

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Order in Company Petition 13 of 2006.

Order reserved on 27.8.2007.

Date of order October 31, 2007.

Arvind Aggarwal & another ...Petitioners.

Versus

Adhunik Packagers (P) Ltd. ...Respondents.

Coram

The Hon'ble Mr.Justice Dev Darshan Sud, J.

Whether approved for reporting?¹ Yes.

For the Petitioners: Mr. Anil K. Aggarwal,
Advocate with Mr. Suneet
Goel, Advocate.

For the Respondents: Mr. Rahul Mahajan,
Advocate.

Dev Darshan Sud, J.

The petitioners have approached this Court under Sections 433(e), (f), 434 and 439 of the Companies Act, 1956 (hereinafter referred to as 'the Act') on the allegations that the respondent which is a private limited company incorporated under the Act is unable to discharge its debts due and payable to the petitioners.

¹ *Whether reports of Local Papers may be allowed to see the judgment?* Yes.

It has been averred that the respondent took loans from the petitioners from time to time for the purposes of utilizing the money in its business. These loans were advanced to the respondents by way of cheques and bank drafts and the amount due and outstanding to the petitioners has been acknowledged as debts outstanding in the balance sheets for the year ended 31.3.2003. The petitioners aver that the acknowledgement in the balance sheet which also stands duly filed before the Registrar of Companies is that a sum of Rs.10,98,228/- is due to petitioner No. 1 and Rs.10,26,997/- to petitioner No. 2. Balance sheet showing the amount due has been filed as Annexure P-2 with the petition. In the subsequent balance sheets filed by the respondents before the Registrar of Companies for the financial year ended 31.3.2004 and 31.3.2005, the petitioners have been accepted as unsecured creditors. The allegations against the respondents are that the company had issued cheques for payment of these unsecured loans as reflected and accepted in the balance sheet, but they have been returned to them with the remarks "account closed". Criminal complaints under Section 138 of

the Negotiable Instruments Act, 1881 have been filed against the respondents which are pending in the Court of the Chief Judicial Magistrate at Patiala.

Statutory notice in terms of Section 434 of the Act was issued to the respondent at its registered office calling upon it to pay the amount alongwith interest. In reply to the notice, the defence which has been taken by the respondents is, according to the petitioners, sham and one which is against the statutory record. In these circumstances, a prayer is made that this Court exercising its powers under Sections 433 and 434 of the Act should order the winding up of the Company.

In reply, the respondents have resisted the application for winding up, pleading, interalia that the father and brother of petitioner No. 1 and father-in-law and brother-in-law of petitioner No. 2 are directors of one company incorporated under the name and style of Lotus Food Stuffs Pvt. Ltd. having its registered office at S-3, Second Floor, LSC, Plot No. 7, Pocket H, Sarita Vihar, New Delhi-44. The respondents submit that an account of M/S Adhunik Packagers Private Limited (Respondent Company) was opened in Canara Bank, Sarita Vihar

Branch, New Delhi. It is stated that the bank is located on the ground floor in the same building in which the office of Lotus Food Stuffs Pvt. Ltd. is operating. This account, according to the respondent, was opened with Mr. Pankaj Aggarwal, brother of petitioner No. 1 and brother-in-law of petitioner No. 2 being identifiers/introducer. The reason for opening this account at New Delhi was that business receipts of the respondent was received by cheques payable at New Delhi. In order to facilitate the collection of the payments, it was thought fit and proper to open the account at Delhi over which the petitioners through their relatives were having active control. The reply states the gist of the defence in the following words "as the work and factory of Adhunik Packagers Private Limited were at Parwanoo and no Director or any other employee of Adhunik Packagers Pvt. Ltd. was stationed at New Delhi, the pay in slips, deposit vouchers were being filled up by the employees of M/S Lotus Food Stuffs Pvt. Ltd. and also another company M/S Lotus Marketing Corporation of Mr. Pankaj Aggarwal and Mr. K.L. Aggarwal. Even blank cheques which were signed by the Director of Adhunik

Packagers Pvt. Ltd. were kept by Mr. Pankaj Aggarwal so as to enable him to make the payment to different parties from the account of M/S Adhunik Packagers Pvt. Ltd. on instruction of M/S Adhunik Packagers Pvt. Ltd. It is submitted that as blank cheques which were signed by Mr. Yogesh Kumar, Director of M/S Adhunik Packagers Pvt. Ltd. were with Mr. Pankaj Aggarwal, he utilized the blank cheques and transferred the amount from the account of M/S Adhunik Packagers Pvt. Ltd. at Canara Bank, Sarita Vihar, New Delhi in the accounts of M/S Lotus Food Stuffs Pvt. Ltd. Even Mr. Pankaj Aggarwal handed over two blank cheques to the petitioners who presented them to the Canara Bank at Sarita Vihar after the account stood closed resulting in proceedings under Section 138 of Negotiable Instruments Act, 1881. It is submitted that when M/S Adhunik Packagers Pvt. Ltd. came to know that Mr. Pankaj Aggarwal has transferred the amount from M/S Adhunik Packagers Pvt. Ltd. bank account at Canara Bank in Sarita Vihar to M/S Lotus Food Stuffs Pvt. Ltd. without their knowledge and in breach of trust the replying respondent objected to the same and asked Mr. Pankaj Aggarwal to remit back the

amount and in failure they will proceed against him. Mr. Pankaj Aggarwal and the petitioners who are related to Mr. Pankaj Aggarwal told M/S Adhunik Packagers Pvt. Ltd. that the amount which Mr. Pankaj Aggarwal had credited in account of Lotus Foods Stuffs Pvt. Ltd. (Lotus Food) from M/S Adhunik Packagers Pvt. Ltd. through cheques which were in his possession will be adjusted with the amount which is due to the petitioners. The petitioners also acknowledged the same. Thus as of date the reply respondent has to recover a sum of Rs.22,90,000/- from M/S Lotus Food Stuffs Pvt. Ltd." The filing of the criminal complaints is not disputed. This, in a nutshell, is the defence which has been taken by the respondents."

I have heard the learned counsel for the parties and gone through the record.

When the matter was taken up for consideration on 27.8.2007, a statement was made by the Managing Director of respondent that he was ready and willing to pay the amount claimed by the petitioners as shown in the balance sheet of the company in case the criminal complaints under Section 138 of the Negotiable Instruments Act

pending in the Court of learned Chief Judicial Magistrate, Patiala are withdrawn.

It is undisputed before me that the audited balance sheets Annexures P-2, P-3 and P-4 have been filed by the respondents with the Registrar of Companies. A perusal of Annexure P-2, balance sheet ended 31.3.2003 shows that a sum of Rs.10,98,228/- is due and outstanding to petitioner No. 1 and Rs.10,26,977/- to respondent No. 2. Similarly, balance sheet for the years ended 31.3.2004 and 31.3.2005 again reflect the same position (these two balance sheets having been filed by the respondents with its reply as annexure R-2). Learned counsel for the respondents submits that a genuine and bonafide dispute has been raised by the respondents which requires adjudication by a civil Court and in the circumstances, the Company cannot be wound up. This petition and proceedings under Section 138 of the Negotiable Instruments Act have been instituted solely with a view to pressurize the respondents into submitting to the unlawful demands of the petitioner. This plea of the respondent cannot be accepted. The defence which has been raised is, to say the least, fanciful and far

fetched. It does not stand to reason as to why a company having its factory, registered and head office at Parwanoo, which is a developed industrial estate in Himachal Pradesh having all modern amenities of banking, should open a bank account in Delhi entrusting its operation to the persons as named in the reply. No company resolution authorizing the opening of such an account and the method of its operation has been placed on the record. To say the least, this defence defies common sense. The respondent would have this Court believe that merely because payments were received by cheques payable at Delhi/ New Delhi, that itself was a fact necessitating the opening of a bank account in Delhi authorizing its operation by persons not entrusted with the management of the Company, and not at Parwanoo which is an industrial town having all modern banking facilities.

Learned counsel submits that the company, being financially sound, no order for winding up should be passed. He places reliance upon a decision of this Court in Haryana Telecom Ltd. v. Himachal Futuristic Communication Ltd. (2006) 133 Comp Cas 351 (HP), holding that winding up petitions

cannot be used to seek enforcement for the realization of debts where there is a bonafide dispute and that it is not just and equitable to wind up a company where it would lead to financial ruin as the company was a solvent and a growing concern. He submits that proceedings under Section 138 of the Negotiable Instruments Act are pending and that in this event, it would not be open to the petitioners to refer to proceedings under the Companies Act.

Learned counsel for the petitioners places reliance on a decision of the Hon'ble Supreme Court in M/S Madhusudan Gordhandas & Com. v. Madhu Woolen Industries Private Ltd. (AIR 1971 SC 2600) holding:

"(20) Two rules are well settled. First if the debt is bona fide 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 Paris Banking Corporation, (1874) 19 Eq. 444). 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 Re. Brighton Club & Norfolk Hotel Co. Ltd., (1865) 35 Beav. 204).

(21) 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 Re: A Company 94 SJ 369). 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 Re: Tweeds Grages Ltd. 1962 Ch. 406). 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.

(22) Another rule which the Court follows is that if there is

opposition to the making of the winding up order by the creditors the Court will consider their wishes and may decline to make the winding up order. Under Section 557 of the Companies Act, 1956 in all matters relating to the winding up of the company the Court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered though perhaps the Court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st Edition, Page 742 as follows: "this right to a winding up order is, however, qualified by another rule, viz., that the Court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the Court in its discretion may refuse the order". The wishes of the creditors will however be tested by the Court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well

settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case (See Re: P. & J. Wacrae Ltd. (1961) 1 All. ER 302)."

He submits that in M/S Simon Carves India Limited v. M/S Punjab Sulphur Products Ltd., Chandigarh through its Managing Director (1986-1) PLR 501, these principles have been followed holding:

"It has been held in *M/S Madhusudan Gordhands & Co. v. Madhu Woolen Industries Private Ltd.* AIR 1971 SC 2600; that 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 on point of law and thirdly the Company adduces *prima facie* proof of the facts on which the defence depends."

He further submits that the defence raised by the respondent is not bonafide and that the petitioner cannot be coerced to give up its right under the

Negotiable Instruments Act to prosecute the respondent for inability to honour its cheques. He submits that the mere fact that the debt has been shown in the balance sheet itself amounts to acknowledgement and is not time barred. He places reliance on the decision of the High Court of Delhi in Rishi Pal Gupta v. S.J.Knitting and Finishing Mills (P) Ltd. (1998) 4 Comp L.J. 519 (Del) and State Bank of India v. Hedge & Golay Ltd. (Kar.) (1987) Vol. 62, Company Cases, 239. He submits that it is by now well settled that the petition is not barred merely because the company urges that the recovery is barred by time.

The principles regarding ordering winding up of a company for its inability to pay its debt are by now well settled and need no reiteration. The petition does not disclose any improper motive or oblique manner adopted for recovery by resort to the provisions of the Act to recover the debts due, acknowledged by the respondent in its balance sheets. Merely because a defence has been set up, would not by itself disentitle the petitioners from resorting to the remedy of recovering the amount due through the process of winding up. The defence

taken by the respondent has been reproduced in detail above to show that on the face of it, the dispute is not bonafide. The facts pleaded that the account was opened in Delhi in the premises where another company was functioning which was under the control of the relations/ acquaintances of the petitioners, only for the reason that the cheques received by the respondents were payable at Delhi / New Delhi and that blank cheques were issued to the employees / acquaintances of the petitioner which were mis-utilised, cannot be accepted without there being any material on record to justify these averments. It is indeed strange that a company operating from a very well established and modern industrial estate in Himachal Pradesh would not want to bank at a place where it has its registered office and all modern banking facilities or that blank cheques were being issued to the petitioners. There is no explanation coming forth from the respondents as to why on the facts pleaded, no action was taken to institute any proceedings/ complaints against the respondents for mis-utilizing alleged blank cheques etc. I refrain from expressing anything more on the defence taken by the

respondents, lest it causes any prejudice to the respondents in the pending criminal proceedings. The stand of the respondents that the amount as shown in the balance sheets as filed in the petition would be paid to the petitioners in case they withdraw the criminal complaints, also cannot be accepted. It is submitted and accepted by both the parties that the cheques which have been issued to the petitioners do not tally with the amount as shown due and outstanding to the petitioners in the balance sheet.

The contention of the learned counsel that since proceedings under Section 138 of the Negotiable Instruments Act are pending, the present petition would not be sustainable cannot be accepted. In Orkay Industries Ltd. and others v. State of Maharashtra and others, with Atash Industries (India) Ltd. and others v. State of Maharashtra and others with Jitendra R. Mehra v. State of Maharashtra and others with Pankaj K. Mehra v. State of Maharashtra and others (1999) 4 Comp LJ 491 (Bom), the High Court of Bombay has held:

"56. Mr. Manohar also submitted that till the disposal of all the winding

up petitions, there should be a stay of the proceedings under section 138 of the Negotiable Instruments Act. These submissions were based on the same grounds on which the proceedings were sought to be quashed. In our view, there can be no stay of the proceedings under section 138 of the Negotiable Instruments Act. As stated above, these proceedings have no bearing and are entirely unrelated and unconnected with the pending petitions. Even if an order of winding up is now passed and/or the order appointing provisional liquidator can have no effect on the proceedings under section 138 of the Negotiable Instruments Act. Therefore, there can be no stay of these proceedings. The authority relied upon by Mr. Manohar in the case of *Sunil Chandra* has no relevance at all. That was a case where the company court in exercise of its power under the Companies Act had granted a stay of proceedings. In this case, the Company Court has granted no stay of proceedings. In the view that we have taken, we see no reason to grant the stay of the proceedings under Section 138 of the Negotiable Instruments Act."

This case was considered in appeal by the Hon'ble Supreme Court in Pankaj K.Mehra and another v. State of Maharashtra and others (2000) 2 Comp LJ 47 (SC), holding:

"Can a company escape from penal liability under S. 138 of the Negotiable Instruments Act (for short "the NI Act") on the premise that a petition for winding up of the company has been presented and was pending during the relevant time? A Division Bench of the Bombay High Court [in Pankaj K. Mehra v. State of Maharashtra and others (1999) 4 Comp LJ 491 (Bom)] held that the company cannot avert liability on the mere ground that such a petition was presented prior to the company being called upon by a notice to pay the amount of the cheque. By holding so, the Division Bench dismissed a batch of writ petitions filed by different companies challenging the criminal proceedings initiated against them in different Criminal Courts for the offence under S. 138 of the NI Act. We have now to deal with the same question in this batch of appeals filed by special leave.

(30) We, therefore, feel that the legislature has thoughtfully used the word "fails" instead of other expressions as failure can be due to variety of reasons including his disability to pay. But the offence would be complete when the drawer "fails" to make payment within the stipulated time, whatever be the cause for such failure.

(31) The drawer of the cheque can have different explanations for the failure to pay the amount covered by the cheque. But no such explanations would be sufficient to extricate him from the tentacles of the offence contemplated in the section. Perhaps some kind of explanations would be sufficient to alleviate the rigor of the offence which may be useful to mitigate the quantum of sentence to be imposed. But that is no ground for consideration at this stage."

The decision of the Bombay High Court was affirmed. I need only observe that Section 138 of the Negotiable Instruments Act and proceedings under the Companies Act operate in different independent fields as considered in detail in both the judgments referred to hereinbefore.

In the facts and circumstances of the case, before the petition is admitted and winding up proceedings advertised, it is ordered:

- (a) That in case the respondent pays to the petitioners the amount as shown in the balance sheet for the financial year ending 31.3.2005 within a period of three months from the date of this order, this petition shall stand closed;
- (b) in case such payment is made, an affidavit stating these facts shall be filed in Court;
- (c) In case of failure to pay the amount, the petition be placed before this Court after the expiry of three months for further proceedings in accordance with law.

There shall be no order as to costs.

October 31, 2007 (PC). (Dev Darshan Sud), J.