

**HIGH COURT OF JAMMU AND KASHMIR AT JAMMU**

(Through Virtual Mode)

C.P No. 01/2008  
IA No. 01/2008

Handicrafts Handlooms Exports .....Petitioner(s)

Through: Mr. Pranav Kohli, Advocate.  
( On video conference/Voice call from residence)  
Vs.

Shankar Shah Ishar Dass .....Respondent(s)

Through: Mr. R. P. Sharma, Advocate.  
( On video conference/Voice call from residence)

**CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR**

**ORDER**

1. The petitioner in this Company Petition has sought the winding up of the respondent-Company in terms of Section 433 (e) read with Section 434 of the Companies Act, 1956, ( hereinafter ' The Companies Act'), principally on the ground that the respondent Company owes a debt of ₹ 186.40 Lakhs to the petitioner, which the respondent has failed to pay despite notice in this regard.

2. It is submitted that the petitioner is a designated trading agency and is engaged in the business of import of bullion etc. The petitioner and respondent- company entered into a contract in which the petitioner agreed to import bullion for and on behalf of the respondent on certain terms and conditions which included the payment of certain commissions by the respondent to the petitioner. The respondent was under an obligation to provide security for the transaction and, accordingly, issued a cheque for ₹ 3

crores in favour of the petitioner. It is pleaded that the dispute arose between the parties on account of respondent's failure to renew the advance cheque given to the petitioner by way of security and also with regard to the payment of commission on account of import of bullion by the petitioner for and on behalf of the respondent. The sum and substance of the grievance of the petitioner is that on account of contractual obligation, a sum of ₹ 186.40 lakhs became due to the petitioner from the respondent. The petitioner claims that it served a statutory notice in terms of Section 433 and 434 of the Companies Act and called upon the respondent to clear the outstanding due. The respondent, however, failed and neglected to clear the admitted debt. Faced with the blatant reluctance on the part of the respondent to clear the debt, the petitioner was constrained to file the instant petition seeking winding up of the respondent- Company.

3. On notice, the respondent appeared through Mr. R. P. Sharma, learned counsel and filed its objections, The respondent has contested this winding up petition primarily on the ground that the debt, which the petitioner is claiming, is not due debt in terms of Section 433 (e) read with Section 434 of the Companies Act. It is the contention of the respondent that, for invoking Section 433(e) and 434 of the Companies Act, the debt claimed by the party seeking winding up, must be due debt and not a disputed amount of liability. The respondent has further contended that, realizing that the amount claimed by the petitioner is seriously disputed by the respondent, the petitioner simultaneously with the filing of this petition, had also approached the Indian Council of Arbitration, New Delhi, for appointment of Arbitrator to resolve the dispute between the petitioner and the respondent.

4. Mr. R. P. Sharma, learned counsel for the respondent submitted that the claim submitted by the petitioner before the Indian Council of Arbitration were dismissed by the Arbitral Tribunal in view of the order passed by it on 05.11.2018, allowing the application of the respondent filed under Section 16(1) of the Arbitration and Conciliation Act, 1996. He has submitted a copy of the order dated 05.11.2018 passed by the Arbitral Tribunal of the Indian Council of Arbitration through online mode, copy whereof has been retrieved and kept on record.

5. Having heard the learned counsel for the parties and perused the record, it is necessary to first set out Section 433(e) and Section 434 (1) (a) herein under:-

**“433.**

433. Circumstances in which company may be wound up by Court. A company may be wound up by the Court,-

- (a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) if the company is unable to pay its debts;

**434.**

(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 five hundred 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;”

6. From perusal of the extracted provisions of Section 433 (e) and Section 434(1) (a), it is manifest that for seeking winding up of respondent-Company the petitioner must demonstrate that there is a debt due and that the respondent- company has failed or is otherwise unable to pay the same. A debt to be due must be a determined or a definite sum of money payable immediately or at a future date, It is thus settled that the expression, ‘unable to

pay its dues' in Section 433(e) of the Companies Act should be taken in commercial sense and the machinery for winding up shall not be allowed to be utilized merely as a means for realizing debts due from the Company.

7. In the instant case, this Court does not find that the petitioner is a creditor and respondent is a debtor for a sum of ₹ 186.40 lakhs. It is, however, true that the defence raised by the respondent to deny the liability has to be substantial one. In the instant case, the petitioner has itself realized that the amount claimable from the respondent is not a determined or definite sum. It is because of this realization, the petitioner invoked the jurisdiction of Indian Council of Arbitration for resolution of the dispute.

8. In the view, that I have taken, I am fortified by the judgment of Hon'ble the Supreme Court in the case of **Mediquip Systems Pvt. Ltd vs Proxima Medical System, (2005) 7 SCC 42**, in which the Apex Court, while relying upon its earlier judgment in **Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt. Ltd. AIR 1971 SC 2600**, has laid down the following principles:-

“The Rules as regards the disposal of winding up petition based on disputed claims are thus stated by this Court in Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt. Ltd. (1972) 42 Com Cases 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.”

9. This Court could have gone into the merits of the claims of the petitioner a bit elaborately, but for the reason that the petitioner, by resorting to the mechanism of arbitration, has virtually admitted that the amount claimed by it from the respondent-company is disputed and not determined, this Court has chosen otherwise.

10. For all these reasons, I find no merit in this petition and the same is, accordingly, dismissed.

11. Nothing said herein above shall be construed as an expression of opinion on the merits of the claim of the petitioner and the parties shall be free to pursue their remedies, as may be available to them in law.

**Jammu,**  
**19.05.2020**

Anil Raina, Addl Registrar/Secy

**( Sanjeev Kumar)**  
**Judge**

Whether the order is speaking: Yes  
Whether the order is reportable: Yes