SEBI & Corporate Laws Reports 2003 (4) 148 Ker.*** wherein it was held thus:

“As the Debt Recovery Tribunal cannot grant a relief of winding up of the company and the same can be granted only by the Company Court, the reliefs are different, and the winding up proceedings also can be continued or initiated before the Company Court. A similar approach was made by the Division Bench of the Bombay High Court in *Viral Filaments Ltd v. Industrial Bank Ltd.*, 2001 (4) Com.LJ.44 (Bom). The learned counsel for the respondent company placed reliance on a decision of the Delhi High Court in *Bank of Nova Scotia v. RPG Transmission Ltd.*, 2003 (1) Be 270 wherein a contrary view was taken. The above judgment also does not say that once the creditor approaches the Debt Recovery Tribunal, he cannot approach the Company Court for other reliefs under the Company Law. In the above judgment it has been observed:

‘A possible exception could be where a judicial determination has already taken place, such as where a decree has been passed by a Court of competent jurisdiction, or where, as in the *Allahabad Bank’s case (supra)*, a decree has already been passed by the Debt Recovery Tribunal. In such cases, the Company Judge would immediately proceed to the second limb of his duties’ under Sections 433 and 434 of the Companies Act, that is post-admission of the petition. At this stage he would appoint a Liquidator and decide on the distribution of the proceeds of the company. It is only in the second

limb of jural activity that an actual difference between recovery proceedings and winding up proceedings becomes manifest.”

The above observation would make it clear that the pendency of a proceeding before the Debt Recovery Tribunal is not a total bar from proceedings with the petition for winding up where the reliefs are different. An order for winding up cannot be sought as a means of recovery, of the debt due from the company. Winding up order can be passed on all or any of the grounds specified under Section 433 of the Companies Act. Section 433(e) says that the Company may be wound up if the company is unable to pay its debts. If the company is financially sound and capable of paying off its debts, the company cannot be wound up. The Company Court is not competent to pass a decree for the amount due to the bank and proceed to recover the same without passing an order of winding up. As the amount due to the bank had been disputed, the creditor bank had to approach the Debt Recovery Tribunal for a decree for the amount”

ii) **NEPA Ltd. v. Inanamandal Ltd.,** (107) Comp.cases 240(All.) wherein a learned single Judge held thus:

“It was then contended that as a civil suit has already been filed by the respondent-company against the petitioner, therefore, the winding-up petition should either be dismissed or kept in abeyance. I am unable to accept the said submission. Different High Courts have taken the view and the matter appears to be well settled that institution of a suit for realisation of dues does not invalidate the winding up proceedings. The Patna High Court in the case of *Central Bank of India v. Sukhani Mining and Engineering Industries (P) Ltd.*, 1977 (47) Camp. Case 1, had observed that there was no provision in the Act which ousts the jurisdiction of the Court in continuing and deciding the winding up proceedings inspite of the fact that there was a suit by a creditor for realisation of its debt. It was further held that a winding-up proceeding is not merely for the benefit of the petitioner but of all its shareholders, creditors or contributories. Therefore, merely because a creditor has filed a suit against the company, the winding-up proceedings cannot be stayed. A similar view has been taken by the Delhi High Court in the case of *Karam Chand Thapar and Bros. Sales Ltd. v. Acme Paper Ltd.*, AIR 1994 Delhi 1, the Calcutta High Court in the case of *All India General Transport Corporation Ltd. v. Raj Kumar Mittal*, 1978 (48) Comp Case 604 and the Punjab High Court in the case of *Lakshmi Sugar Mills Company (P) Ltd. v. National Industrial Corporation Ltd.*, 1968 (38) Camp. Case 384. Respectfully agreeing with the said decisions, I do not find any force in the said submission made by the learned counsel for the respondent.”

iii) ***Madhusudan Gordhandas and Co v. Madhu Woollen Industries Pvt Ltd., Mahendra B. Parikh and others***, 1972 (42) Camp. cases 125 (SC) wherein the Honorable Supreme Court held thus:

“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 unreasonable (See *In re London and Paris Banking Corporation*). 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 *In re Brighton Club and Norfolk Hotel Co Ltd.*).

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 that particular debt. (See *In re A Company*). 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 *In re Tweeds Garages Ltd.*). 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.”

4. Mr. Seshadri, learned counsel for the petitioner, relying, on the above judgments prayed this Court to order winding up of the respondent company.

5. The learned counsel appearing for the respondent, relying on the counter submits that the respondent has paid atleast 1/3rd of the instalments and down payment of Rs 4,06,000 as such the respondent is the owner of the assets. Whereas, ‘the petitioner, without prior permission or notice to the respondent has sold the computers and server for a paltry amount, which would have fetched Rs.8,65,500; that the petitioner has calculated exorbitant interest at the rate of 36% per annum; that the amount of Rs.11,41,092 quoted as due as on 26.11.2001 is incorrect; when the right of the petitioner is challenged by the respondent by filing a civil suit and the same is also pending and also the fact that the petitioner himself has filed a suit before this Court for recovery of amount, the petition for winding up is not maintainable and prayed for dismissal of the petition.

6. The issues involved in this company petition is within the ambit of Section 433(e) and 434(1)(a) of the Companies Act, 1956. Section 433 (e) and 434 (1) (a) of the Companies Act runs as follows:

"433. A company may be wound up by (Tribunal) Court,

.....

(e) if the company is unable to pay its debts.

434. Company when deemed unable to pay its debts.

(1) A company shall be, deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding (one lakh) rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

7. Sections 433 and 434 of the Companies Act are dealing with cases in which a company may be wound up by the Court. Section 433(e) is one of the six clauses in which the Company may be wound up by the Court *i.e.*, if the company is unable to pay its debts. Under Section 434, a creditor should make a demand requiring the company to pay the amount due to the creditor. The mode of making such payment is also mentioned in Section 434. Under sub-clause (a) of Section 434(1), if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding rupees one lakh (substituted for Rs.500 by Companies (Second Amendment) Act, 2002) then due, has served on the company, by, causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

8. The petitioner herein has sent a statutory notice dated 22.6.2002 by registered post with acknowledgment due calling upon the respondent to pay the sum of Rs.9,46,503 within twenty one days. The said notice was also received by the respondent company, but the respondent neither paid any amount nor given reply.

9. The power to wind up a company should not be used unless there is a strong ground for it. It is well settled that the presentation of a petition for winding up is a abuse of process of the Court, if the debt, on which the petition is founded is disputed *bona fide*. Where it is not disputed and the Company is unable to pay a large sum lawfully due and payable by it, the creditor is entitled to apply for winding up. If the debt claimed from the company is *bona fide* disputed, a petition for winding up of the company on the ground of its inability to pay its debt is liable to be rejected.

10. The company Court should not look at the evidence from the point of view of conclusive proof of the transaction. What the Court should examine is whether the evidence adduced in any way supports the assertion of the company in its petition that it is tenable defence to be disputed. In order to determine whether a company is able to pay its debt or not, the matter to be considered is the company is able to meets its liability as and when they accrue due. It will depend upon the facts and circumstance of each case and the Court will always have to consider them to come to a conclusion as to whether the dispute is *bona fide* one or is only manufactured or raised and the conduct of the party is also one of the relevant considerations to determine the question as to whether the dispute about the debt is *bona fide* or not. If the Court, on examining the facts of a case has come to the conclusion that there existed *bona fide* dispute with regard to the debt, on the basis of which the winding up petition has been presented, then the Court has to refuse to entertain the petition. On the other hand, if the Court comes to the conclusion that the dispute sought to be raised is not *bona fide* and is only manufactured or created for the purpose -of resisting the application, it is the duty of the Court to refuse to grant any relief to the company sought to be wound up.

11. In the above view, I now consider the facts involved in the case on hand. The respondent entered into a hire purchase agreement with the petitioner and availed Rs.15,60,426, which is payable in 24 monthly instalments at the rate of about Rs.65,000 per month. As per the said agreement, the respondent company has made instalments upto March 2001 and sent a letter dated 23.4.2001 requesting the petitioner for moratorium for repayment of instalments, which was also granted by the petitioner. Even after the period of moratorium, the respondent failed to pay the instalments. During the inspection of the respondent premises, it was found by the petitioner that out of eight computers, four computers were stationed in other cities and the server was located at the premises of VSNL, Chennai. The petitioner sent letter dated 28.7.2001 reminding the respondent the due amount of Rs.2,72,426 as on that date. By another letter dated 25.8.2001, the petitioner called upon the respondent to

surrender the assets taken on hire purchase. By letter dated 29.8.2001, the respondent agreed to surrender the four laptops on 10.10.2001. On 20.10.2001, the petitioner called upon the respondent to pay the outstanding amount of Rs.4,09,444 due as on that date and requested the respondent to surrender the other three laptops, but no action was taken by the respondent. On 26.11.2001, the petitioner sent a letter calling upon the respondent to pay the outstanding amount of Rs. 11,41 ,092 due as on that date. It is also brought to the notice of this Court that the petitioner has paid Rs.44,082 payable by the respondent to VSNL, on their request, enabling VSNL to release the server to the respondent. The petitioner also sold the laptops at Rs. 3,50,886 and the said amount was given credit to the hire instalment payable by the respondent. In the meanwhile, the respondent filed a suit O.S. No. 3006 of 2002 before the XIII Assistant City Civil Court, Chennai praying for a declaration to declare that the petitioner is not entitled to seize the assets and the same is pending.

Admittedly, no interim order has been passed against the petitioner by the said Court. On 22.6.2002, the petitioner issued statutory notice under Section 434 of the Companies Act, calling upon the respondent to pay the sum of Rs.9,46.503 due as on that date. The said notice was also received by the respondent, but the respondent has neither paid any amount nor replied to the said notice. The quantum of amount is now disputed by the respondent on the ground that the seized laptops were sold by the petitioner for a paltry amount and if they were sold for certain higher amount the outstanding balance should be lesser than claimed.

12. The above said facts make it clear that the respondent is unable to pay its debt. Indeed, in one of the communications dated 30.10.2001, the respondent admitted their inability by stating we express our inability to make any additional payment at present. But we hope to start making payments from the month of December 2001. Of course, the petitioner has filed a suit for recovery of the amount against the respondent to avoid limitation, which is pending. It is well settled that the said suit is not a bar for passing orders of winding up. Hence, the judgment relied on by the counsel for the petitioner *Nepa Ltd v. Jnanamandal Ltd.*, (107) Comp Cases 240 (All.) mentioned supra squarely applicable to the facts of the case on hand.

13. The argument of the counsel for the respondent is that when the suit filed by the respondent in O.S. No. 3006 of 2002 before the XIII Assistant City Civil Court, Chennai for a declaration to declare that the petitioner is not entitled to seize the assets is pending, the company petition is not maintainable. The prayer sought for in



O.S. No. 3006 of 2002 is not to seize the immovables which are covered under the hire purchase agreement without following due process of law. The learned counsel for the petitioner submits that in the event of default by the hirer namely the respondent, the right is given under the hire purchase agreement to re-possess the hired goods. This Court need not go into the validity of the said suit. However, this Court is entitled to investigate the question as to whether a dispute has been manufactured in order to delay or defeat the realisation of dues of the petitioner and is merely a cloak for inability of the company to pay its just debts. Analysing the facts mentioned above, this Court is of the considered view that the said suit, which is filed for limited relief is merely a cloak for inability of the respondent to pay its just debts and the same may be ignored since the winding up is necessary in public interest. In view of the same, the said suit is not a bar to proceed against the respondent for winding up.

15. In the decision *Madhusudan Gordhandas and Co., v. Madhu Wollen Industries Private Limited*, 1972 (42) Comp Cases 125 (SC) the Honourable Supreme Court, cited Supra, while dismissing the petition for winding up has held that the principle on which the Court shall act are (i) the defence of the company is in good faith and one of substance (ii) the defence is likely to succeed in point of law (iii) the company adduces *prima facie* proof of the facts on which the defence depends (iv) 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 that particular amount and (v) where; 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 the winding up order without requiring the creditor to quantify the debt precisely.

16. Applying the above said principles laid down by the Apex Court, the defence of the respondent is not in good faith and one of substance, the defence is not likely to succeed in point of view and no *prima facie* proof of the facts on which the defence depends are made.

17. In view of the said discussion, the company petition is ordered as prayed for. The petitioner is directed to deposit a sum of Rs.10,000 with the official liquidator. The Official Liquidator is directed to take charge of the assets of the respondent company. The directors of the respondent company are directed to file statement within three weeks from date of receipt of a copy of this order.

RSN