Supreme Court of India
Pradeshiya Industrial & ... vs North India Petrochemicals Ltd on 9 February, 1994
Equivalent citations: 1994 SCC (3) 348, JT 1994 (1) 579
Author: S Mohan
Bench: Mohan, S. (J)

PETITIONER:
PRADESHIYA INDUSTRIAL & INVESTMENT CORPN. OF U.P.

Vs.

RESPONDENT:
NORTH INDIA PETROCHEMICALS LTD.

DATE OF JUDGMENT09/02/1994

BENCH:
MOHAN, S. (J)
BENCH:
MOHAN, S. (J)
VENKATACHALLIAH, M.N.(CJ)

CITATION:
1994 SCC (3) 348 JT 1994 (1) 579
1994 SCALE (1)526

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by MOHAN, J.- Leave granted.

2.The brief facts leading to this appeal are as follows. The first respondent, North India Petrochemicals Limited (hereinafter referred to as 'NIPL') filed a winding-up petition (Company Petition No. 1 of 1993) before the High Court of Allahabad, Lucknow Bench, Lucknow under Sections 433, 434 and 439 of the Companies Act, 1956 (hereinafter referred to as 'the Act').

3.On July 1, 1988 a Shareholders' Agreement or Promoters Agreement was entered into. That superseded earlier agreements which recorded that the grant of a Letter of Intent for the manufacture of 15,000 tonnes per annum of Phthalic Anhydride in favour of the appellant-Corporation. However, the said Letter of Intent was to be used, utilised and implemented in collaboration with M/s Dalmia Dairy Industries Limited (Respondent 2 herein). The collaboration agreement or the promoters agreement contemplated that a new company would be

brought into existence called the Northern India Petrochemicals Limited. Clause 3 of the agreement provided that initial authorised capital would be Rs 5 lakhs which would be issued in equity shares of Rs 10 each while the subscribed capital of the company would be such as would be decided by the Board of Directors of the Company from time to time.

4.Clause 6 of the said agreement contemplated that each party would ensure that its respective shareholdings in the paid-up equity capital of the company shall be 26% plus 10 equity shares for PICUP (the appellant herein) and 25% minus 10 equity shares for second respondent, Dalmia Dairy Industries Limited.

5.Clause 7 of the agreement further provided that the Board would consist of 13 Directors out of which 4 were to be nominated by PICUP, the appellant herein and 3 by the second respondent, Dalmia Dairy Industries and the remaining 6 Directors were to be appointed as per the provisions of the Act.

6.Clause 13(a) stated that the appellant, Dalmia Dairy Industries Limited will contribute equal sums as may be required, from time to time, for the purpose of preliminary and exploratory and other expenses. These contributions are to form part of the share capital agreed to be contributed by each party under the agreement.

7.Northern India Petrochemicals Limited came to be incorporated on March 12, 1985.

8.Differences arose between the second respondent and the appellant. The second respondent got the disputes referred to arbitration as per clause 27 of the promoters agreement dated July 1, 1988 by letter dated December 19, 1991. The second respondent nominated the former Chief Justice of Delhi High Court, Justice Shri Shiv Prakash Narain, as their arbitrator. Thereafter the appellant nominated Shri D.N. Jha, former Chief Justice of Allahabad High Court. These two arbitrators appointed Shri Justice M.H. Kania (former Chief Justice of this Court) as Chairman.

9.On January 6, 1992, the first respondent issued a notice under Section 434 of the Act to the appellant. It was stated that an amount of Rs 140.33 lakhs had been spent on the project. The notice further stated that an amount of Rs 72.50 lakhs was payable by the appellant under the terms of the promoters agreement. That amount had not been forthcoming. On that ground it is alleged that the appellant was indebted to the tune of Rs 72.50 lakhs as on November 30, 1991 which the appellant was called upon to pay as its share contribution of NIPL within three weeks of the receipt of the notice.

10.On January 29, 1992 the appellant replied to the notice denying its liability to pay the amount of Rs 72.50 lakhs. It was stated therein that the disputes raised by second respondent M/s Dalmia Industries Limited had already been referred to arbitration and as such is pending adjudication. Hence, NIPL was not entitled to take any action.

11.In the winding-up petition it is alleged that the sum of Rs 72.50 lakhs is a debt payable by the appellant to the first respondent. The debt arose on the basis of the promoters agreement between

the appellant and the second respondent for promoting the first respondent-company referred to above.

12.It is further alleged that the appellant is liable to pay towards certain expenses for exploratory work. Those expenses will be adjusted and treated as subscription to the share capital. The appellant has agreed to subscribe by way of equity participation in the share capital. That amount ought to be paid. There is a breach of promoters agreement for the failure to pay these amounts, namely, the dues on account of share capital and the expenses for exploratory work. It was alleged that the said sum of Rs 72.50 lakhs was due. Therefore, the first respondent claimed to be a creditor.

13.It may be noted, as stated above, that the second respondent has already referred the dispute to arbitration under clause 27 of the promoters agreement for adjudication claiming specific performance of the promoters agreement and in the alternative for damages for breach of contract. The said amount is the basis for the winding-up petition as it is one of the claims in the statement of claims before the arbitrators. One further fact requires to be noted; the promoters agreement had already cancelled as per notice dated October 31, 1992.

14.In view of the above, the appellant denied the liability to pay the amount on various grounds not only in the company petition but also before the arbitrators. Inter alia it was urged that the winding-up petition was not maintainable. The claim itself was doubtful. It was a matter which required adjudication. Therefore, it was not a debt as contemplated within the meaning of Sections 433 and 434 of the Act. Respondent 1 is not a creditor.

15. Before the learned Single Judge four preliminary objections were taken:

> (1)The petition does not comply with the requirement of the Company Rules insofar as Rule 21 which is mandatory in character is not satisfied.
>
> (2)Inasmuch as a creditor is seeking relief the application has to be accompanied by an application under Section 439(8) of the Act. There is also non-compliance of Section 439(8) and as such Rule 97 of the Company Rules had been breached.
>
> (3) There was no presentation in accordance with Rule 95.
>
> (4) When a notice to show cause why the petition should not be admitted was initially issued, the notice was not-in the prescribed form. In spite of it, publicity had been given in the newspapers in order to pressurise the appellant to yield to the demand.

16.These preliminary objections were overruled by an order dated January 28, 1993. ; Thereafter in dealing with the question whether the petition deserved to be admitted or not it was concluded that a prima facie case had been made out for admission. However, the advertisement was suspended till further orders. Aggrieved by the same, an appeal was preferred to the Division Bench. The preliminary objections which were raised before the learned Single Judge were reiterated. They were overruled.

17.Another objection taken was as to the maintainability of the appeal. That was overruled on the ground that the order of the learned Single Judge was likely to require the respondents to face the winding-up proceedings. Therefore, an appeal would lie under Section 483 of the Act.

18.As to the admissibility of the winding-up petition, the Division Bench is of the view that promoters agreement had in fact been entered into. The company is the beneficiary of the agreement. As a beneficiary it could claim that amount. From the material on record it is seen that no specific plea had been taken to show the circumstances under which the amount had not been paid by the appellant. Accordingly, the appeal came to be dismissed.

19. Hence, the present special leave petition.

20. It is urged by the learned Solicitor General that the learned Single Judge had gone wrong while holding that the admissibility of winding-up petition would depend upon arguable issues. Equally, the Division Bench failed to note that the debt is bona fide disputed. Further it failed to note that the question of liability is still pending adjudication before the arbitrator. No winding-up petition can be admitted unless the court comes to the conclusion that the defence put up is moonshine. In support of these submissions reliance is placed on Madhusudan Gordhandas v. Madhu Woollen Industries Pvt. Ltd.' In the instant case, the debt itself is yet to be established. Merely because the promoters agreement had been signed it does not follow that the appellant is liable as a debtor. 1 (1971)3SCC632:(1972)42CompCasl25

21.In opposition to this, learned counsel for the respondents would support the impugned orders contending that both the courts below have carefully analysed the legal position. They have correctly found that the agreement had been entered into under which there is an obligation to pay certain amount. This obligation if not discharged, would amount to a debt. Insofar as there is a prima facie case of liability, certainly the petition could be admitted. The ruling relied on by the appellant has no relevance to the facts of this case.

22.To determine the correctness of the above submissions it is necessary, on our part, to find out as to what exactly is the position in relation to the debt, on facts. As seen from the earlier narration, the promoters agreement was entered into between the appellant and Respondent 2, Dalmia Industries Limited. Only under that agreement the first respondent, North India Petrochemicals Limited, was floated. As per clauses 6 and 13(a) the appellant will have to pay its share of contribution to the first respondent. It is the case of the first respondent that already an amount of Rs 140.33 lakhs has been spent on this project. Therefore, towards each share the appellant is liable to contribute a sum of Rs 72.50 lakhs which, according to it, is a debt. It is important to note that by virtue of clause 31 of the agreement the appellant was not obliged to proceed with the obligation cast upon it under the terms of the agreement. Clause 31 of the agreement reads as follows:

> "31. Neither party to this agreement shall be considered responsible for any breach of failure of this agreement or any terms hereof arising from the imposition of restriction or onerous regulations by any Government agency or local authority or by acts of civil or military authority or other cause beyond their control."

Since the agreement has been cancelled the appellant is not liable to discharge any of its obligations under the agreement. If really, the cancellation is to be challenged there are other ways of doing it.

23.The second respondent, Dalmia Industries Limited has resorted to arbitration proceedings and has claimed this money. Hence, there is a substantial dispute inasmuch as the second respondent claims the said payment of Rs 72.50 lakhs on the ground that they should be reimbursed.

24.The appellant is a financial corporation which is fully owned by the State of Uttar Pradesh. It cannot be denied that it is a profit-making organisation and is not incurring losses. It is paying dividends on annual profits. Therefore, there is no relationship of debtor and creditor.

25.The defence of the appellant in relation to non-payment is a bona fide defence. Whatever it may be, the liability of the appellant is yet to be determined. It is in this factual background we will deal with legal aspect of the matter. Section 433 of the Act says:

> "A company may be wound-up by the Court,(a) to
>
> (d)
>
> (e) if the company is unable to pay its debts;
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> (f) From the above it follows:
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> (1) There must be a debt; and (2) the company must be unable to pay the same.
>
> An order under clause (e) is discretionary.

26.A debt under this section must be a determined or a definite sum of money payable immediately or at a future date.

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, Re2; V. V. Krishna Iyer & Sons v. New Era Mfg. Co. Ltd. 3)

28.While dealing with the scope of Section 433(e) this Court had occasion to hold the following [at page 131 in Madhusudan Gordhandas1 [the case relied on by learned Solicitor General)]: (SCC pp. 638-39, paras 20-22) "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 Corpn., Re4. 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., Re5.) 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 A Company, Re6.) 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., Re7.) The principles on which the court acts are first that the defence of the 2 LR (1869) 9 Eq 122 3 (1965) 35 Comp Cas 410: (1965) 1 Comp LJ 179 (Ker) 4 LR (1874) 19 Eq 444 5 (1865) 35 Beav 204 6 (1894) 94 SJ 369: (1894) 2 Ch 349 (Ch D)

7. (1962) Ch 406: 1962 Comp Cas 795 (Ch D) 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.

Another rule which the court follows is that if there is opposition to the making of the windi Dg-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 Edn., 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 windingup 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 P. & J. Macrae Ltd., Re8)"

29.It is beyond dispute that the machinery for winding-up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P) Ltd. v. A.C.K. rishnaswami9 this Court quoted with approval the following passage from luckley on the Companies Acts, (1 3th Edn., p. 45 1): "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 windingup order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court'."

30. Examined in the light of the above, we are unable to uphold the judgments of the courts below on the facts narrated above. Our reasons are as under: (1961) 1 All ER 302: 31 Comp Cas 424 (CA) (1965) 35 Comp Cas 456 (SC) (1)The basis of the claim of the first respondent for Rs 72.50 lakhs is

the promoters agreement dated July 1, 1988. This agreement has been cancelled by the appellant by notice dated October 31, 1992. Though the learned Single Judge of the High Court referred to this aspect he had not pursued it further. He has not considered as to what would be the consequence. Unfortunately, the Division Bench has overlooked this aspect when it held thus: "In the present case, there is an allegation in the petition that there was an agreement between the Company and Dalmia Dairy Industries for promoting the petitioner Company and that under the terms of that agreement the Company had to pay certain amounts. There is nothing on record to suggest that such an agreement was not entered into." (2)The first respondent is not a creditor. The appellant is not a debtor because it is a financial institution for an amount which is agreed to be subscribed. Neither the learned Single Judge nor the Division Bench has decided this important question whether there is a debt and the company has either neglected or is unable to pay. (3)The same claim is the subject-matter of arbitration which is pending adjudication. Therefore, there is no definiteness about it.

(4) In view of all these, there is no prima facie dispute as to the debt.

(5) The defence raised is a substantial one and not mere moonshine. We find it difficult to appreciate the reasoning of the learned Single Judge when he holds that there are arguable issues and, therefore, the winding-up petition has to be admitted. On this aspect the courts below failed to note that the admission of the winding-up petition is fraught with serious consequence as far as the appellant is concerned.

31.We are informed that the financial position of the appellant is sound. It is the largest financial corporation of the State of Uttar Pradesh. It has rendered financial assistance of Rs 1024.83 crores till March 1992 to more than 100 industrial units and has also promoted joint sector projects. It is profit-making financial corporation and is paying dividend as seen from the balance sheet for the year 1991-92, (filed along with special leave petition). The assets of the appellant-corporation are Rs 5,26,35,36,568. The reserves are Rs 17,60,15,222. The profits earned by the appellant before payment of tax is Rs 7.40 crores and after meeting its financial liabilities, Rs 2.78 crores.

32.Thus, we find no justification whatever for admitting the winding-up petition. Accordingly the impugned judgments are hereby set aside. Civil Appeal will stand allowed with costs to be borne equally by Respondents 1 and 2.