

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 11807 of 1995@@
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Dolphin International Ltd. ...Appellant (s)

Versus

Gavs Laboratories (P) Ltd. ...Respondent(s)

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This appeal is directed against the judgment of the Division Bench of the Delhi High Court upholding the order of a learned single Judge who, in exercise of his jurisdiction under the Companies Act (for short "the Act"), admitted an application for winding up and directed publication of the citation, on the basis of an application filed by the respondent under Sections 433 and 439 of the Act, alleging therein that the appellant-Company is unable to pay the debts. The appellant took the stand that the assertions in the application filed under Section 433 of the Act is wholly incorrect. According to the appellant, the reasons given show why the alleged amount has not been paid is an accounting between the Russian supplier and the respondent and under the terms of agreement some commission was agreed to be paid. The learned Single Judge, however, on examining the materials placed before him, came to the conclusion that a case for winding up has been made out in terms of Sections 433 read

with Section 434 (1) (a) of the Act and accordingly directed admission of petition and publicity of citation in question.

On an appeal being carried, the Division Bench came to the conclusion that the plea of the appellant that some amount was to be paid to M/s. Abhishek Mercantile Ltd. as well as to the foreign buyer is nothing but an after-thought and on the materials adduced, it must be held that the Company is unable to pay the debts in question. With this conclusion the appeal having been dismissed and the order of the learned single Judge having been upheld, the present appeal has been preferred on special leave being granted.

Mr. P.N. Misra, learned senior counsel appearing for the appellant, vehemently contended that both the learned single Judge as well as the Division Bench wholly misconstrued the provisions of Section 433(1)(e) of the Act and ordered the admission of petition when the Company is having a running business and is making huge profits, as would appear from the balance-sheet of the two years that were produced and, therefore, mere allegation of non-payment of the debts made by the respondent in the application filed under Section 433 of the Companies Act would not constitute the condition precedent under Section 433(1)(e) being satisfied and, therefore, the

order in question is wholly erroneous. It is in this context it was further asserted that in the meantime, the respondent-Company has filed a suit for recovery of the dues

in question and that suit is pending in Delhi High Court. It was also brought to our notice that while granting leave this Court has passed an interim order on 11th December, 1995 calling upon the appellant to furnish a bank guarantee to the tune of Rs.8 lakhs pursuant to which a bank guarantee has been furnished and the same is continuing. Mr. Misra, urged that the respondent will in no way be prejudiced if the bank guarantee is permitted to be continued and the suit is directed to be disposed of wherein the respective liabilities of the parties can be adjudicated upon after the parties led evidence.

Mr. S. Ravindra Bhat, learned counsel for the respondent, on the other hand, contended that a combined reading of Sections 433(1)(e) and 434(1)(a) of the Act would make it explicitly clear that the appellant-Company must be held to be unable to pay the debts in question and, at any rate, the plea of the appellant is not a bonafide one; therefore, the impugned order admitting the application for winding up by the learned Single Judge and upheld by the Division Bench cannot be held to be erroneous in any manner.

The question as to when the provisions of Section 433(1)(e) of the Act can be held to have been satisfied conferring jurisdiction on a Company Judge to direct winding up has been considered by this Court in the case of Madhusudan@
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Gordhandas v. Madhu Woollen Industries Pvt. Ltd. 1971 (3)@
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SCC 632], which has been followed and reiterated in the case of Pradeshia Industrial & Investment Corpn. of U.P. v.@@
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North India Petrochemicals Ltd. & Anr. [1994(3) SCC 348].@@
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Having applied our mind to the ratio of the aforesaid two cases and the materials on record and the materials placed before us in course of the arguments, we are of the considered opinion that a case for winding up in accordance with Section 433(1)(e) of the Act has not been made out and the Division Bench committed error in not considering all the relevant materials and yet in jumping to the conclusion that a case for winding up has been made out. In the aforesaid circumstances, we set aside the impugned orders admitting the petition for winding up and directing publication of citation. We further direct that the bank guarantee, which has been furnished by the appellant, shall remain valid until disposal of the pending suit No. 1017/95 and the High Court is requested to dispose of the suit as expeditiously as possible, preferably within a year from today.

The appeal stands disposed of with no order as to costs.

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(G.B. PATTANAİK)@@
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New Delhi;

October 29, 2002

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(S.B. SINHA)@@
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ITEM No.105 COURT No. 2 SECTION XIV

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

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Gavs Laboratories (P) Ltd. ...Respondent(s)

(With office report)

Date :29/10/2002 This/these appeal(s)/matter(s) was/were called on
for hearing today.

CORAM :

HON'BLE MR. JUSTICE G.B. PATTANAIAK
HON'BLE MR. JUSTICE S.B. SINHA

For Appellant (s) Mr. P N Misra, Sr. Adv.
Mr. P I Jose, Adv.
Mr. A. Radhakrishnan, Adv.

For Respondent (s) Mr. S. Ravindra Bhat, Adv.
Mr. Sanat Kumar, Adv.
Ms. Hetu Arora, Adv.
Mr. Naveen R. Nath, Adv.

UPON hearing counsel, the Court passed the following
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Appeal stands disposed of in terms of the signed
order. No costs.

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(J.S. Rawat)
Court Master

(Suneet Bala Sharma)
Assistant Registrar

(Signed order is placed on the file)