IN THE HIGH COURT OF MEGHALAYA

Com.Pet.No.7/2013

M/s Walchandnagar Industries Limited, an existing Company having its Registered Office at 3 Walchand Terraces, Tardeo Road, Mumbai, 400034 and having its Office at Walchand House 167 A, 2/8 + 2/9, Karve Road, Kothrud, Pune-411038. ::::: Petitioner

-**Vs-**

M/s JUD Cement Ltd., A Company registered under the Companies Act, 1956 and having its Registered Office at G.S. Road, Hanumanbux Umadut, Shillong, Meghalaya, India-793001 and the Corporate Office at Anil Plaza, 4th Floor (B-1), near ABC, Bhangagarh, G.S. Road,Guwahati-781005 within the jurisdiction of this Hon'ble Court. ::::: Respondent

BEFORE
HON'BLE MR.JUSTICE T. NANDAKUMAR SINGH

For the Petitioner	::	Mr. K.K. Mahanta, Sr. Adv Mr. K. Singh, Mr. K.M. Mahanta, Advs
For the Respondent	::	Mr. K Paul, Ms. R Dutta, Advs
Date of hearing	::	***03.12.2015***
Date of Judgment & order	::	***15.01.2016***

JUDGMENT AND ORDER

Heard Mr. KK Mahanta, learned senior counsel assisted by Mr. K Singh, learned counsel appearing for the petitioner and Mr. K Paul, learned counsel for the respondent-company.

2. The prayer sought for in the present application under Sections 433, 434 and 439 of the Companies Act, 1956 are:-

"*(a) That M/S JUD Cement Ltd., the Respondent-Company be wound up by the order of the Court under the provisions of Section 433 (e) read with Section 433 (f) of the Companies Act, 1956.*

(b) Official Liquidator attached to this Hon'ble High Court, be appointed as Liquidator of the Company with all powers under the provisions of the Companies Act, 1956, with powers to take charge and possession of the assets, properties, books and records of the company and to manage its affairs forthwith.

(c) Cost of this petition be provided for.

(d) Such further and other orders be made and direction be given as this Hon'ble High Court may deem fit and proper in the facts and under the circumstances of the matter.

And for which act of kindness the humble petitioner is as duty bound shall every pray."

3. The respondent-company namely, M/s JUD Cement Limited was incorporated on 04.07.2005 under the provisions of the Companies Act, 1956 as a Private Company Limited. The respondent-company was earlier known as JUD Cements Private Limited. The registered office of the respondent-company is situated at GS Road, Hanumanbux Umadut, Shillong, Meghalaya, India-793001. The respondent-company was on or before about 15.04.2008 converted into a Public Limited Company and accordingly, a fresh certificate of Incorporation dated 15.04.2008 was issued by Registrar of Companies. As such, it is now a Public Limited Company and is known as M/s JUD Cements Ltd.

4. The main objects of the respondent-company was formed and incorporated are contained in Clause III (A) (1) of the Main Objects Clause of the Memorandum of Association of the company. One of the relevant objects is reproduced below:-

"*(1) To carry on the business of manufactures, traders, stockists, importers, exporters and dealers in cement ordinary,*

white, coloured, cement pipes, Portland cement, cement lime, limestone, alumina, cements sheets, refactories, bricks and other construction and building materials, all kinds of by-products of cement and limestone, calcium carbide, pozzolana, blast furnace, silica, precipitated lime and other products based on lime stone."

5. The facts of the petitioner's case leading to the filing of this application is briefly recapitulated. A contract was signed on 15.10.2006 between the petitioner and the respondent-company for supply of mechanical, electrical and instrumentation equipments, for providing of technical assistance, supervision of erection and commissioning of a TPD dry process cement plant at Wahiajer in the district of Jaintia Hills, Meghalaya. Initially, the contract price agreed by the parties was Rs.54,78,00,000/- (Rupees fifty four crores seventy eight lakhs only) excluding taxes and duties. The said contract price was subsequently revised from time to time and ultimately, it was revised to Rs.57,87,85,000/- (Rupees fifty seven crores eighty seven lakhs eight five thousand only) vide revision dated 31.10.2008. The respondent-company and the petitioner acted on this contract and the petitioner discharged all its liabilities as per the said contract dated 31.10.2008. Thereafter, the accounts were reconciled first on 10.09.2009 between the petitioner and the respondent-company, whereby a sum of Rs.3,83,98,224/- (Rupees three crores eighty three lakhs, ninety eight thousand two hundred twenty four only) was found due and payable to the petitioner by the respondent-company. After signing of the said Reconciliation statement of accounts, the respondent-company issued three cheques of Rs.50,00,000/- (Rupees fifty lakhs only) each in favour of the petitioner. It is stated that the said three cheques were issued by the respondent-company towards part payment of total legally enforceable debt and liability of Rs.3,83,98,224/- (Rupees three crores eighty three lakhs, ninety eight thousand two hundred twenty four only), which the respondent-

company admitted an acknowledged at the time of signing of Reconciliation statement. Against one of the said cheques of Rs.50,00,000/- (Rupees fifty lakhs only), the petitioner received an amount of Rs.25,00,000/- (Rupees twenty five lakhs only) on 01.10.2009 and Rs.25,00,000/- (Rupees twenty five lakhs only) on 31.10.2009 from the respondent-company. However, the said two cheques of Rs.50,00,000/- (Rupees fifty lakhs only) were dishonoured. Thus, the petitioner filed a case under Section 138 of the Negotiable Instruments Act, 1881 in respect of the said two cheques and the proceedings thereof are pending before the court.

6. The petitioner had approached the respondent-company as well as the Chairman and Managing Director from time to time for obtaining its due and legally enforceable liability of remaining amount payable by the respondent-company but under one pretext or other, the respondent-company had delayed the payment. Ultimately, the respondent-company during the year 2010-2011 made a partial repayment of Rs.1,80,07,277/- (Rupees one crore eighty lakhs seven thousand two hundred seventy seven only) apart from Rs. Rs.50,00,000/- (Rupees fifty lakhs only), out of the total legally payable debt and liability of Rs.3,83,98,224/- (Rupees three crores eighty three lakhs ninety eight thousand two hundred twenty four only). On 13.04.2011, the parties again met to reconcile the amount and the revised reconciliation statement and signed on 13.04.2011 by both the parties and a sum of Rs.1,54,11,576/- (Rupees one crore fifty four lakhs eleven thousand five hundred seventy six only) was found to be due and payable to the petitioner by the respondent-company. Thereafter, the respondent-company issued six post dated cheques totaling to Rs.51,37,192/- (Rupees fifty one lakhs thirty seven thousand one hundred ninety two only) towards part discharged of the aforesaid due and payable debt to the petitioner. However,

on presentation of all these cheques issued were returned unpaid. Thereafter, the proceeding under Section 138 of the Negotiable Instruments Act, 1881 was initiated and the same was pending. Time and again, the petitioner made telephone calls and sent reminders asking the respondent-company to make the payment of the said amount of Rs.1,54,11,576/- (Rupees one crore fifty four lakhs eleven thousand five hundred seventy six only), but the respondent-company did not pay any heed to the same. Therefore, the respondent-company is liable and responsible to pay the said amount of Rs.1,54,11,576/- (Rupees one crore fifty four lakhs eleven thousand five hundred seventy six only) to the petitioner.

7. The petitioner, through its General Manager-Legal and Finance, issued a notice dated 31.05.2012 as required under the provisions of Section 434 of the Companies Act, 1956 to the respondent-company demanding the payment of Rs.1,54,11,576/- (Rupees one crore fifty four lakhs eleven thousand five hundred seventy six only) with a sum of Rs.79,25,213.56/- (Rupees seventy nine lakhs twenty five thousand two hundred thirteen and fifty six paise only) as interest calculated at the rate of 12% per annum within three weeks as per Section 434 (1)(a) of the Companies Act, 1956. The said notice was sent by registered post with AD at the registered office of the respondent-company and the same was duly delivered at and received by the respondent-company. However, the respondent-company did not respond to the same. However, through bona fide mistake, the petitioner through its General Manager Legal and Finance issued the said notice in the form of Advocate notice. But the fact remains that the demand was made and the respondent-company duly received the said notice. The said notice dated 31.05.2012 (*Annexure-4 to the petition*) reads as follows:-

"***WALCHANDNAGAR INDUSTRIES LIMITED***
(AN ISO 9001 COMPANY)

Date:31-05-2012

M/s JUD Cements Ltd.
(Earlier JUD Cements Pvt.Ltd.)
having its registered office at
Anil Plaza, 4th Floor (B-1),
Near ABC, Bhangagarh, G.S. Road,
Guwahati 781 005

Dear Sirs,

Under the instructions of my client M/s Walchandnagar industries Limited having its Registered Office at 3 Walchand Terraces, Tardeo Road, Mumbai 400 034 and Chief place of business at Walchand House 167A, 2/8 + 2/9 Karve Road, Kothrud, Pune-411 038, I have to give you this notice under section 434 (1)(a) of the Companies Act, 1956 and address as under.

1. That you had entered in to a contract dated 15th October, 2006, with my client for purchase of equipments for a new dry processing Cement plant of 1000 TPD capacity, on terms, conditions and covenants as contained in the above referred contract for a total consideration of Rs.54,78,00,000/- (Rupees Fifty Four Crores Seventy Eight Lakhs only) and further revised to Rs.57,87,85,000/- (Rupees Fifty Seven Crores Eighty Seven Lakhs Eighty Five Thousand only).

2. That you and my clients acted on this contract and completed the same. There after the accounts were reconciled first on 10-09-2009 and then on 13-04-2011, and a sum of Rs.1,54,11,576/- (Rupees One crore Fifty Four Lakhs Eleven Thousand Five Hundred Seventy Six only) was found due and payable to my clients. That you accepted this reconciliation in writing and promised to pay the dues in due course. Accordingly you issued six post dated cheques to clear part of this due and payable debt. That these cheques issued by you have been returned dishonoured and proceedings under section 138 of the Negotiable Instruments Act, 1881 are pending against you and your Directors in the appropriate Courts.

3. That a sum of Rs.1,54,11,576/- Rs.1,54,11,576/- (Rupees One crore Fifty Four Lakhs Eleven Thousand Five Hundred Seventy Six only) is due and payable by you, which fact has been acknowledged by you and your officials in writing and my client was assured and promised that you will take steps to clear the same as you had some financial problems to be tied up.

4. Time and again my client has sent you reminders, telephones etc. for the payment of said sum of Rs.1,54,11,576/-

(Rupees One crore Fifty Four Lakhs Eleven Thousand Five Hundred Seventy Six only) but you have not paid any heed to it and at present you are liable and responsible to pay the said sum of Rs.1,54,11,576/- (Rupees One crore Fifty Four Lakhs Eleven Thousand Five Hundred Seventy Six only).

5. However after continuous follow up and reminders from my client you have failed and neglected to pay and clear this sum of Rs.1,54,11,576/- and as on 10th May, 2012, you are liable and responsible to pay a sum of Rs. Rs.1,54,11,576/- (Rupees One crore Fifty Four Lakhs Eleven Thousand Five Hundred Seventy Six only). It is clear that you are unable to pay the above stated settled and undisputed debt of Rs.1,54,11,576/- to my client and hence have rendered yourself for an action against you under section 433 and 434 of the Companies Act, 1956.

In the circumstances, my client, hereby calls upon you to pay a sum of Rs. Rs.1,54,11,576/- (Rupees One crore Fifty Four Lakhs Eleven Thousand Five Hundred Seventy Six only) along with a sum of Rs.79,25,213.56 as interest @12%, calculated up to 31-05-2012 and a sum of Rs.10,000/- (Rupees Ten Thousand Only) towards legal cost, all totaling to Rs.2,33,46,789.56 (Rupees Two Crores, Thirty Three Lacs, Forty Six Thousand Seven Hundred Eighty Nine and Paise Fifty six only) within three weeks as per section 434(1) (a) of the Companies Act, 1956, failing which my Client will have no alternative but to file a winding up Company Petition before the relevant High Court, and/or any other appropriate Court/s, seeking winding up of the Company, entirely at your risks as to cost and consequences, which please note.

Yours faithfully,
For Walchandnagar Industries Limited
Sd/-
General Manager (Legal & Finance)

Copy to:-

1. Mr. Adarsh Jhunjhunwala-Chairman & Managing Director
C/o: M/s JUD Cements Ltd.
Anil Plaza 4th Floor (B-1),
Near ABC Bhangagarh, G.S. Road,
Guwahati 781 005.

2. Mr. Akshat Jhunjhunwala-Director,
C/o: M/s JUD Cements Ltd.
Anil Plaza 4th Floor (B-1),
Near ABC Bhangagarh, G.S. Road,
Guwahati 781 005."

8. The respondent-company is unable to pay its creditors, the admitted debts due and payable, despite statutorily demanded by the petitioner within the period mentioned in the said notice. Thus, the respondent-company is commercially insolvent. Therefore, it is just, fit and equitable that the respondent-company should be wound up under the provisions of Sections 433, 434 and 439 of the Companies Act, 1956. For easy reference, Sections 433, 434 and 439 of the Companies Act, 1956 are quoted hereunder:-

> "*[**433. Circumstances in which company may be wound up by Tribunal**. – A company may be wound up by the Tribunal,–*
>
> *(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;*
>
> *(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;*
>
> *(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;*
>
> *(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;*
>
> *(e) if the company is unable to pay its debts;*
>
> *(f) if the Tribunal is of opinion that it is just and equitable that the company should be wound up;*
>
> *(g) if the company has made a default in filing with the Registrar its balance sheet and profit and loss account or annual return for any five consecutive financial years;*
>
> *(h) if the company as acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;*
>
> *(i) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in section 424G:*
>
> *Provided that the Tribunal shall make an order for winding up of a company under clause (h) on application made by the Central Government or a State Government.]*

***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 rupee] 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;

(b) if execution or other process issued on a decree or order of [any Court or Tribunal] in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the [Tribunal] that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the [Tribunal] shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub- section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm.

***439. Provisions as to applications for winding up**.– (1) An application to the [Tribunal] for the winding up of a company shall be by petition presented, subject to the provisions of this section,–*

(a) by the company; or

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors; or

(c) by any contributory or contributories; or

(d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately; or

(e) by the Registrar; or

(f) in a case falling under section 243, by any person authoised by the Central Government in that behalf.

[(g) in a case falling under clause (h) of section 433, by the Central Government or a State Government.]

(2) A secured creditor, the holder of any debentures (including debenture stock), whether or not any trustee or trustees have

been appointed in respect of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (b) of sub- section (1).

(3) A contributory shall be entitled to present a petition for winding up a company, notwithstanding that he may be the holder of fully paid- up shares, or that the company may have no assets at all, or may have, no surplus assets left for distribution among the share- holders after the satisfaction of its liabilities.

(4) A contributory shall not be entitled to present a petition for winding up a company unless–

> *(a) either the number of members is reduced, in the case of a public company, below seven, and, in the case of a private company, below two; or*
>
> *(b) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up, or have devolved on him through the death of a former holder.*

(5) Except in the case where he is authorised in pursuance of clause (f) of sub- section (1), the Registrar shall be entitled to present a petition for winding up a company only on the grounds specified in [clauses (b), (c), (d), (e) and [,(f) and (g)] of section 433:

Provided that the Registrar shall not present a petition on the ground specified in clause (e) aforesaid, unless it appears to him either from the financial condition of the company as disclosed in its balance- sheet or from the report of [a special auditor appointed under section 233A or an inspector] appointed under section 235 or 237, that the company is unable to pay its debts:

Provided further that the Registrar shall obtain the previous sanction of the Central Government to the presentation of the petition on any of the grounds aforesaid.
(6) The Central Government shall not accord its sanction in pursuance of the foregoing proviso, unless the company has first been afforded an opportunity of making its representations, if any.

(7) A petition for winding up a company on the ground specified in clause (b) of section 433 shall not be presented–

> *(a) except by the Registrar or by a contributory; or*

(b) before the expiration of fourteen days after the last day on which the statutory meeting referred to in clause (b) aforesaid ought to have been held.

(8) Before a petition for winding up a company presented by a contingent or prospective creditor is admitted, the leave of the [Tribunal] shall be obtained for the admission of the petition and such leave shall not be granted-

(a) unless, in the opinion of the [Tribunal], there is a prima facie case for winding up the company; and
(b) until such security for costs has been given as the [Tribunal) thinks reasonable."

9. Hence, the present application for the prayers mentioned aforesaid.

10. The respondent-company had filed affidavit-in-opposition dated 23.04.2014 wherein, raising preliminary objection vis-à-vis maintainability of the present application for winding up of the respondent-company under Sections 433, 434 and 439 of the Companies Act, 1956. Para 5A of the affidavit-in-opposition dated 23.04.2014 filed by the respondent-company reads as follows:-

"*5A. That before adverting to any of the statements made in the Company Petition, the Answering Respondent begs to raise the following preliminary objection vis-à-vis maintainability of the instant Application for winding up of the Company under Section 433, 434 and 439 of the Companies Act, 1956 on and amongst the following:-*

a) That the instant Company petition is not maintainable in its present form in view of the Article 16 of the contract dated 15.10.2006 entered into between the Parties herein which provides for arbitration and mandates the Parties to refer to a arbitrator in case of any disputes, controversy or claim arising out of or in connection with this contract, and or its break, termination and validity will be finally settled by arbitration to be conducted in accordance with the Rules of Indian Arbitration Act, 1996. The petitioner is barred under the law from initiating any proceeding without exhausting the

arbitration clause and as such the instant application is liable to be dismissed in limine.

b) That the instant application is liable to be dismissed for suppression of material facts in as much as the petitioner in its company petition has suppressed the fact that the petitioner although have stated about the pending proceeding under 138 of the N.I. Act, 1881 before the various Court. However, the petitioner has not disclosed the fact about its disposal for want of jurisdiction by the learned Trial Court at Pune. As any person who come before the Court seeking relief is reasonably expected to disclose all fact pertaining to the case, the action of the petitioner in concealing this material fact about the dismissal of the 138 proceeding with an ulterior motive to gain undue advantage and/or hide its lacuna tantamount to playing fraud on Court and as such the instant petition is liable to be dismissed outright.

c) That the petitioner in their own admission has admitted to the fact of pending proceeding U/s 138 of the Negotiable Instruments Act, 1881 and as the relief claimed in the said proceeding is for realization of debts and if the petitioner succeed in the proceeding then there would be no occasion for the petitioner to file the winding up petition as the relief claimed in the instant case and under 138 proceeding is the same and in equity, the petitioner cannot file two cases seeking the same relief before the two different Courts as the same would amount to abuse of process of law. As such the instant petition is liable to be dismissed being bad in law.

d) That the instant petition is not maintainable for non-joinder of necessary parties in as much as the other creditors/Banks/shareholders who also have stake in the Company and whose participation and views in the matter is essential, have not been arrayed as parties in the case and as it is settled that if there is opposition to the making of winding up order by the Creditors etc., the Court will consider their wishes and may decline to make the winding up order. That being the position, the other Creditors of the company is also required to be arrayed as necessary parties in the case and unless their views are taken on board in deciding the case and the instant petition cannot be entertained and is liable to be dismissed being not maintainable for non joinder of necessary parties.

e) That the instant petition is not maintainable for non-compliance of the provision of section 439 (8) of the Companies Act, 1956 (corresponding section 272 (6) of the Companies Act, 2013) which requires a winding up petition to be accompanied by an application seeking leave of the Court and its non compliance would also amounts to breach of rule 97 of the Company Rules and

as leave of the Court is a mandatory pre-requisite before filing a winding up petition, thus non compliance of the same makes the instant petition liable to be dismissed.

f) That for a winding up order, the essential requirement is the inability to pay debts inspite of repeated request whereas admittedly in the instant case, the request/demand was made only once by the petitioner and payments made through cheques and part payment realized. However, two cheques were dishonoured for which appropriate proceeding is pending before the competent court. In other words, as there has been part payment and part realization of debts by the petitioner, the same cannot be termed as 'neglect to pay' by the Respondent Company. Thus, the instant petition lacks merit as required under the Companies Act, 1956 for a winding up order. Hence, the instant petition is liable to be dismissed."

11. It is admitted case of both the parties that there is an arbitration clause in the said agreement for the contract work dated 15.10.2006 and any dispute between the parties arising out of the said contract is to be referred to the arbitrator. It is also stated in the affidavit-in-opposition that every company faces financial hardships in the course of business and faces situation of delayed payment of its due and debts. But by passing a situation like financial problem for the time being cannot be equated of the company's inability to pay especially when the respondent-company had already made partial payment of debts to the petitioner and recourse of winding up process cannot be resorted to whenever a company faces financial problem and machinery for winding up cannot be allowed to utilize merely as a means for realizing debts due from the company. It is also further stated that the respondent-company is not commercially insolvent as alleged by the petitioner as its assets still exceeds its liabilities and recourse of winding up petition for payment of debt is nothing but a pressure tactics resorted to by the petitioner for realization of its debts for which appropriate proceedings before the competent court is pending. Paras 13 and 17 of the affidavit-in-opposition filed by the respondent-company read as follows:-

"*13. That the averments made in paragraph 12 of the Company petition is denied by the Answering Respondent and the petitioner is put to the strictest proof thereof. On the contrary it is stated that every Company faces financial hardships in the course of business and faces situation of delayed payment of its due and debts. But facing a situation financial problem cannot be equated with Company's inability to pay especially when the Respondents have already made partial payments of debts to the petitioner and recourse to winding up process cannot be resorted to whenever a Company faces financial problems as admitted by the petitioner and machinery for winding up cannot be allowed to be utilized merely as a means for realizing debts due from a company.*

17. That the averments made in paragraph 16 of the company petition is denied most vehemently by the answering Respondent and the Petitioner is put to the strictest proof thereof. On the contrary it is stated that Respondent company is not commercially insolvent as alleged by the petitioner as its assets still exceeds its liabilities and recourse to winding up petition for payment of debt is nothing but a pressure tactics resorted to by the petitioner for realization of its debt for which appropriate proceedings before the competent court is pending disposal."

12. In the course of hearing of the present petition, learned counsel for the respondent-company stated that the record maintained by the petitioner on the due debts in respect of first agreement dated 15.10.2006 had already been paid.

13. The petitioner also filed rejoinder affidavit dated 11.08.2014 in reply to the affidavit-in-opposition filed by the respondent-company on 23.04.2014. In the rejoinder affidavit filed by the petitioner, the petitioner reiterated that the respondent-company is not commercially insolvent and as the respondent-company had neglected to pay its debts, the petitioner had filed winding up petition. It is also further stated in the rejoinder affidavit that the respondent-company inability to pay the debts is established by the fact that cheques issued by it towards post payment of the dues were bounced on presentation to the bank because of insufficient fund and also the fact that the respondent-company has not paid any amount to the petitioner towards

these dues shows its negligence in clearing the dues and debts. It is also further stated that arbitration clause is not applicable since the contract was executed fully, dues were settled and admitted, part payment was made and that proceeding under Section 138 of the Negotiable Instruments Act, 1881 are independent criminal proceedings having no bearing on the present proceeding. The gist of the rejoinder affidavit was that the dues were settled and admitted by the respondent-company and the respondent-company had neglected in clearing the admitted dues and debts.

14. In the course of hearing of the present application, learned counsel for the respondent-company strenuously contended that there is absolutely no admitted dues and debts arising out of the said contract dated 15.10.2006 and the respondent-company had neglected to pay the admitted dues and debts. Learned counsel further contended that all the dues and debts arising out of the first contract dated 15.10.2006 had already been cleared by the respondent-company. This Court passed an order dated 07.05.2015 allowing the respondent-company to file additional affidavit clearly mentioning the facts and circumstances which show that the respondent-company had already paid the due amount. Accordingly, the respondent-company filed the additional affidavit dated 18.05.2015. Paras 3, 4, 5, 6, 7 & 8 of the additional affidavit dated 18.05.2015 of the respondent-company read as follows:-

> "*3.That the petitioner company had moved this Hon'ble Court by way of a Company Petition under section 433, 434 and 439 of the Companies Act, 1956 for winding up of the Respondent Company and the same was registered as Company Petition No.7 of 2013. The Respondent Company upon receipt of notices has filed its objection inter-alia on various grounds challenging the maintainability of the Company Petition.*

4. That on careful perusal of the accounts of the Company and the averments made by the petitioner in the connected company petition No.7 of 2013 and the documents annexed by them, it transpired that the Respondent Company had already paid the entire outstanding amount of Rs.1,54,11,576/- (Rupees One Crore Fifty Four Lakhs Eleven Thousand Five Hundred and Seventy Six) only as would be evident from Annexure 3 to the Company Petition and correspondence made between the Chief Managing Director of the Respondent Company and the petitioner Company dated 24.01.2011. The Company craves leave of this Hon'ble Court to rely on the same at the time of hearing.

5. That vide order dated 07.05.2015, this Hon'ble Court was pleased to allow the Respondent Company to file additional affidavit only to the question of fact raised by the Counsel for the Respondent that the Respondent Company had already paid the due amount.

6. That the petitioner states that in terms of the Order dated 7.05.2015, this instant affidavit is being filed for the purpose of bringing on record the factum that the Respondent Company has paid Rs.66,38,88,741/- (Rupees Sixty Six Crores Thirty Eight Lakhs Eighty Eight Thousand Seven Hundred Forty One) only whereas admittedly the amount to be paid to the Petitioner Company by the Respondent Company is Rs.57,87,85,000/- (Rupees Fifty Seven Crores Eighty Seven Lakhs Eighty Five Thousand) only.

7. That the Deponent states that as would be evident from the statement of accounts as well as the reconciliation statement dated 13.04.2011, the entire amount as claimed by the Petitioner Company for setting up of 1000 TDP cements plant in pursuance of contract dated 15.10.2006 has already been paid by the Respondent Company unto the Petitioner company and as such there is no occasion for preferring of this instant application before this Hon'ble Court and the same having been filed by suppression of material fact ought to be dismissed with exemplary cost to the answering Respondent.

8. That the Deponent states that the Petitioner Company to confuse this Hon'ble Court has deliberately mixed up in the accounts the alleged payment due from the Respondent company unto the Petitioner Company on account of the second unit which was to be purchased vide contract dated 09.08.2007 (not the subject matter of this instant company petition) and is presently pending adjudication in arbitration before Hon'ble Mr. Justice P.K. Musharay (Retd) vide Arbitration application No.1/2014, Walchandnagar Industries Ltd. Vs. JUD Cements Ltd."

15. Learned senior counsel appearing for the petitioner contended that the respondent company is trying to confuse the Hon'ble Court by

coalescing the accounts of the project which is subject matter of the present winding up petition with the accounts of the second unit which is not the subject matter of the present petition but admittedly the subject matter of the pending adjudication before arbitrator Justice Musahary (Retd). The affidavit clarified that in the second reconciliation statement dated 13.04.2011, the outstanding amount of Rs.1,54,11,576/- was found to be due and payable by the respondent company to the petitioner company in respect of the contract dated 15.10.2006 which is the subject matter of the instant petition and the said amount was arrived at by excluding the amount of Rs.2,03,60,000/- paid by the respondent company towards the second unit in respect of which the arbitration proceeding is pending. This was indicated in the reconciliation statement dated 13.04.2011 by adding the amount of Rs.2,03,60,000/- to the opening balance of Rs.1,20,07,277/- and thus taking the total opening balance to Rs.3,23,67,277/- this was done because the respondent company in their books of account as on 01.04.2010 have shown the opening balance due to the petitioner company as Rs.1,20,07,277/- by subtracting the amount of Rs.2,03,60,000/- as paid towards the project in question while as a matter of fact Rs. 2,03,60,000/- was paid by the respondent company towards the second unit vide contract dated 09.08.2007 and not against the present contract. Hence, while reconciling the books of account of both the parties the respondent company admitted the mistake and therefore the amount of Rs.2,03,60,000/- was added back to the opening balance as shown in the respondent books of accounts and the total opening balance thus arrived at Rs.3,23,67,277/-. Thereafter, by subtracting the payments released during 2010-2011 that is Rs.1,80,07,277/- from the aforesaid total opening balance of Rs.3,23,67,277/- the balance due was found to be Rs.1,43,60,000/-. Another amount of Rs.10,51,576/- was also found due vide bill dated 02.01.2010 and was accordingly added to the balance due of

Rs.1,43,60,000/- and thus a final and total amount of Rs.1,54,11,576/- was found to be balance due as on 13.04.2011 by the respondent company to the petitioner company. The reconciliation statement was duly signed by the authorized signatories of the companies and the respondent company thereafter issued 6 (six) post dated cheques totaling to Rs.51,37,192/- towards clearing a part of the said dues. Hence the contention of the respondent company that they have paid the entire dues and there is no outstanding dues payable to the petitioner company is entirely false, incorrect and misconceived.

16. To the contra, learned counsel for the respondent company by referring to the second reconciliation statement as on 14.04.2011 contended thus:

AS PER JUD (RESPONDENT COMPANY)

A. OPENING BALANCE- 1ST UNIT- CONTRACT DATED 15.10.2006 : 1,20,07,277

B. (IGNORE) - 2ND UNIT- CONTRACT DATED 09.08.2007 : 2,03,60,000

C. (IGNORE) NOT APPLICABLE

Therefore liability in respect of the 1st Unit on 01.04.2010 : 1,20,07,777

D. PAYMENTS MADE FROM 28.10.10 – 10.03.11 (MINUS FROM A) : 1,80,07,277

E. TOTAL -60,00,000

F. SPARES (DEDUCT FROM E) : 10,51,576

TOTAL -49,48,424

As per books of account of JUD as on 31.3.2011 an amount of Rs.49,48,424/- has been overpaid to Walchandnagar Industries Ltd.

17. The Apex Court in ***Mediquip Systems (P) Ltd. v. Proxima Medical System GMBH: (2005) 7 SCC 42*** held that an order under Section

433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and the inability referred to in the expression "unable to pay its debts" in Section 433(e) of the Companies Act should be taken in the commercial sense. The machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a company. If the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. Paras 18, 19, 20, 21, 22, 23, 24, 25, 26, & 27 of the SCC in ***Mediquip Systems (P) Ltd*** case ***(****Supra****)*** read as follows:-

> "*18. This Court in a catena of decisions has held that an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression "unable to pay its debts" in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a company.*
>
> *19. The respondent is not a creditor and the appellant is not a debtor insofar as US $ 11,000 is concerned. The defence raised by the appellant is a substantial one and not mere moonshine which is to be finally adjudicated upon on merits before the appropriate forum.*
>
> *20. Section 433 of the Companies Act says:*
>
> *"433. A company may be wound up by the Court,–*
>
> *(a)-(d) * * **
>
> *(e) if the is unable to pay its debts;*
>
> *(f) * * **
>
> *From the above it follows:*
>
> *(1) there must be a debt; and*
>
> *(2) the company must be unable to pay the same.*
>
> *An order under clause (e) is discretionary.*

21. The debt under Section 433 of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date. We are informed that the financial position of the appellant is sound.

22. This apart, both, the learned Single Judge and the Judges of the Division Bench have granted interim relief which can be granted only in aid of, and as ancillary to the main relief which may be available to the party on final determination of its right in a suit or proceeding.

23. The ***Bombay High Court has laid down the following principles in Softsule (P) Ltd., Re: (1977) 47 Comp Cas 438 (Bom)****: (Comp Cas pp.443-44)*

Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make order.

Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.

Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not "due" within the meaning of Section 434(1)(a) and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

Fourthly, one of the consideration in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise.

24. The ***Madras High Court in Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd: (1990) 3 Comp LJ 322****, Comp LJ at p.326 has evolved the following principles relating to bona fide disputes:*

> *(i) if there is a dispute as regards the payment of the sum towards the principal, however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a civil court.*
>
> *(ii) the existence of a dispute with regard to payment of interest cannot at all be construed as existence of a*

bona fide dispute relegating the parties to a civil court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding-up proceedings; and

(iii) if there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company.

25. The rules as regards the disposal of winding-up petition based on disputed claims are thus stated by this Court in ***Madhusudan Gordhandas & Co. v. Madhu Wollen Industries (P) Ltd.: (1971) 3 SCC 632: (1972) 42 Comp Cas 125: AIR 1971 SC 2600****. This Court has held that if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The principles on which the court acts are:*

(i) that the defence of the company is in good faith and one of substance;

(ii) the defence is likely to succeed in point of law; and

(iii) the company adduces prima facie proof of the facts on which the defence depends.

26. In view of the judgment now passed, the appellant will be entitled to refund of the sum of Rs.2 lakhs deposited by it in compliance with the direction given by the High Court when the matter was pending before it. The High Court is directed to refund the same to the appellant on production of a certified copy of this judgment.

27.(*****Ed. Para 27 corrected vide official corrigendum No.F.3/Ed.B.J./88/2005 dated 12-9-2005****) In view of all these, there is prima facie dispute as to the debt. Thus, we find no justification whatsoever for admitting the winding-up petition. Accordingly, the judgments passed by the learned Single Judge and of the Division Bench are set aside. The civil appeal stands allowed. No costs.*"

18. The Apex Court in ***Pradeshiya Industrial & Investment Corporation of U.P. v. North India Petrochemical Ltd. & Anr: (1994) 3 SCC 348*** held that:

"*27. What then is inability when the section says "unable to pay its dues"? That should be taken in the commercial sense. In that, it is unable to meet current demands. As stated by William James , V.C. it is "plainly and commercially insolvent – that is to*

say, 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 probable assets would be insufficient to meet the existing liabilities." (In ***European Life Assurance Society, Re: LR 1869) 9 Eq 122; V.V. Krishna Iyer & Sons v. New Era Mfg. Co. Ltd.: (1965) 35 Comp Cas 410: (1965) 1 Comp LJ 179 (Ker)****.*

29. It is beyond dispute that the machinery for winding-up will not be allowed to be utilized merely as a means for realizing its debts due from a company. In ***Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami: (1965) 35 Comp Cas 456 (SC)*** *this Court quoted with approval the following passage from* ***Buckley on the Companies Act,*** *(13th Edn., p.451)*

> "*It is well-settled that 'a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court'*."

19. Keeping in view of the ratio decidendis of the cases mentioned above, this Court has given anxious consideration to the case put up by the parties and is of the considered view that there is bona fide dispute as to the debts payable by the respondent-company. The defence of the respondent-company is a substantial one. It is now well settled that machinery for winding up will not be allowed to utilize merely as a means for realizing its debts due from a company. Therefore, there is no justification whatsoever for allowing the present winding up petition. Thus, winding up petition is dismissed.

JUDGE

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