

AFR

E-Court**Neutral Citation No.** - 2025:AHC-LKO:30334**Reserved:** 05.05.2025**Pronounced:** 22.05.2025**Court No. - 6****Case :-** COMPANY PETITION No. - 6 of 2012**Petitioner :-** Zaitex Polyblends Pvt. Ltd.**Respondent :-** Sri Durga Bansal Fertilizer Ltd.**Counsel for Petitioner :-** Amrendra Nath Tripathi, Rahul S. Sahay, Rajesh Kumar Verma, Shobhit Mohan Shukla, Shraddha Agarwal, Stuti Mittal**Counsel for Respondent :-** Shailendra Srivastava, Amal Rastogi, Anurag Verma, Basant Agrawal, Devendra Mohan Shukla, Nalini Jain, Pritish Kumar, Tushar Hirwani**Hon'ble Pankaj Bhatia,J.**

1. Heard Mrs. Shraddha Agarwal, learned counsel assisted by Shri Shobhit Mohan Shukla and Ms. Gursimran Kaur, learned counsel for the petitioner; Shri. N.K. Seth, learned Senior Advocate, assisted by Shri Pritish Kumar, Shri Tushar Hirwani, Shri Amal Rastogi, learned counsel for the Respondent No.1; Shri R.K. Verma, learned counsel for the Respondent No.2 and Shri Anurag Verma, learned counsel for Official Liquidator.

2. Present petition has been filed under Section 439(1)(b), Section 433(e) & (f) and Section 434(1)(a) of the Companies Act as well as under Section 20(1) of The Sick Industrial Companies (Special Provisions) Act, 1985 by the petitioner/company seeking winding up of the respondent/company mainly on the ground that it has failed to pay the admitted amounts of Rs.21,55,52,263/- (Rupees Twenty One Crore Fifty Five Lakhs Fifty Two Thousand Two Hundred and Sixty Three only) excluding the interest upon the unsecured loan as detailed in Para 19(iii) of the notice.

3. It is also stated that the Board for Industrial and Financial Reconstruction (*for short 'BIFR'*) had recommended the winding up

of the company on 26.07.1996 and the said order was affirmed by Appellate Authority for Industrial and Financial Reconstruction (*for short* 'AAIFR') and the Hon'ble Delhi High Court. It is, thus, proposed to be argued that the respondent/company is unable to pay the debts. It is also stated that the respondent/company and its Directors and Officials are trying to dispose the machinery etc., with a view to defraud its creditors including the petitioner. Allegations with regard to lack of probity in the functioning of the respondent/company are also stated.

4. It is also stated that authorized share capital of the respondent/company was at Rs.4,00,00,000/- (Rupees Four Crore only) divided into 40,00,000/- equity shares of Rs.10/- each and the issued, paid up and subscribed capital as per balance sheet was Rs.3,46,49,530/- (Rupees Three Crore Forty Six Lakh Forty Nine Thousand Five Hundred Thirty Only).

5. It is pleaded that the respondent/company was established mainly for the manufacture and to deal with all kind of fertilizers of organic and inorganic chemicals in terms of the Memorandum and Article of Association of the respondent/company, which are contained in Annexures – 1 & 2. It is being pleaded in Para 8 of the writ petition that the respondent/company has not been functional and is lying close for the last ten years.

6. It is stated and pleaded that the respondent/company had availed financial facilities from financial institutions namely IDBI Bank, ICICI Bank & IFCI Ltd., and took a loan to the tune of Rs.486 Lakh in which the Directors of the Company had given their unconditional and irrevocable personal guarantees. It is further stated that the said financial institutions sanctioned an additional loan of Rs.63.30 Lakh—the proportions are disclosed in Paras 9 & 10 of the petition.

7. It is stated that to secure the outstanding loan from the financial institutions, loan agreement was executed on 10.09.1987 and 15.11.1989 and security documents were also executed in favour of the financial institutions and an equitable mortgage was also created in respect of the immovable properties of the respondent/company situate at District Faizabad, U.P.

8. It is pleaded that the respondent/company had filed a reference under the The Sick Industrial Companies (Special Provisions) Act, 1985 (*for short 'SICA Act'*) before the BIFR in the year 1994 vide Case No.33 of 1994. In the said proceedings, BIFR had declared that all rehabilitation efforts had failed and referred the company for winding up under Section 20(1) of the SICA Act vide order dated 26.07.1996 (Annexure – 3). It is also stated that the Registrar of the BIFR had complied with the said order and had duly intimated to the Registrar of this Court, however, no action was taken thereupon.

9. It is further stated that against the order dated 26.07.1996 of the BIFR, an appeal was preferred before the AAIFR, however, the appeal was subsequently dismissed. The respondent/company thereafter approached the Delhi High Court in Writ Petition (Civil) No.968 of 1999, however, the said writ petition was dismissed on 07.03.2000 with adverse remarks against the respondent/company (Annexure – 5). It is stated that when the respondent/company failed to liquidate its dues taken from the financial institutions, the financial institutions filed for recovery before the Debts Recovery Tribunal – I, Delhi vide O.A. No.201 of 1999 under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (*for short 'the DRT Act'*). The said O.A. was decided against the respondent/company on 17.09.2004 and a recovery certificate was issued for an amount of Rs.8,79,01,479/- alongwith *pendentelite* and future interest at the rate of 11% w.e.f. the date of filing of the O.A. i.e. 24.03.1999 and cost was also imposed. The DRT also provided that in case the amounts are not paid, the same shall be recoverable

by auction/sale of hypothecated assets and mortgaged properties and from the personal properties of the defendants in the said original application. Subsequently, the recovery certificate issued by the DRT - I, Delhi was transferred to DRT, Lucknow for execution as their properties were situated at District Faizabad which falls within the jurisdiction of DRT, Lucknow.

10. It is stated that a deed of assignment was executed on 07.11.2006 in between the petitioner/company and the IDBI Bank (one of the lender banks) (known as the 'Deed of Assignment') which was also got registered with the Office of Sub-Registrar VII, New Delhi on 07.11.2006. In terms of the said assignment deed, the portfolio of debt of the respondent/company owed to IDBI Bank was transferred in favour of the petitioner/company. It is also claimed that the debts owed by the respondent/company to the ICICI Bank and State Bank of India were assigned in favour of the Kotak Mahindra Bank Limited vide Deeds of Assignment dated 31.03.2005 and 16.01.2006. It is also pleaded that the respondent/company borrowed money from the petitioner/company in the form of unsecured loan to clear the dues of Kotak Mahindra Bank Limited and IFCI Limited and from the said money, the dues were cleared by the respondent/company, however, as part of the negotiations, the financial instruments were handed over to the petitioner/company and admission to that effect is also reflected in the respondent/company's balance sheet as on 31.03.2010 in the form of inter-corporate loans of Rs.96,80,632.67/- out of which Rs.64,30,000/- belongs to the petitioner/company.

11. It is also stated that certain dues were also assessed by the Assistant Provident Fund Commissioner claiming a dues of Rs.25,24,091/- against the respondent/company.

12. It is stated that through a communication by the respondent/company, initially, a stand was taken that the company

has been recommended by the BIFR for winding up, and subsequently another letter was written stating that dues of all the lenders were settled but the dues of IDBI Bank were assigned to the petitioner/company with which talks of settlement are going on.

13. It is further stated that subsequently out of the funds available with the respondent/company, the management of the respondent/company illegally withdrew an amount of Rs.6,75,000/- and deposited an amount of Rs.6,20,000/- in the Provident Fund Account. It is claimed that thereafter the respondent/company was trying to sell the immovable assets of the company illegally to the detriment of the petitioner/company.

14. It is pleaded that the respondent/company has accepted the debt by showing a secured loan of Rs.2,24,30,000/- and unsecured debt of Rs.64,30,000/-. It is also pleaded that a charge was also created by the respondent/company in favour of the petitioner/company for an amount of Rs.2,24,30,000/- and the same was also registered with the Registrar of Companies (*for short* 'ROC') under Section 125 of the Act.

15. It is stated that despite requests and reminders, the respondent/company did not discharge its liability towards the petitioner/company, as such, a notice of winding up was sent on 10.10.2011 under Section 433 and Section 434 of Companies Act (*for short* 'the Act') calling upon the respondent/company to pay an amount of Rs.21,55,52,263/- (Rupees Twenty One Crore Fifty Five Lakh Fifty Two Thousand Two Hundred and Sixty Three Only) excluding the interest upon the unsecured loan, however, the said notices were returned unserved from all the addresses including the address of the registered office of the company as well as the other known addresses of the respondent/company with the remark that '*no such person is residing*'. It is stated that although the notices were returned unserved, the petitioner took steps for publication of

the said notices in two local dailies i.e. Hindi Dainik 'Aaj' and English Daily 'The Pioneer' – both published from Lucknow on 08.12.2011 (Annexure – 16).

16. On the basis of the said pleadings, it is stated that the respondent/company failed to liquidate the debts owed to the petitioner/company even despite the notice and thus, it is liable to be wound up.

17. Respondent/company in its counter affidavit has denied all the allegations. The main defences taken are that the petition is bad for non-impleadment of the Registrar of Companies; the petitioner has not approached this Court with clean hands and have concealed the material facts.

18. With regard to the claims of the petitioner/company, it is stated that the case of the petitioner/company is based upon deed of assignment dated 07.11.2006, which is illegal as the petitioner is neither a 'reconstruction company' as defined under Section 2(1)(v) nor a 'securitization company' as defined under Section 2(1)(za) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (*for short 'the SARFAESI Act'*) and the petitioner/company is not a Bank or a Banking Company as defined under the DRT Act and thus, the claim based upon the assignment deed is a nullity.

19. It is further argued that the deed of assignment was registered at Delhi, whereas the properties are situated at Faizabad, as such, no interest can be claimed based upon the deed of assignment being hit by Section 28 of the Registration Act.

20. It is stated that the statutory notice under Section 434 of the Act has never been tendered or served at the registered offices of the company, as such, the petition under Section 434(1)(a) of the Act is not maintainable. It is further argued that the alleged claim of the petitioner/company is barred by limitation. It is further objected that

the claim of the petitioner/company is based upon the alleged dues of IDBI Bank allegedly assigned to the petitioner/company and the petitioner cannot take recourse to winding up and has avoided taking recourse of filing of a suit for recovery in order to avoid payment of Court fees and thus, it is liable to be dismissed. It is further stated that no admitted amount of the petitioner is due upon the answering respondent. It is further argued that the decree passed by the DRT has been satisfied in the recovery proceedings and thus, the claim of the petitioner is not maintainable.

21. It is further stated that the claim of the petitioner for over Rs.21 Crore in lieu of the OTS of Rs.44.60 Lakh in which the petitioner has paid less than Rs.27 Lakh is based upon fraud, misrepresentation and thus, liable to be dismissed and the amounts claimed are highly inflated.

22. It is further stated that the dues claimed by the petitioner/company are bonafidely disputed and cannot be adjudicated in the winding up proceedings. It is also denied that the net worth of the respondent/company has eroded. It is further stated that the winding up petition is liable to be dismissed on the ground that one Mr. Neeraj Tulsiyan and the petitioner were, in fact, not the creditors of the respondent/company, instead they were the strategic investor who had undertaken to settle the liabilities and thereafter, earn profit from working of the respondent/company proportionate to their investments.

23. In the counter affidavit, the financial facilities extended to the respondent/company by the consortium of financial institutions i.e. IDBI Bank, ICICI Bank and IFCI Ltd., are admitted and the availing of financial assistance from State Bank of India is also admitted.

24. It is stated that in the year 1992, the respondent/company was adversely affected due to decontrol of Single Super Phosphate Fertilizers (SSP) by the Government and the farmers had started

shifting to nitrogen based fertilizers, which adversely affected the financial health of the company and thereafter, could not continue with the production despite efforts. The fact with regard to the respondent/company approaching BIFR and AAIFR are also admitted.

25. It is stated that after having failed to get the company revived either in the proceedings before the BIFR or AAIFR in the year 2003, the respondent/company received an offer for running the factory from one M/s Khaitan Fertilizers Ltd. The proposal of the said company was forwarded to ICICI Bank and the ICICI Bank had initially accepted the offer as a merchant banker, however, it is stated that subsequently, M/s Khaitan Fertilizers Ltd., backed out of their offer.

26. It is stated that in the year 2005, one Mr. Neeraj Tulsiyan, who was known to the promoters of the company, entered into an understanding with the respondent/company and at his instance, a Techno-Economic Viability Report was also prepared and in pursuance thereof, Mr. Neeraj Tulsiyan undertook to clear the entire liability of the respondent/company towards the banks, the financial institutions and the other statutory authorities and debtors, and he promised to pump in requisite funds – although, no formal Memorandum of Understanding (MOU) was executed in between the parties, the said statement is based upon the letter dated 13.11.2007 written by Mr. Neeraj Tulsiyan to the respondent/company (Annexure – CA 3).

27. It is stated that in pursuance to the said understanding, the Board of Directors of the respondent/company in its meeting dated 02.08.2005 authorized M/s Neeraj Tulsiyan and Associates to take steps to settle all the dues with the respondent/company. It is stated that in pursuance to the said authorisation, Mr. Neeraj Tulsiyan and the Board of Directors of the respondent/company entered into a

settlement of dues with IDBI Bank under an OTS settlement for a sum of Rs.54,66,920/- which was conveyed by the IDBI Bank to Mr. Neeraj Tulsiyan on 19.12.2005. It is further stated that for revival of the company and for settlement of the dispute, out of the total amount of OTS, a sum of Rs.15,00,000/- was contributed by the respondent/company through their family members while Mr. Neeraj Tulsiyan contributed Rs.39,70,000/-. It is stated that the OTS amounts were paid on 26.11.2005 & 10.12.2005 and subsequently, in the DRT proceedings on account of the OTS settlement, DRC proceedings were closed vide order dated 28.09.2007 (Annexure – CA 7). It is stated that after settling the amount with IDBI Bank, the dues of ICICI Bank which was assigned to Kotak Mahindra Bank Limited were taken up and were settled for an amount of Rs.52 Lakhs in which M/s Neeraj Tulsiyan and Associates contributed Rs.42 Lakh and the promoters of the respondent/company contributed Rs.10 Lakh. It is further stated that thereafter steps were taken for settlement of the dues of IFCI Ltd., in which the petitioner made a contribution of Rs.22 Lakh and the promoters of the respondent/company contributed Rs.28 Lakhs and settlement was got done. It is stated that on 07.11.2006, the petitioner/company got assignment deed by misleading the respondent/company – according to the respondent, the same was got executed after 11 months of the OTS having been finalized and the OTS amount having been paid to IDBI Bank.

28. It is stated that the alleged assignment deed was made on 07.11.2006 and the OTS proposal was accepted and amounts paid in the year 2005, as such, the IDBI Bank had no dues left on the respondent/company and could not have executed any deed of assignment of the alleged debt in respect of the respondent/company.

29. It is also brought on record that subsequently, M/s Neeraj Tulsiyan and Associates did not take any interest in pursuance to his

promise and the respondent/company settled the dues with State Bank of India.

30. It is also stated that despite promise Mr. Neeraj Tulsiyan did not pay the dues of the Provide Fund Department and in fact, stole certain machinery worth more than Rs.66 Lakh.

31. It is also stated that after the Delhi and U.P. Stock Exchange became non-functional, the respondent/company exited and thereafter, got the valuation re-done in which the land and building and total assets of the respondent/company were valued at Rs.11,92,89,038/- and the net worth of the respondent/company after excluding all the liabilities was assessed at Rs.3,91,00,271/-. It is further stated that in the year 2005, a Techno-Economic Survey was done in which the valuation of the plant was assessed at Rs.22 Crores.

32. In Para 31 of the Counter Affidavit it has been stated that the dues remaining with the respondent/company are that of Provident Fund Department (approximately Rs.40 Lakh), Rajasthan State Mining and Mineral Ltd. (approximately Rs.40 to 45 Lakh), and the amount of the petitioner, which according to the respondents, are disputed. It is also admitted that certain demands towards electricity dues were pending which have been settled. It is denied that the company had lost its substratum.

33. It is also stated that the petitioner had earlier served a notice under Section 13(2) of the SARFAESI Act on 23.02.2009 only with a view to grab the assets of the respondent/company which was challenged in Writ Petition No.8117 (M/B) of 2009 in which an interim order was passed on 31.08.2009. The respondent/company has also denied all the averments made in the subsequent paragraphs specifically.

34. With regard to the proceedings pending before BIFR and AAIFR, it is stated that the company was in financial difficulty and

has subsequently undergone major changes. With regard to the creation of the charge in favour of the petitioner/company and its registration with the ROC, it is stated that the same was done at the instance of Mr. Neeraj Tulsiyan in lieu of the promise made by him for securing the amounts, however, he had subsequently failed to honor his commitments and after the discharge of the debts, no charge was left in favour of the IDBI Bank and thus, could not have been got registered.

35. With regard to the amounts shown in the balance sheet of the respondent/company, it is stated that in the balance sheet from the year 2006 up to 31.03.2018, an unsecured loan of Rs.64.30/- Lakh is being shown due on the petitioner/company. It is stated that the charge of Rs.2,24,30,000/- shown in the balance sheet of the respondent/company was erroneously shown as secured loan and the said entry was subsequently revoked in the Financial year 2018-19.

36. With regard to the balance sheet of the petitioner/company it has been pleaded that the same does not reflect any investment as on 31.03.2018 nor does it give any detail about any secured loan given to anybody, however, an unsecured loan to the tune of Rs.119.80 Lakh (considered good) given by the petitioner/company is shown, thus, even as per its own balance sheet, the petitioner/company had never given unsecured loan and now the petitioner/company cannot claim any security/charge on the assets of the respondent/company.

37. It is also stated that in its balance sheet, the petitioner/company has shown that no litigation is pending regarding the petitioner/company.

38. It is specifically denied that any notice dated 10.10.2011 was ever tendered or given to the respondent/company and no proof with regard to the service on the registered address has been furnished. It is further stated that the service of notice in the newspapers does not fulfill the requirement specified under Section 434 of the Act and

even otherwise the said two newspapers do not have any circulation at Faizabad as the newspapers were of Lucknow.

39. It is also stated that the petition is not maintainable under Section 433(e) of the Act.

40. Specific assertion has been made that the respondent/company is ready and willing to pay the amount of Rs.64.30/- Lakh to the petitioner/company and during the course of the hearing as well as in an affidavit filed, respondent/company have admitted that they are ready and willing to pay the amount of Rs.64.30/- Lakh to the petitioner/company and to show their bonafide, they had proposed to tender an amount of Rs.1 Crore.

41. Shri N.K. Seth, learned Senior Advocate, appearing for the respondent, during the course of the hearing, had left it open to the Court to fix any amount on the respondent/company towards the amount of Rs.64.30 Lakh and the respondents would honor the same.

42. Following judgments have been cited by both the parties:

From Petitioner's side:

To impress the scope of the powers that can be exercised by the Company Court:

(i) Credit Suisse AG v. SpiceJet Limited; Company Petition No.363 of 2015, Dated 06.12.2021 which in turn has reiterated the principles as were laid down in the case of *Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd.*; (1971) 3 SCC 632;

(ii) M/s Classic Diamonds (India) Ltd. v. ICICI Bank Limited; 2016 SCC OnLine Bom 15573;

To argue on the scope of contract and its interpretation:

(i) Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties & Ors.; Civil Appeal No.5147 of 2016 decided on 19.08.2020;

(ii) B.O.I. v. Custodian and Ors.; (1997) 10 SCC 488;

With regard to the bonafide dispute and as to whether the dispute raised is bonafide or not in a winding up petition:

(i) Steel Authority of India Limited v. M/s Shiv Mahima Ispat Pvt. Ltd.; 2016 SCC Online Raj 3842

(ii) M/s Shital Fibres Ltd. v. Indian Acrylics Ltd.; Civil Appeal No.1105 of 2021, decided on 06.04.2021

With regard to the claim being within limitation:

(i) Asset Reconstruction Company (India) Ltd. v. Bishal Jaiswal and Anr.; (2021) 6 SCC 366;

(ii) Bangur Foundation Ltd. v. Esjey Corp.; 2003 SCC OnLine Cal 113;

(iii) Shahi Exports Pvt. Ltd. & Anr. v. CMD Vuildtech Pvt. Ltd.; 2013 SCC OnLine Del 2535;

(iv) Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff; 1961 SCC OnLine Cal 128

With regard to the effect of recording in the balance sheet:

(i) Electron Industries Ltd. v. Soham Polymers (P) Ltd.; (2005) 13 SCC 86

With regard to the manner in which the notice is required to be served:

(i) Evergreen Plywood Industries v. Circular Leasing and Resources P. Ltd.; 2004 SCC OnLine Cal 698;

- (ii) Evergreen Plywood Industries Ltd. v. Circular Leasing and Resources P. Ltd.; 2004 SCC OnLine Cal 699;
- (iii) V. Raja Kumari v. P. Subbarama Naidu and Anr.; (2004) 8 SCC 774;
- (iv) Deepak Machineries Pvt. Ltd. v. Ispat Industries Ltd.; 2005 (2) Bom CR 94;
- (v) Gradeur Collection v. Shahi Fashions Pvt. Ltd.; ILR (2013) V Delhi 3644 Co. Pet.;
- (vi) Shriram City Union Finance Limited v. Super Rubber Engineering Company Pvt. Ltd.; 2018 SCC OnLine Bom 12483;

To argue that the respondent/company is a defunct company:

- (i) M/s Allied International Products Ltd. v. Appellate Authority for Industrial and Financial Reconstruction and Ors.; 2000 SCC OnLine Del 993;
- (ii) Madhya Pradesh State Industrial Development Corporation v. M.P. Toll Roads Ltd.; 2018 SCC OnLine Bom 15301;

To argue that the respondent/company cannot approbate and reprobate after taking the advantage of agreement and subsequently resile from the same:

- (i) Shyam Telelink Ltd. Now Sistema Shyam Teleservices Ltd. v. Union of India; Civil Appeal No.7236 of 2003, decided on 05.10.2020;

With regard to interpretation of entries in the balance sheet:

- (i) Padam Tea Co. Ltd. v. Darjeeling Commercial Co. Ltd.; 1975 SCC OnLine Cal 140;

To argue that the application under Section 340 is liable to be rejected:

- (i) Amarsang Nathaji v. Hardik Harshadbhi Patel and Ors.; (2017) 1 SCC 113.

From Respondent's side:

To argue that the petitioner is neither a reconstruction company nor a securitisation company:

- (i) M/s Gorakhpur Steel Metals Pvt. Ltd. v. The Presiding Officer, D.R.T. & Ors.; 2017 (121) ALR 817;
- (ii) M/s Gorakhpur Steel Metals Pvt. Ltd. v. The Presiding Officer, D.R.T. & Ors.; 2017 (125) ALR 115;
- (iii) Suzuki Parasrampuriah Suitings Private Limited v. Official Liquidator Mahendra Petrochemicals Ltd. (In Liqn) and Ors.; 2015 SCC OnLine Guj 1017;
- (iv) Suzuki Parasrampuriah Suitings Private Limited v. Official Liquidator Mahendra Petrochemicals Ltd. (In Liqn) and Ors.; (2019) 212 CompCas 480 (GUJ) : MANU/GJ/1812/2016;

To argue that the petition is barred by limitation:

- (i) Gaurav Hargovindbhati Dave v. Asset Reconstruction Company (India) Ltd. & Anr.; 2020 SAR (Civ) 21;
- (ii) Jignesh Shah and Anr. v. Union of India and Anr.; AIR 2019 SC 4758;
- (iii) Sampuran Singh and Ors. v. Niranjana Kaur (Smt) and Ors.; (1999) 2 SCC 679;
- (iv) Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited and Anr.; (2020) 15 SCC 1;

(v) Ram Prakash v. Deputy Director of Consolidation and Ors.; 2022 SCC OnLine All 107;

(vi) Satrohan and Ors. v. The Settlement Officer Consolidation Lko. and Ors.; Writ – B No.357 of 2022 decided on 03.06.2022.

In respect of the submission that the statutory notice under Section 434 has not been received at the registered office of the company:

(i) Alliance Credit and Investments Ltd. v. Khaitan Hostombe Spinel Ltd.; 1996 SCC OnLine All 782;

(ii) State Black Sea Shipping Company & Anr. v. Viraj Overseas Pvt. Ltd.; 2003 SCC OnLine Deli 597;

(iii) Neeraj Realtors Private Limited v. Janglu (Dead) Through Legal Representative; (2018) 2 SCC 649;

(iv) Corporate Ispat Alloys Limited v. G.B. Transport (India) Pvt. Ltd.; 2015 CJ(Cal) 716;

(v) N.L. Mehtra Cinema Enterprises Pvt. Ltd. v. Parvinchandra P. Mehta; 1989 SCC OnLine Bom 11;

To argue that liability is being bonafidely disputed by the respondent/company and cannot be adjudicated in winding up petition:

(i) IBA Health (India) Private Limited v. Infor-Drive Systems SDN.BHD; (2010) 10 SCC 553;

(ii) Swaraj Infrastructure Pvt. Ltd. v. Kotak Mahindra Bank Ltd.; (2019) 3 SCC 620;

(iii) Mediquip Systems (P) Ltd. v. Proxima Medical System GMBH.; (2005) 7 SCC 42;

To impress that the petitioner has not approached this Court with clean hands:

(i) Kishore Samrite v. State of Uttar Pradesh and Ors.; (2013) 2 SCC 398;

(ii) Jagdish Chandra & Ors. v. Krishna Mohan Aggrawal & Ors.; Second Appeal No.37 of 2020, decided on 06.02.2020.

To argue that the assignment deed is void by virtue of Section 28 of the Registration Act:

(i) Veena Textiles Limited v. The Authorised Officer, IFCI Ltd.; 2014 (5) CTC 209;

To further argue that the preliminary objections including the maintainability of the petition should be decided first:

(i) Manubhai J. Patel and Anr. v. Bank of Baroda and Ors.; (2000) 10 SCC 253;

(ii) Union Bank of India & Ors. v. Ranbir Singh Rathaur and Ors.; (2006) 11 SCC 696;

(iii) T.K. Lathika v. Seth Karsandas Jamnadas; (1999) 6 SCC 632

To argue that the application under Section 340 Cr.P.C. filed by the respondent should be decided first:

(i) Pramod Kumar Singh v. State of U.P. & Anr.; Neutral Citation No.2024:AHC;96456;

(ii) Syed Nazim Husain v. The Additional Principal Judge, Family Court & Anr.; 2003 SCC OnLine All 2358

43. Supplementary counter affidavits have also been filed at the instance of the respondents.

44. It is also essential to notice that the Provident Fund Department has also joined the proceedings by filing a claim of their

dues, however, the other dues are not disputed by the respondent/company who have undertaken to clear the same.

45. In the present case, when the petition was filed, this Court on its first date of hearing i.e. 23.02.2012 had issued notices and directed for publication in the newspapers. Subsequently, during the pendency of the proceedings, orders came to be passed appointing the Official Liquidator and various orders were passed to the Liquidator regarding taking possession and thereafter, permitting the removal of certain assets. It is also essential to notice that on 30.03.2018, the petition was dismissed for want of prosecution and the Official Liquidator was discharged. Subsequently, recall application was filed and the order dated 30.03.2018 was recalled vide order dated 20.04.2018. It also bears from record that on 13.07.2018 with the consent of parties, the petition was directed to be published in the newspapers in accordance with Rule 24 of the Companies (Court) Rules, 1959. Application for recall of the order dated 13.07.2018 is also pending. It is also relevant to notice that the application at the instance of the respondent/company for taking proceedings under Section 340 of the Cr.P.C. are also pending. However, considering the fact that I am proceeding to decide the main winding up petition itself, no useful purpose would be served in passing separate orders on the applications.

46. Considering the submissions as recorded above, present petition has been filed under Section 433(e) & (f) read with Section 434(1)(a) read with Section 439(1)(b) of the Companies Act as well as under Section 20(1) of The Sick Industrial Companies (Special Provisions) Act, 1985.

Section 433(e) & (f) read with Section 434(1)(a) read with Section 439(1)(b) of the Companies Act read as under:

“433. Circumstances in which company may be wound up by Tribunal.—A company may be wound up by the Tribunal,—

...

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

(f) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up;

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;

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—

...

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

Section 20(1) of The Sick Industrial Companies (Special Provisions) Act, 1985 read as under:

“20. Winding up of sick industrial company.—(1) Where the Board, after making inquiry under Section 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.”

47. During the course of the arguments, it was pointed out to the counsel for the petitioner, who had extensively argued, that the petition was not filed under Section 433 (c) of the Act and a relief has been sought on that count, to which learned counsel for the petitioner Mrs. Shraddha Agarwal had stated that it is within the domain of the jurisdiction of this Court to pass orders even if no specific pleading or prayer to that effect is made. The said contention cannot be accepted for the simple reason that it is fairly well settled that the strict rule of pleadings apply for winding up in terms of the provisions of Rule 6 and Rule 11 of the Companies (Court) Rules,

1959, thus, the petition lacking a prayer for winding up of a company under Section 433(c) of the Act cannot be considered in view of the lack of prayer.

48. Considering the petition on the ground as pleaded and prayed, the issue to be considered by this Court is whether the company is unable to pay its debts and whether it is equitable that the company is wound up ?

49. For making a case that the company is unable to pay its debts, it is argued that in terms of the mandate of Section 434(1)(a) of the Act, it is clear that if the company is indebted in a sum exceeding one lakh rupees and a notice has been served, a clear case for winding up of respondent/company is made out. The said contention is based upon the claim of the petitioner/company that they are entitled to the amounts of loan as reflected in the balance sheet of about Rs.64.30 Lakh and the balance by virtue of them being an assignee of debt by the IDBI Bank, which is also permitted and reflected in the mandate of Section 434(1)(a) of the Act.

50. Contradicting the said claim, the respondent/company had admitted its liability to pay the amount of Rs.64.30 Lakh, and as recorded in the earlier part of the order, an offer has been made and left upon the Court to fix the amount which the respondent/company shall pay in respect of the loan of Rs.64.30 Lakh as also reflected in the balance sheet. Thus, to that extent there is no dispute by the respondent/company.

51. With regard to the second limb of the claim of the petitioner/company on the basis of assignment deed executed in its favour by the IDBI Bank and disputed by the respondent company, it is essential to notice that the deed of assignment would be an '*actionable claim*' as defined under Section 3 of Transfer of Property Act and can be enforced as an actionable claim by the petitioner, however, the fact remains that the assignment deeds, assigned the

debts which were non-existent as the OTS proposal had already been signed by the IDBI Bank and based upon the payments thereof, the recovery proceedings were also consigned to record.

52. From the definition of ‘actionable claim’ as defined under Section 3 of the Transfer of Property Act, it is clear that on the basis of the said, the claimant should be entitled to knock at the door of a Court and the Court can grant a decree of recoverable and payable debt. However, the debt owed to IDBI Bank stood extinguished even prior to the assignment in favour of the petitioner, as such, even if the petitioner had approached and filed a suit for recovery against the respondent/company based upon the assignment of the debt, the same would, *prima facie*, have miserably failed, as the part of the debt owed to the IDBI Bank over and above the OTS settlement stood waived.

53. It is clear that the debt assigned should be a ‘*debt recoverable*’ in accordance with law and cannot include the ‘*waived debt*’ unless the clauses of the assignment deed clearly specify and the settlement in between the assignor and the borrower is also specifically mentioned. This aspect makes it clear that, in any case, claim of petitioner company based upon assignment deed is clearly not an *undisputed claim and is a contentious issue*. Thus, I have no hesitation in holding that the claim of the petitioner/company based upon the ‘assignment deed’ cannot be a foundation for seeking winding up.

54. The admission of the respondent/company in its balance sheet with regard to the charge created, would not materially affect the position as held above, for the simple reason that in terms of the mandate of Section 124 of the Act, the charge although includes a mortgage and the registration of charges works in favour of the person in whose favour the charge is registered to the exclusion of all others, however, the charge or a mortgage is only liable to be

redeemed if there is a legally recoverable debt. A waived debt, leaves the lender with no debt which can be said to be assigned and thus, merely because the charge is registered, the same would not give any benefit to the petitioner/company as is being claimed by them.

55. With regard to the amounts admitted amounting to around Rs.64.30/- Lakh, the petitioner/company has a claim and as no notice as is required under Section 434 of the Act was duly served on the registered address of the company and further in view of the admission of the respondent/company before this Court that they are ready and willing to pay the amount, it cannot be said that the company has failed and neglected to pay the amount which is '*sine qua non*' for invoking Section 433(c) and 434(1)(a) of the Act, thus, in view of the admission and the categorical submission made by learned counsel for the respondent during the course of hearing, I deem it appropriate to direct that the respondent/company shall pay the amount of Rs.64.30 Lakh alongwith interest at the rate of 11% per annum from the date of its payment till actual payment/realization. Interest of 11% is being levied as that was the interest on which amounts were settled with the financial institutions. The said amount shall be paid by the respondent Company within two months from date of judgment.

56. Coming to the pleadings with regard to seeking wind up under Section 433(f) of the Act:

57. To appreciate a case for winding up of a company on the ground that it is just and equitable, it is essential for the Court to form a view that in view of the status of the company, if the company is not wound up, the same would amount to a threat to the commercial world and the existence of the company is not desirable for the commercial world. No such material exists to form a view that the company if not wound up would be a threat to the commercial world and/or can lead to further defrauding of creditors,

more so, when the respondent/company has categorically undertaken to settle the dues of the Provident Fund, which according to Shri N.K. Seth, shall be cleared within a period of three weeks of the decision of the present case alongwith any other due payable to any other creditor.

58. I have already held that the winding up petition under Section 433(c) of the Act cannot be considered solely because no prayer to that effect has been made.

59. Thus, for all the reasons recorded above, present winding up petition deserves to be dismissed and is ***dismissed*** with the direction that the respondent/company:

- (1) shall pay an amount of Rs.64.30 Lakh alongwith interest at the rate of 11% per annum from the date when the amounts were paid till actual payment/realization within two months;
- (2) shall clear the Provident Fund dues within a period of four weeks from today;
- (3) shall clear the outstanding dues of any other creditor.

Order Date:- 22.05.2025
nishant

[Pankaj Bhatia, J.]