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PRACHI PRANESH NANDIWADEKAR

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 287 OF 2008
IN
COMPANY PETITION NO.921 OF 2001
ALONG WITH
IN PERSON APPLICATION (L) NO.17934 OF 2023

M/s. Bassein Metals Pvt. Ltd.
Having its registered office at
B-61, Dattani Apartment No.4,
Parikh Nagar, S. V. Road,
Kandivli (W), Mumbai 400 067
and presently C/602, Avon Plaza
-I, Thakur Complex,
Kandivli (East),
Mumbai – 400 001.

… Appellant
(Original Respondent)

Versus

The National Small Industries Corpn. Ltd.
A Government of India Enterprises having its Head Office at NSIC Bhavan,
Okhla Industrial Estate,
New Delhi 110 020 and
having its Regional Office at
Prestige Chambers,Kalyan Street,
Masjid Road (East),
Mumbai 400 009.

… Respondent
(Original Petitioner)

Mr. Shadab Jan a/w Ms. Niharika Jalan i/by Mr. Ruturaj V. Bankar for the Appellant.

None for the Respondent.

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CORAM : M.S. Sonak &
Jitendra Jain, JJ.

RESERVED ON : 4 July 2025
PRONOUNCED ON : 9 July 2025

JUDGMENT (Per JITENDRA JAIN, J.) :-

1. This appeal, filed by the appellant (original respondent), challenges the order dated 11 October 2007 passed by the learned Single Judge of this Court in Company Petition No.921 of 2001 whereby the appellant (original respondent) was ordered to be wound up since the appellant (original respondent) was unable to pay the debt due to the respondent (original petitioner).

Brief facts :-

2. In November 1992, the appellant (original respondent) entered into an agreement with the respondent (original petitioner) for availing the benefits of the "raw material assistance scheme" in the form of finance, which was to be lent by the respondent (original petitioner). An undertaking and personal guarantee of the Managing Director of the appellant (original respondent) was also executed for repayment of money to the respondent (original petitioner). A Letter of Credit was also drawn in favour of the respondent (original petitioner) by the appellant (original respondent).

3. In August 1998, two cheques were issued by the appellant (original respondent) in favour of the respondents

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(original petitioner) for a sum of Rs . 90,00,000/- and Rs . 1,77,80,849/-. These cheques were not honoured and therefore, proceedings under Section 138 of the Negotiable Instruments Act, 1881 (NI Act) were initiated against the appellant (original respondent) by the respondent (original petitioner).

4. In September 1998, the appellant's (original respondent) bankers raised certain objections with regard to the Letter of Credit worth Rs.44,74,000/-. Though the appellant (original respondent) cleared discrepancies, the amount was not paid to the respondent (original petitioner).

5. In December 1998, the respondent (original petitioner) wrote a letter to the appellant (original respondent) requesting that they resolve the issue of non-payment of dues.

6. In January 1999, the appellant's (original respondent) Managing Director executed a demand promissory note in favour of the respondent (original petitioner) confirming the balance as on 31 March 1999 at Rs . 2,83,70,700/-.

7. On 3 July 2001, the respondent (original petitioner) issued a winding-up notice calling upon the appellant (original respondent) to make payment within 21 days. However, the appellant (original respondent) in its reply to the winding-up notice vaguely denied liability and demanded an inspection of certain documents.

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8. The respondent (original petitioner) filed a winding-up petition under Section 433 of the Companies Act, 1956, against the appellant (original respondent)-Company.

9. The appellant (original respondent) and the respondent (original petitioner) filed their reply and rejoinder in March/April 2002 and finally on 11 October 2007, the impugned order came to be passed in Company Petition No.921 of 2001 for winding up of the appellant (original respondent)-Company.

10. This Court stayed the impugned order on 17 September 2008, and the appeal was admitted. Against the order granting stay, the respondent (original petitioner) challenged the order by filing SLP to the Supreme Court. On 5 October 2009, the Hon'ble Supreme Court did not interfere with the interim order but requested the High Court to expeditiously hear and dispose of the present appeal within one year.

11. On 11 November 2009, the Coordinate Bench of this Court expedited the hearing and fixed the appeal for 19 November 2009. However, thereafter, the matter was listed on a couple of occasions but did not come to a head or reach a hearing. On 4 July 2025, the matter was listed for final hearing before this Bench for the first time, and therefore, we heard it finally.

12. Mr. Shadab Jan, learned counsel for the appellant (original respondent), submitted that the winding up order can be passed only if there is crystallised debt and not when

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there is a discrepancy in the amount due. He brought to our attention the orders passed by the Metropolitan Magistrate dated 7 August 2004 and 24 July 2012 where the appellant (original respondent) was acquitted for committing offence punishable under Section 138 of the NI Act with respect to two cheques referred to above. He also brought to our attention the order passed by the learned Single Judge in Summary Suit No.4441 of 2001 where the appellant (original respondent) was found to be liable to make the payment. This order and decree has not been challenged by the appellant (original respondent) and neither the decree has been discharged. Learned counsel further submitted that since foundation of winding up proceedings were dishonour of cheques and non-honouring of Letter of Credit and Metropolitan Magistrate subsequently, has acquitted the appellant (original respondent) from the offence under Section 138 of the NI Act, the whole basis of winding up notice falls. Learned counsel for the appellant (original respondent) relied upon the following two decisions in support of the submissions and prayed for allowing the appeal :-

(i) Madhusudan Gordhandas & Co. Vs. Madhu Woollen Industries Pvt. Ltd.[1] *and*

(ii) Satish Chander Ahuja Vs. Sneha Ahuja[2]

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1 (1972) 2 S.C.R. 201

2 (2021) 1 SCC 414

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13. None appeared for the respondent (original petitioner).

Analysis & Conclusion :-

14. Section 433 of the Companies Act, 1956 provides for circumstances in which the Court may wind up a company. The circumstances are specified in clauses (a) to (i). Clause (e) provides for winding up if the company is unable to pay its debts. Therefore, we must examine whether the appellant (original respondent) was and is unable to pay its debts.

15. At the outset, on a query being raised by the Court on the present activities of the appellant (original respondent), we were informed by the learned counsel for the appellant (original respondent) that there are no activities being carried out by the company, nor are there any assets of the company. Therefore, it was his contention that a winding up order will only require the official liquidator to take charge of the company, which has nothing and therefore will be a burden on the exchequer.

16. In the course of the hearing, the appellant (original respondent) handed over compilation of documents which contained orders passed by the Metropolitan Magistrate, order passed by the High Court in Summary Suit and proceedings initiated under the Securitisation Act by Arcil. On a query being raised, by the Court, the learned counsel fairly stated that although some of the documents were prior to the impugned order same were not filed or shown to the Company Court at the relevant time. With respect to the other

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documents, he submitted that same are post the impugned order and, therefore, this Court should take cognisance of these documents for adjudicating the present appeal.

17. The appellant (original respondent) entered into an agreement with the respondent (original petitioner) for obtaining finance to procure raw material. The respondent (original petitioner) is a Government of India undertaking whose object is to give financial assistance to businesses.

18. The agreement was executed in November 1992 for obtaining the finance facility. In December 1998, respondent (original petitioner) requested the appellant (original respondent) for a joint meeting to resolve matters concerning recovery of dues/Letter of Credit.

19. In January 1999, the appellant (original respondent) executed a demand promissory note for a sum of Rs.2,83,70,700/- in favour of the respondent (original petitioner) with a specific undertaking to pay interest @ 10% p.a. till full payment is made. There is no dispute that this demand note was executed by the appellant (original respondent) in favour of the respondent (original petitioner).

20. In October 1999, respondent (original petitioner) referred to its earlier communications regarding recovery of outstanding dues and stated that the statement of accounts as desired by the appellant (original respondent) were already furnished in March 1999, but still the appellant (original respondent) has not cleared the dues. Therefore, the

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respondent (the original petitioner) requested that the appellant (the original respondent) repay the dues. There is no rebuttal/reply to this particular letter.

21. The appellant (original respondent) having failed to pay the dues, respondent (original petitioner) issued a statutory winding-up notice in July 2001 to the appellant (original respondent) giving the history of the transaction and requesting the appellant (original respondent) to make total payment of Rs.3,68,29,634/- within a period of 21 days failing which the respondent (original petitioner) would initiate civil/criminal and/or winding up proceedings. This statutory notice was replied by the appellant (original respondent) vide letter dated 21 July 2001. In the said reply, the appellant (original respondent) merely requested for various documents and vaguely and baldly in one sentence denied the allegation contained in the statutory notice.

22. The documents of which the inspection were sought in the above reply were never requested by the appellant (original respondent) from the respondent (original petitioner) at any point of time prior thereto, although the transaction started from the year 1992. The appellant (original respondent) never denied its liability to pay the dues till the receipt of the statutory winding up notice and even thereafter, except denying the contents and allegation stated in the winding up notice nothing further was said.

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23. It is important to note that demand promissory note was executed in January 1999 admitting liability of Rs.2,83,70,700/-. In March 1999, the respondent (original petitioner) gave copies of statement of accounts to the appellant (original respondent) and in October 1999, the respondent (original petitioner) in its letter requested the appellant (original respondent) to clear the dues which were pending since long. There is no correspondence from the appellant (original respondent) to the respondent (original petitioner) at any point of time, prior to the winding up statutory notice in July 2001 about denying the liability to pay the dues. The conduct of the appellant (original respondent) speaks for itself moreso, when the present transaction is with a Government of India undertaking which is set up to help the businessmen like the appellant (original respondent) to finance their activities.

24. It is only in the reply to the winding up petition that the appellant (original respondent) has raised various grounds disputing the discrepancies in the figure, non-execution of the documents, cheques being issued against service charges etc. We fail to understand why these grounds were raised after filing the petition, rather than while the respondents (original petitioners) were pursuing the appellant (original respondent) for recovery of the dues. On the contrary, by executing the demand promissory note in January 1999, the appellant (original respondent) has admitted its liability to the extent of Rs.2,83,70,700/-. The figure in the winding up notice has

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increased on account of interest specified in the demand promissory note. The appellant (original respondent) was also furnished with the statement of accounts in March 1999 and same is evident from the annexure to the petition and rejoinder but still choose not to dispute the same, till the filing of the reply to the winding up petition aslateas March 2002. Therefore, letter of 27 February 1999 relied upon in reply to the winding up petition has no relevance.

25. The Appellant (original respondent) in the reply admitted that cheques were towards service charges and same is also the finding of Metropolitan Magistrate. If that be so, then we fail to understand why the debt was unpaid since the transactions have to be examined as a whole. The Calcutta High Court in the case of ***John Paterson & Co. (I) Ltd Vs. Pramod Kumar Jalan***[3], ordered winding up where the company admitted amount was received not as a loan but for issuing debentures and there was failure to repay debt and interest.

26. From the above factual analysis, we have no iota of doubt that the grounds raised for opposing the winding up are not bonafide but an afterthought and only to subvert winding up proceedings.

27. The reason for enacting Section 433(e) of the Act for winding up of companies which are unable to pay its debts is to ensure that such companies do not carry out their activities in future with other creditors and dupe new creditors. This

[3] (1983) 53 Com Cases 255 (Cal.)

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seems to be the objective of the winding up under Section 433(e) of the Act. It is to protect the interest of the future creditors that if Court comes to a conclusion that the company is unable to pay its debts then such a company is better to be wound up then to permit such companies to enter into various transactions and default to too many creditors.

28. In instant case, from the facts narrated above, the objective of the appellant (original respondent) seems to be not to pay even the admitted dues as per the demand promissory note executed in January 1999 and same only demonstrates its inability to clear the dues. The objective of the appellant (original respondent) is to raise some or the other ground and submit before the Court that since the dues are disputed, winding up petition is not maintainable. In our view, such an approach is deplorable because no such grounds were raised at any point of time prior to the winding up petition being filed. The winding up petition is of 2001 and it is only in the reply in March 2002 that various grounds are taken with an ulterior motive to avoid winding up of the company.

29. The appellant (original respondent) has tendered across the Bar a compilation of documents containing various orders and contended that in criminal proceedings under Section 138 of the NI Act, the appellant (original respondent) and its officers were acquitted on the basis of very cheques which are the subject matter of winding up, it clearly demonstrates that the grounds raised for opposing the

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winding up are bonafide. Firstly, the order passed by Metropolitan Magistrate in C. C. No.408-S-203 is dated 7 August 2004 and there is no reason given by the appellant's counsel as to why this order was not placed for consideration while the company petition was being argued since the order of winding up was passed on 11 October 2007. The second order of the Metropolitan Magistrate is dated 24 July 2012 in C.C. No.859/SS/2005 in support of the appellant's submission that even in this order the appellant (original respondent) was acquitted from offence under Section 138 proceedings to justify bonafide ground to oppose the winding up.

30. It is settled law that findings in criminal proceedings are based on the proof "beyond reasonable doubt" whereas in civil proceedings the extent of proof is based on "preponderance of probability". The findings in criminal proceedings cannot be relied upon while adjudicating civil proceedings. Therefore, we do not agree with the learned counsel for the appellant (original respondent) with his submissions that the findings in these criminal proceedings shows bonafide of dispute and therefore same should be followed without anything else. The findings in criminal proceedings cannot be taken as sacrosanct for deciding civil matters.

31. Even assuming based on the reliance placed by the appellant (original respondent) on the decision of the Supreme Court in the case of ***Satish Chander Ahuja (supra)*** if we take cognisance of the orders passed in criminal

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proceedings, then with the same breath we cannot ignore the order of this Court in Summary Suit No.4441 of 2001 where on the basis of these very cheques, a decree was passed against the appellant (original respondent). On a query being raised, we were informed by the learned counsel for the appellant (original respondent) that the appellant (original respondent) had not made any payments towards this decree till today and they have also not challenged the said order passed on 5 August 2011. Therefore, by accepting the submission of the appellant's counsel that this Court should consider the orders passed in criminal proceedings, we cannot ignore the orders passed by this Court in Summary Suit decreeing the amount against the appellant (original respondent) and which decree till today remains not satisfied. This clearly demolishes the submission of bonafide dispute to avert the winding up of the company.

32. The decree passed in Summary Suit itself goes on to show that the appellant (original respondent) is liable to pay the debts based on demand promissory note and cheques and is unable to pay the same till today. We also cannot ignore the fact that today there are no activities in the appellant company and there are no assets which goes on to further show its inability to pay the debts. Therefore, we do not find any fault in the order passed in company petition whereby the appellant company is ordered to be wound up under Section 433(e) of the Act.

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33. We also cannot ignore the fact that respondent (original petitioner) is a government undertaking established to support the businessmen. The appellant (original respondent) after having obtained and utilised financial facilities cannot for the first time in reply to winding up petition raise defence for the first time when no such plea was raised earlier. The action of the appellant (original respondent) virtually amount to defrauding the State and avoid paying the due inspite of there being a decree against them.

34. The decision relied upon by the learned counsel for the appellant (original respondent) in the case of ***Satish Chander Ahuja (supra)*** is not applicable to the facts of the present case since the issue before us and before the Hon'ble Supreme Court is different and based on different facts. In any case, even if we accept the submission of the appellant (original respondent) on the basis of the said decision, as observed above we cannot ignore the decision passed in the Summary Suit which has decreed the amount against the appellant (original respondent) and same remains to be unpaid and unchallenged till today.

35. The second decision relied upon by the learned counsel for the appellant (original respondent) is the case ***Madhusudan Gordhandas & Co. (supra).*** The facts in the case of ***Madhusudan Gordhandas & Co. (supra)*** were different from the present case. In the present case, the appellant (original respondent) had not raised any dispute with respect to the amount due till the filing of the reply to the winding up

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petition. The defence in the reply is only taken almost after long lapse of time and in the interregnum no correspondence disputing the amount has been addressed by the appellant (original respondent) but on the contrary a demand promissory note was executed for an admitted amount and interest. Furthermore, in the instant case before us there are no activities in the appellant company nor there are any assets as stated by the learned counsel for the appellant (original respondent). There is already a decree against the appellant (original respondent) arising out of the very same transaction and which decree till today has remained unpaid and unchallenged.

36. Therefore, looking at the facts of the present case, the decision in the case of ***Madhusudan Gordhandas & Co. (supra)*** do not take the case of the appellant (original respondent) any further.

37. In this connection, it is worthwhile to reproduce para 21 of the decision in the case of ***Madhusudan Gordhandas & Co (supra)*** which reads as under:

> *"Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See Re. A Company) [94 S.J. 369].* ***Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (See Re. Tweeds Garages Ltd.) [1962 Ch 406.].*** *The principles which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends."*
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> *(emphasis supplied)*

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38. The Calcutta High Court in the case of ***Rydak Syndicate Ltd. Vs. Roshanlal Agarwal*** [4] ordered winding-up when against the claim of Rs.5.5 lakhs, company admitted Rs.3.5 lakh and was unable to pay even that. Even in the present case, it is not the stand of the appellant (original respondent) that nothing is payable and further the appellant (original respondent) has failed to pay any amount till today on its own calculation of amount due and even as per the decree of this Court in Summary Suit.

39. In view of above, the appeal filed by the appellant (original respondent) challenging the order of winding up dated 11 October 2007 passed by the learned Single Judge in Company Petition No.921 of 2001 is dismissed and the interim order granted on 17 September 2008 stands vacated. It is better to bury the company with no activities and assets than to give life to commit more defaults and put many creditors in trouble as per the ratio laid down by the Delhi High Court in ***Roshan Singh & Co. P. Ltd. vs. Daewoo Motors India Ltd.***[5]**.**

40. Appeal is dismissed. No order as to costs. Since the appeal is dismissed, the In Person Application does not survive and is accordingly disposed of.

(Jitendra Jain, J) **(M.S. Sonak, J)**

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4 *(2008) 81 SCL 323*

5 (2003) 41 SCL 284

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