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Steel Strips Ltd. Vs. Him Teknoforge Ltd.

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Court : Himachal Pradesh

Decided On : Sep-02-2002

Reported in : [2003]42SCL177(HP)

Judge : W.A. Shishak, C.J. and; Arun Kumar Goel, J.

Acts : Companies Act, 1956 - Sections 433 and 434

Appeal No. : Company Appeal No. 1 of 2002

Appellant : Steel Strips Ltd.

Respondent : Him Teknoforge Ltd.

Advocate for Def. : R.L. Sood, Adv.

Advocate for Pet/Ap. : K.D. Sood, Adv.

Judgement :

Arun Kumar Goel, J.

1. This case has a chequered history and pleadings of the parties in Company Petition No. 5 of 2001 makes an interesting reading. With a view to properly appreciate and understand the case as was projected on behalf of the parties at the time of hearing, few facts which are relevant and necessary for deciding this appeal need to be noted.

2. Parties had business dealings between them. Appellant had admittedly supplied some material to the respondent, who had been making payments from time to time regarding such supplies. Appellant claims that as on 1-4-1999 a sum of Rs. 1,21,93,169.48 paise was due and outstanding payable by the respondent to it. This amount was inclusive of interest up to 31-3-1999. Further case of the appellant is that 8 cheques of the total value of Rs. 27,82,799 were issued by the respondent towards the outstanding amount. These were dishonoured when presented to the bankers of the respondent for encashment with the endorsement exceeds arrangements. Further case of the appellant is that a sum of Rs. 6,12,648 is also due and outstanding payable by the respondent for the supply made by its sister concern SAB Industries Limited which has been taken over by the appellant. Thus the sum of Rs. 1,21,93,169.48 paise was due to the petitioner-company as on 1-4-1999 as detailed hereinabove.

3. When this amount was not forthcoming, appellant claims that after issuing statutory notice under Sections 433 and 434 of the Companies Act, 1956 proceedings were initiated for winding-up of the respondent-company in this court vide Company Petition No. 4 of 1999. Incidently, it may be observed that so far filing of this Company Petition and its having been finally disposed of in terms of compromise Annexure P-XV, and on its basis final order Annexure P-XVI, having been passed by the learned Company Judge was not disputed at the time of hearing. However, learned counsel for the respondent pointed out that his client is not. bound by Annexure P-XV. Because respondent-company was forced to enter into it, being in no win situation and had to give in to the highly unreasonable, unjust, unfair and unconscionable terms and conditions being totally loaded in favour of the appellant and against the respondent-company. For ready reference contents of Annexures P-XV and P-XVI are extracted hereinbelow :--

'Agreement

This Agreement is being executed on 21st July, 1991 at Chandigarh, between M/s. Steel Strips Limited having its Registered Office at village Jitwal Kalan, District Sangrur (Punjab) and Head Office at SCO 49-50, Sector-26, Chandigarh (hereinafter referred to as 'SSL') through its Managing Director, Shri R.K. Garg,

and M/s. Him Teknoforge Limited, having its Registered Office at Sai Road, Baddi, District Solan, (HP) and Administrative Office at House No. 39, Sector 28-A, Chandigarh, (hereinafter referred to as HTL) through its Managing Director, Shri Vijay Aggarwal.

Whereas the SSL has been supplying to HTL the billets and rolled steel products on credit basis from time to time since, 1994 and HTL have been availing the aforesaid credit facility and a running account is being maintained by SSL.

Whereas HTL has issued 8 cheques amounting to Rs. 27,28,799 to discharge its existing part liability. However, all the cheques have been returned back dishonoured to SSL's bankers with remarks 'Exceeds Arrangement'. As a consequence SSL has initiated a complaint under Section 138 of Negotiable Instruments Act, 1988 against HTL and its Directors, which complaints are pending against HTL and its Directors before various Courts of Judicial Magistrate 1st class in Chandigarh, as per Annexure-I.

Whereas SSL also issued the winding-up notice dated 7-4-1999 for the admitted liabilities of HTL which was duly received by HTL and SSL has filed Winding-up Petition No. 4/99 which is pending in HP High Court at Shimla.

Whereas HTL has come to the office of SSL at Chandigarh for compromise to clear the outstanding amount due to SSL and meeting has been held on 12-7-1999 and HTL and SSL, agreed to reconcile the accounts. It was decided that SSL will waive off the interest up to 31-3-1999 and also SSL agreed to issue Credit Note to HTL towards the discount etc. to the extent of Rs. 15,99,020. HTL will, however, pay interest at the rate of 18 per cent p.a. w.e.f. 1-4-1999 on the outstanding as on 1-4-1999. HTL agreed to pay the entire outstanding including interest, up to 31-12-2000. Therefore, after all the waiver/discount it is found that an amount of Rs. 80,34,200 remains payable to SSL on 1-4-1999 which will include amount of Rs. 6,12,648 towards the cost of material supplied to HTL by SAB Industries Limited, a sister concern of SSL, which has now been taken over by SSL on 1-9-1998. HTL agreed that they will pay interest on Rs. 80,34,200 at the rate of 18 per cent p.a. w.e.f. 1-4-1999 till the clearance of all the dues on reducing balance basis.

The agreed account by both the parties is as under :

Amount (Rs.)

Amount outstanding as on1-4-1999 as per Winding-up Petition
1,21,93,169.48

Less:Interest waiver up to 31-3-1999:

SSL (P.S.S. Unit)

24,05,099.00

SSL (SAB Unit)

1,25,859.00

Debit Note reversed

28,991.00

Volume Discount by SSL

15,99,020.00

41,58,969.00

Total amount payable by HTL to SSL

as principal amount.

80,34,200.00

Interest from 1 -4- 1999 to31-12-2000 at the rate of 18 per cent p.a.

12,71,170.00

Total amount payable by HTL
93,05,370.00

To discharge its liability as stated above HTL agreed to pay to SSL a total sum of Rs. 93,05,370, by December, 2000, in monthly instalments, starting from 20-7-1999 and SSL has agreed the request on the following terms and conditions :

I. HTL will pay monthly instalments, as per enclosed Annexure-II, w.e.f. 20-7-1999 to 31-12-2000 towards payment of outstanding of Rs. 93,05,370 including interest at the rate of 18 per cent as stated above by way of post-dated cheques drawn on State Bank of Patiala, Sector 17-C, Chandigarh.

Whereas HTL has also assured to enhance the amount of instalments of the aforesaid payment, if working of HTL Company improves in future.

II. That the HTL hereby confirms the cheque(s) to be issued by HTL to discharge the aforesaid liability towards outstanding, will be honoured by the bankers of HTL on its presentation and that HTL shall not advise their bankers to stop the payment of the said cheques any time in future under any circumstances whatsoever, HTL also undertakes that they shall not request to SSL not to present the said cheques on the due dates in any circumstances whatsoever. HTL also agrees that signing power of the person who signed the enclosed cheques will not be withdrawn in any circumstances. However, in case of dishonour of cheques SSL will be at liberty to initiate legal proceedings, Civil and Criminal, against HTL and its directors and to recover the said amount along with interest at the rate of 21 per cent per annum with quarterly rests thereon.

III. HTL also undertakes to issue Sales Tax Forms pending as per Anncxurc-III, to SSL and SAB Industries Ltd. against the material supplied by SSL and SAB Industries Ltd. to HTL within one month from the dale of this Agreement otherwise liable for Sales Tax in accordance with law.

IV. With the above assurances and good faith and having received the post-dated cheques as per Annexure-II enclosed hereto the SSL agrees to withdraw on the receipt of post-dated cheques, the 8 (eight) Criminal Complaints filed by it against HTL and its Directors under Section 138 of Negotiable Instruments Act, 1988, which are pending in various Courts of JMICs at Chandigarh as per Annexure-I. Also SSL agrees to withdraw the Winding-up Petition filed in H.P, High Court at

Shimla. Both the parties agree to file the Agreement in H.P. High Court at Shimla in Winding-up Petition District Courts at Chandigarh.

V. As per the provisions of Income-tax Act, HTL is required to deduct TDS at the rate of 20 per cent on interest. SSL has submitted a Non-Deduction Tax Certificate from Income-tax Deptt. for period up to 31-3-2000 (ie. assessment year 2000-2001). Out of total interest of Rs. 12,71,170 interest pertaining to the year ending 31-3-2000 is Rs. 11,25,760. Therefore, no tax on this interest has been deducted. Interest pertaining to April, 2000, and onwards is Rs. 1,45,410. HTL has retained Rs. 31,990 towards Tax Deducted at Source (TDS) on the said amount and cheque for the balance amount has been issued. In case SSL furnishes the Certificate of Non-Deduction of Tax for the assessment year 2001-2002, the retained amount of Rs. 31,990 will be released by HTL forthwith on receipt of the said Certificate. In case SSL is not able to furnish Certificate, TDS Certificate for that amount will be given to SSL.

VI. SSL will not initiate or continue any litigation in respect of any amount/matter, whatsoever payable by HTL to SSL prior to the execution of this agreement, against HTL except mentioned in terms of this agreement and/or breach of this agreement and will withdraw all the cases/complaints/petilions etc. filed by them earlier against and HTL and its directors. If SSL does not withdraw all the complaints/cases/petitions etc. filed by SSL itself or through any of its Managing Director/Director/Authorised person, against HTL and its Managing Director/Director or file any Civil or Criminal Cases against HTL or its Directors, HTL will have right to approach/ request the Court to dismiss all these cases/litigations as withdrawn on the basis of this agreement for which SSL does hereby accord its consent.

VIII. This agreement is executed and signed in triplicate and the original will remain with SSL and the duplicate copy will remain with HTL and third copy will be filed with the High Court, Himachal Pradesh at Shimla, by SSL.

In witness, thereof the parties have set their respect hands through the aforesaid authorised representatives in the presence of following witnesses on the 21st day of July, 1999 at Chandigarh.

Witnesses : For Steel Strips Limited

1. Sd/-C.B. Gupta Sd/-94 Sector 16, Panchkula(R.K. Garg)Managing Director2. Sd/-M.L.Jain. Sd/-1057, Sector 4, Panchkula.(Vijay Aggarwal)For Him Tcknoforge LimitedManaging Director."ANNEXURE-I

Detailof complaints filed by M/s. Steel Strips Limited against

M/s. Him TeknoforgeLtd. pending in various Courts of

JMIC at Chandigarh.

Sr. No.

ChequeNo. & Date

Amount(Rs.)

In the Court of JMIC.Chandigarh

Nextdate

1.

325508

4-2-1999

194330.00

Ms. Jatinder Walia

9-8-1999

2.

325175

10-2-1999

392977.00

Sh. Jasbir Singh

27-7-1999

3.

325174

15.1-1999

375735.00

Sh. Naval Kumar

29-9-1999

4.

325509

9-2-1999

145652.00

Ms. Jatinder Walia

9-8-1999

5.

325178

30-1-1999

120105.00

Ms. Jatinder Walia

9-8-1999

6.

325173

10-1.1999

500000.00

Sh. Naval Kumar

29-9-1999

7.

325176

20-1-1999

500000.00

Sh. Naval Kumar

29-9-1999

8.

325177

28-1-1999

500000.00

Sh. Jasbir Singh

27-7-1999

2728799.00

ANNEXURE P-XVI

Copy of Order/Judgment/Statement/Passed/Delivered/Recorded on 4-8-1999 by the Hon'ble Mr. Justice R.L. Khurana, J. in Coy. Pet. 4/99 in Coy. Applications 4 & 5/99 filed in Coy. Pet. 4/99.

Steel Strips Limited, having its Head Office at SCO No. 49-50, Sector 26, Madhya Marg, Chandigarh-160 019, and Registered Office at Village Jitwal Kalan, Teh. Malerkotla, District Sangrur, Punjab through Shri M.L. Jain, Authorised Representative.

Petitioner

Versus

M/s. Him Teknoforge Limited, Sai Road, Baddi, District Solan, H.P.

Also At :

(1) M/s. Him Teknoforge Ltd., H. No. 39, Sector 28-A, Chandigarh.

(2) M/s. Him Teknoforge Ltd., Plot No. 264-268-A, Industrial Area-I, Pitampura - 454775, District Dhar (MP).

(3) M/s. Him Teknoforge Ltd. 167, Usha Nagar Extension, Indore - 453009 (MP).

Respondents

4-8-1999

Present: Mr. K.D. Sood, Advocate, for the Petitioner. Mr. R.L. Sood, Advocate, for the Respondent.The petitioner has made an application under Company's Court Rule 9 for placing on record compromise/arrangement arrived at between the parties. Let the same be taken on the record.

It is stated by the learned counsel for the petitioner that in view of the compromise/settlement arrived at between the parties, the petitioner does not wish to press the present petition at this stage. Leave granted. The present petition is

dismissed as not pressed.

Dasti Copy, as prayed for, on usual terms.

Coy. A. No. 4/99

Infructuous.

Coy. A. No. 5/99

Interim order dated 6-7-1999 is vacated and the application is dismissed as having become infructuous.August 8, 1999Sd/- R.L. Khurana, Judge.'

4. What is the effect of these annexures will be dealt with hereinafter on the basis of respective submissions those were urged at the time of hearing of this petition.

5. From the pleading of the parties it also emerges that after execution of Annexure P-XV supra respondent did liquidate part of the agreed amount in terms of the payment arrangement made. Relevant pleadings made in this behalf are in paragraph 19 of the company petition out of which this appeal has arisen and reply filed by the respondent to it.

6. For ready reference paragraph 19 of the company petition as well as reply is also extracted hereinbelow :--

'19. Out of the 36 cheques mentioned in para supra, some of the cheques were encashed whereas others were dishonoured. However, against some of the dishonoured cheques, the respondents issued demand drafts, but a sum of Rs. 40,05,370 still remains and asum of Rs. 53,00,000 only has been cleared against the cheques issued. A sum of Rs. 31,990 was held back by Him Teknoforge Ltd. on account of TDS deductions. The respondents also issued a cheque of Rs. 46,537.88 on account of interest, cheque No. 009207 dated 31-12-2000 which also was dishonoured and as such on 31-3-2001 a sum of Rs. 40,05,370 is due to the petitioner-company against the admitted liability of Rs. 93,05,370. Since the respondent has not paid the amount as scheduled. It is also liable to pay a sum of Rs. 41,58,996 on account of interest and other charges which were waived off earlier. Besides this, the respondent is also liable to pay interest at the rate of 21

per cent p.a. with quarterly rests on the amount delayed/not paid as per the agreement dated 21-7-1999, which works out to Rs. 7,71,659.48 up to 31-3-2001. A copy of the statement of transaction is attached as Annexure P-XXII and a copy of debit notes on account of interest is attached as Annexure P-XXIII respectively.'

Reply

'19. Contents of para 19 as stated are not admitted. The correct position is that some cheques which have been issued by the respondent-company were bounced and because the same were presented to the bankers of the respondent-company without any consultation with the respondent-company. However, the respondent-company issued demand drafts in lieu of some of the cheques. It may be submit ted that industry as a whole is passing through a recession and the petitioner-company is not an exception to it. Huge payments are due to the respondent-company from various other companies and on account of such payments having been blocked up, the cash flow of the respondent-company has suffered, although it is not suffering from financial ill-health. As already submitted the net asset value of the respondent-company is on the positive side and huge payments arc due to the respondent-company and respondent-company is making all efforts to recover its dues in turn from various companies. The respondent-company has in turn received some postdated cheques from some of the parties dealing with it and such cheques are likely to be encashed due to it for the preceding months. It is denied that petitioner is entitled to any amount much less the amount of Rs. 41,58,969.00 as has been falsely claimed by it. The said amount was never due from the respondent-company to the petitioner-company and was waived of even at the time of the execution of the agreement dated 21-7-1999, which in any case is not binding upon the respondent-company. Therefore, this amount cannot be claimed again in the present surreptitious and false manner by the petitioner-company. It has calculated and claimed interest at a highly inflated rate which is unknown to the business world. Therefore, also the claim of the petitioner is false. In any case, the correct position has been explained by the respondent No. 1 in para 16 supra which may kindly be read as a part and parcel of the reply to the present para.'

7. It may also be noted here that learned counsel for the parties were not at variance at the time of hearing of this appeal that so far as the dishonoured cheques issued by the respondent-company are concerned. It is being prosecuted in courts at Chandigarh. There is also material on record to that effect.

8. Not only this, but during the pendency of company petition 5 of 2001, some payments were made before the court, which position is reflected in the orders dated 3-12-2001, 7-1-2002 and 3-3-2002. What is the effect of such payments will also be dealt with hereinafter.

9. Appellant alleges that when payments were not forthcoming in terms of Annexure P-XV supra and cheques were dishonoured. It was again forced to issue notice under Sections 433 and 434 of the Companies Act making demand. In this behalf claim was made regarding outstanding amount of Rs. 44,62,856.40 paise with interest at the rate of 21 per cent from 1-12-2002 with quarterly rest within 21 days from the receipt of the said notice. Receipt of this notice is not in dispute and it was duly acknowledged by the Managing Director of respondent-company vide Annexure P-XX, as under :

'Steel Strips Ltd.,

SCO 49-50,

Sector 26,

Chandigarh.

Kind Attn. : Sh. R.K. Garg, Managing Director.

Reg. : Notice under Sections 433 and 434 of the Companies Act, 1956.

Dear Sir,

We are in receipt of your notice dated 4-1-2001.

In terms of MOU dated 21-7-1999 your claim was settled for Rs. 80,34,200 and an amount of Rs. 12,71,170 was payable on account of interest for the period 1-4-

1999 to 31-12-2000. We issued post-dated cheques for Rs. 92,73,380 (after retaining amount of Rs. 31,990 on account of TDS) to you. Cheques worth Rs. 53.00 lakhs have already been cleared.

Due to adverse market conditions, long recession and low realisation there is financial crunch in the company and we could not pay the cheques for the remaining amount of Rs. 39,73,380.00. The financial position is still very bad but we are trying our best to clear your dues. We assure you that we will clear the balance payment of Rs. 39,73,380.00 by 31-3-2001. We request you not to file winding up petition against the company as it will be unnecessary litigation which will take lot of time and burden with avoidable expenses to both the parties.

We further request you to give us time for personal meeting so that matter can be discussed in detail.

Thanking you,

Yours faithfully,

for Him Teknoforge Limited,

Sd/-

(VijayAggarwal)

Managing Director'

10. When respondent-company failed to comply with the notice Annexure P-XVII despite having sent reply vide Annexure P-XX supra, Company Petition No. 5 of 2001 was filed with a prayer to wind-up the respondent-company since case was covered under Section 433(e) of the Companies Act, 1956.

11. Respondent when put to notice, contested and resisted claim of the appellant and urged that no doubt it is passing through financial bad phase, but no case for its winding-up is made out. With a view to support this plea, it was pleaded that its fixed assets are much more than its liabilities. It is providing employment at its units to a large number of workers directly besides providing any indirect

employment to a number of other persons. Expecting to receive payments in due course of its business from its customers, cheques were issued, as detailed in the petition by the respondent to the appellant. It has also been pleaded that respondent is not bound by Annexure P-XV supra as it is heavily loaded in favour of the appellant and when it was entered upon, respondent-company was in no win situation, therefore, it succumbed to the coercive and arm-twisting techniques employed by the appellant-company. Interest as mentioned in Annexure P-XV is alleged to be unconscionable. Similarly claim of amount regarding sums payable to M/s. Sab Industries Ltd. being time-barred, as such no claim could be based thereon. In addition to the fact that there is no proper take over as per provisions of Companies Act to authorise the appellant to maintain the claim in that behalf. Company Petition was not filed as per provisions of Companies Act and Company (Court) Rules, 1959 by a duly authorised person, who could have sworn affidavit in its support. In fact, Annexure P-XV is void ab initio having not been executed under the authority of Board of Directors of respondent-company.

12. Further case set-up by the respondent is that there is serious and bona fide dispute regarding alleged claim made in the company petition. Therefore, it was not maintainable and instead of having recourse to ordinary law of land, where all disputed questioned could be gone into, short-cut has been adopted by the appellant. Disputes being civil in nature are purely within the domain of civil court. Thus appellant needs to be directed to go there. Issuance of dishonoured cheques by the respondent-company is not disputed, as is clear from the stand put in paragraphs 7 and 8 of the reply. Respondent has even gone to the extent of not admitting the memorandum of understanding Anncxurc P-XV and further pleaded that it is not binding on the respondent-company, and it is also pleaded that amount allegedly claimed is barred by time. Similarly, claim as projected in the petition to the extent of Rs. 1,21,93,169.48 paise was also denied. Neither receipt of notice Annexure P-XVII nor its having been replied was disputed at the time of hearing. Again while denying the agreement dated 21-7-1999 Annexure P-XV, it is pleaded that it is tainted with coercion having not been executed out of free will and accord by the respondent-company. Para 19 of the petition as well as reply which in our view have some material bearing have been extracted hereinabove. Rejoinder has been filed by the appellant wherein facts which were contrary to the

averments made in the company petition have been denied and in rejoinder to such pleadings of the respondent averments made in the company petition were reiterated.

13. With a view to support its case copies of invoices as well as ledger account have also been placed on record. We may notice here that learned counsel for the respondent at the time of hearing of this appeal disputed the copies of the statement of accounts as according to him these are not properly maintained accounts.

14. In the aforesaid background when matter came up before the learned Company Judge on 16-4-2002, following order was passed :--

'Heard.

Admittedly, respondent is being prosecuted in respect of dishonoured cheques to the tune of Rs. 35 lakhs in various courts. Out of this amount of Rs. 35 lakhs, a sum of Rs. 5 lakhs has admittedly been received by the petitioner-company. Only a sum of Rs. 30 lakhs on the basis of dishonoured cheques remains to be paid. An offer has been made on behalf of the respondent that this outstanding amount of Rs. 30 lakhs will be paid by the respondent on or before 31st December, 2002. It has further been stated on behalf of the respondent that in case the respondent failed to pay this amount by the stipulated date, the petition for winding-up may be advertised in accordance with law.

The offer made on behalf of the respondent is reasonable and requires acceptance. Therefore, while accepting the offer made by the respondent, it is directed that the respondent-company through its Managing Director, who is present in the court today, will within one week from today file an undertaking in the form of an affidavit undertaking to pay the outstanding amount of Rs. 30 lakhs on the basis of the dishonoured cheques by 31st December, 2002 and that in the event of the failure of the respondent-company to pay the outstanding amount by that date, the petition for winding-up may be advertised in accordance with law. The undertaking on having been filed, shall be deemed to have been accepted by this court. A copy of the undertaking shall be supplied to the counsel for the

petitioner in advance.

It is, therefore, ordered that the present petition be admitted. The respondent is called upon to pay the outstanding amount of Rs. 30 lakhs by 31st December, 2002 as undertaken and in the event of failure of respondent-company to pay the amount by the due date, the present petition will be advertised in accordance with law. In case the amount is paid by the stipulated period, the present petition shall stand disposed of without prejudice to the rights of the parties. Liberty is reserved to the petitioner-company to approach this court for issuing the necessary advertisement in the event of the respondent-company failing to pay the amount by the stipulated period.

Dasti copy on usual terms.

April 16,2002.

Sd/-

R.L. Khurana, Judge.'

15. Appellant is aggrieved by the underlined portion of the order dated 16th April, 2002, passed by the learned Compary Judge in the present appeal.

16. Mr. K,D. Sood, learned counsel for the petitioner submitted that on admitted facts underlined portion of the order supra passed by the learned Company Judge cannot be sustained. With a view to advance his case, he referred to the pleadings of the parties in the Company Petition and the documents placed on record, with special emphasis on Annexures P-XV, P-XVI, P-XX and P-XXI. He also tried to get some mileage from the day to day orders passed during the course of Company Petition No. 5 of 2001 when payments were made by the respondent in Court as noted hereinabove. He submitted that not only payments of some of the dishonoured cheques were made, but cost of litigation was also paid.

17. According to him, respondent is estopped from challenging the legality, correctness or otherwise of either Annexure P-XV, the agreement which resulted in passing of the order in Company Petition No. 4 of 1999 vide Annexure P-XVI.

According to him, cheques being dishonoured is not disputed. Details of the position of cases as existed on the day of the filing of the Company Petition No. 5 of 2001 are given in Annexure P-XXI which also is not disputed, as according to him, if the cheques had been unauthorisedly issued or agreement P-XV had not been entered into between the parties and what is alleged by the respondent is correct, then there was no need for its having paid substantial amount as detailed in paragraph 19 of the Company Petition. This factual position having paid substantial amount is not disputed by the respondent in its reply as is evident from the extracted pleadings supra. According to him, estoppel is clearly attracted to the facts of the present case and all the pleas to the contrary questioning the authority to execute Annexure P-XV and its legality is nothing but purely an afterthought and needs to be rejected.

18. Regarding interest being unquestionable, it was pointed out by Mr. K.D. Sood that the transaction was commercial in nature between the parties. When Annexure P-XV was entered into, his clients had already given up substantial portion of its claim so far interest up to 31-12-1990 was concerned and had confined the same to Rs. 93,05,370. It was only out of this amount that a sum of Rs. 53 lakhs admittedly stands paid by the respondent. Thus, in the overall circumstances of this case and also looking to the pleadings on the file of the Company Petition, Section 433(e) of the Companies Act is clearly attracted and relief could not have been denied. According to him, while examining the case of the respondent in its peculiar background, bona fides of the respondent need to be looked into. Keeping in view the circumstances as explained from the time of filing of Company Petition No. 4 of 1999, thereafter entering into Annexure P-XV and passing of the order Annexure P-XVI by this Court, respondent has disentitled itself from raising the so-called disputes in Company Petition No. 5 of 2001. Special emphasis was laid by him on Annexures P-XVII and P-XX supra.

19. All these pleas have been controverted by Mr. R.L. Sood. According to him, Company Petition as well as present appeal is nothing but an abuse of the process of law and court by adopting a short-cut to civil suit for recovery of its alleged outstanding dues. Thus, the appellant is indulging in arm twisting and to ensure financial ruination of his client. While admitting the execution of Annexure

P-XV and on its basis order Annexure P-XVI being passed by this court, he stated that at that time his client had no option except for signing on the dotted line, otherwise not only it would have been put to grave hardship, but bread and butter of a big number of employees would have been put in jeopardy. He further submitted that the claims made in the Company Petition are time-barred besides being disputed on facts. Thus there is bona fide dispute which cannot be gone into in the Company Petition. According to him, even some of the claims made are time-barred. He referred to the demand made on behalf of M/s. SAB Industries Limited. He further submitted that the rate of interest claimed is unreasonable and unfair. Thus the Company Petition is nothing but a coercive and pressurising technique deployed by the appellant. According to him, this is a temporary phase because of overall recession in the industrial world throughout the country in particular and world over in general. According to him, order passed by the learned Company Judge needs to be upheld. He admitted the earlier litigation in Company Petition No. 4 of 1999 and how it came to an end.

20. Further according to him, Company Petition must go for want of legal and proper notice under Section 433, as Annexure P-XVII, according to him, includes debts which were time-barred and further includes interest which is highly excessive being penal in character. He also questioned the legality and correctness of the affidavit filed in support of Company Petition No. 5 of 2001 being not in Form No. 3 attached to Company (Court) Rules, 1959. Despite Annexure P-XX, Mr. R.L. Sood urged that his client is well advised being within its rights to dispute its liability. Memorandum of understanding between the appellant and SAB Industries vide Annexure P-V was also questioned on behalf of the respondents as having been entered upon without complying with the provisions of Companies Act. Audited balance sheets have not been produced by the appellant to support the claim made.

21. What emerges from the pleadings of the parties to which a brief reference has been made hereinabove as well as from the documents attached by them with the pleadings of the Company Petition, is that the respondent was transacting business with the appellant and SAB Industries. Both were making supplies of goods to the respondent. Payments were being made from time to time for such

supplies. For some reasons including the respondent passing through financially lean period, some amount became due and payable. Amount being in arrears was not disputed even at the time of hearing of this appeal. In this behalf, we may also notice that the respondent has not questioned the direction of the learned Company Judge, wherein it has been called upon to pay the outstanding amount of Rs. 30 lakhs by 31-12-2002 as undertaken. In the event of the failure of the respondent to pay this amount by due date. Company Petition has been ordered to be advertised in accordance with law. It may be observed that no appeal has been filed by the respondent against the order of the learned Company Judge. Thus, in our view, respondent cannot either on facts or in law dispute its liability for payment of at least this amount.

22. When a reference is made to paragraph 19 of the Company Petition as extracted hereinabove, amount that is paid and that is outstanding and payable in terms of Annexure P-XV has been specifically mentioned. There is no specific denial on the part of the respondent. In case what was urged at the time of hearing of this appeal was factually correct regarding the amount, in such a situation respondent ought to have specifically pleaded the facts particularly regarding the issuance of cheques, clearance of some, and others having been dishonoured. On what basis the sum of Rs. 53 lakhs was cleared and for what purpose cheques as detailed in paragraph 16 were issued, there is no express denial. It hardly needs to be emphasised that the respondent could give its explanation. But after going through the pleadings, we are of the view that there is no such explanation and the version put forth is far from being satisfactory.

23. In this behalf, we may also observe that the plea regarding the respondent being not bound either by Annexure P-XV, the agreement which resulted in withdrawal of Company Petition No. 4 of 1999 or by its reply Annexure P-XX supra is purely an afterthought, besides being untenable in the facts of this case. In case respondent was not bound by Annexure P-XV, why it would issue the cheques and then get more than 50 per cent of the agreed amount to be cleared. Similarly, if claim made by the petitioner in Annexure P-XVII i.e. the notice under Sections 433 and 434 of Companies Act was not correct and based on facts and the amount being not due and outstanding. It would have refuted the contents of the same.

Instead of there being any such thing, Annexure P-XX is self-explanatory. Therefore, all the pleas to the contrary with reference to these two documents have been raised simply to be rejected. In case Annexure P-XV was the result of arm-twisting or coercion etc., it could have been immediately challenged after its execution. Record shows that it was entered upon between the parties on 21-7-1999 and till the filing of the Company Petition No. 5 of 2001, respondents never disputed the same. Rather respondent made payments from time to time of Rs. 53 lakhs as per terms of Annexure P-XV. It may be pointed out that it is not the case of the respondent that the sum stated to have cleared out of the amount as detailed in Annexure P-XV was not paid/cleared by the said Company.

24. Learned counsel for the respondent was specifically asked as to how he can object to the order passed by the learned Company Judge when his client is not at all aggrieved by any part of the said order. He submitted that in case appellant is heard to challenge the order supra passed by the learned Company Judge, then there is nothing in law that precludes his client to challenge even the order whereby the payment of Rs. 30 lakhs has been ordered to be made by or before 31-12-2002. On this basis, he urged all the pleas as referred hereinabove. In our view, all these pleas on behalf of the respondent have been raised to be rejected. Impugned order was passed in the presence of the learned counsel for the parties. In case his client had any grievance, it would have been objected to on behalf of the respondent then and there. Respondent has not only accepted the said order, but has acquiesced in its passing by not challenging its legality and correctness. Reference to undertaking in the impugned order demolishes the edifice of the case of the respondent. Thus, respondent is now precluded from challenging the same.

25. Now, we shall make reference to the case law relied upon on behalf of the parties with a view to support their respective pleas and contentions.

26. In Wastinghouse Saxby Farmer Ltd, In re. [1982] 52 Comp. Cas. 479, Calcutta High Court held that where the defence related to inferior goods supplied in collusion with employees of debtor company, no bona fide dispute based on material on record being there, the company was held to be liable to be wound-up subject to time for settlement of claim.

27. In Surindra Packers v. Punjab Land Development & Reclamation Corpn. Ltd. [1989] 66 Comp. Cas. 883, it was held by Punjab and Haryana High Court that inability to pay debt by a company regarding goods supplied to it and short payment having been made without any justification as also failure of the company to pay despite repeated demands, is itself prima facie evidence of inability to pay. In this case company was directed to pay dues within specified time failing which advertisement was ordered to be issued. To similar effect is the decision of Allahabad High Court in Ema India Ltd. v. Trackparts of India Ltd. [2001] 106 Comp. Cas. 700.

28. In TDICI Ltd. v. Neptune Inflatables Ltd. [1999] 1 CLJ 240 (Mad.), it was held that there is no presumption regarding inability to pay. However, on facts admission of debt being there in correspondence and inability to pay despite undertakings for early payment, advertisement of petition was ordered.

29. In National Conduits (P.) Ltd. v. S.S. Arora AIR 1968 SC 279, what was held was that on admitting winding-up petition, court is not forthwith required to advertise the same. Admittedly in the Company Petition No. 5 of 2001 while admitting the petition, the learned Company Judge had also postponed the advertisement. As such no benefit can be derived by the respondent from this judgment.

30. Mr. R.L. Sood urged that mere inability to pay its debt by itself is no ground to order winding-up, unless it is also shown prima facie that the defaulting company has lost its substratum and it cannot be revived. So far legal position is concerned, there is no dispute. The question that needs to be seen is whether this is a bona fide dispute or not. So far sum of Rs. 30 lakhs which the respondent has been called upon to deposit and against which no grievance is made by it, clearly shows that at least this amount is due and payable.

31. The question thus remains regarding interest payable by the respondent. In this view of the matter, no benefit can be derived by the respondent from the decision in Madhusudan Gordhandas & Co, v. Madhu Woollen Industries (P.) Ltd. [1972] 42 Comp. Cas 125 (SC), American Express Bank Ltd. v. Core Health Care Ltd. [1999] 96 Comp. Cas. 841, [1998] 15 SCL 363 (Guj.) and New Swadeshi Mills

of Ahmedabad Ltd. v. Dye-Chem Corpn. [1986] 59 Comp. Cas. 183 (Guj.).

32. Reliance was placed on a decision of Madras High Court in Krishnawami v. Stressed Concrete Construction Ltd. [1963] 2 CLJ 301 to support the plea that the debt in case of SAB Industries Ltd. being time-barred and thus, not recoverable. Therefore, the appeal as well as the petition both were liable to be dismissed. We may observe in this behalf that Annexure P-XV coupled with Annexure P-XX supra clearly establishes that the respondent is now precluded and estopped from raising this plea because of having waived its right to raise these pleas. Reason being that when a debt becomes time-barred, only remedy is lost but the right remains. A debtor like respondent can always acknowledge a time-barred debt. This is exactly the situation in the present case. After the receipt of notice under Sections 433 and 434 of the Companies Act, Annexure P-XV, respondent-company instead of disputing anything on facts vide Annexure-XX, pleaded its inability to repay the amount. Rather a prayer for not filing of winding-up petition is clearly made in Annexure P-XX supra. Admittedly cheques issued pursuant to Annexure-XV, as detailed, in paragraph 16 of the Company Petition have not been disputed. In these circumstances, even if what is alleged regarding the debt of the SAB Industries Ltd. being time-barred, there is clear-cut acknowledgement of the same in Annexure P-XX issuance whereof was not disputed at the time of hearing and there cannot be any other better evidence on the part of the respondent. We have thus no hesitation in holding that when Annexure P-XX was sent by respondent, what was pleaded in reply to the Company Petition No. 5 of 2001, and was argued at the time of hearing of this appeal was never intended by the respondent.

33. Other line of the decisions referred to by Mr. R.L. Sood for the rejection of winding-up petition are where dispute existed and the court rejected such winding-up petitions. For the view we have taken on the basis of the admitted facts and documents as well as pleadings of the parties, there is no bona fide dispute between the parties so far principal amount is concerned. Thus, reliance placed on Anand Steelv. Bharat Earth Movers Ltd. [1987] 3 CLJ 175 (Kar.) and K. Suresh Shenoy v. Cochin Stock Exchange Ltd. [1988] 3 CLJ 350 (Ker.) is of no consequence and does not in any manner improve the case of the respondent.

34. So far challenge to affidavit in support of the Company Petition is concerned, we would not have gone into this question. However, since it has been raised, therefore, we are going into it. Reliance in this behalf was placed on behalf of respondent on Malhotra Steel Syndicate v. Punjab Chem-Plants Ltd, [1989] 2 CLJ 261 (Pun. & Har.). This is a judgment on its own facts. In this case, parties were relegated to the remedy of civil suit because it was found as a question of fact that there was a boha fide dispute between the parties and winding-up petition was not the proper remedy. Similarly, the decision reported in V. V, Krishna lyer Sons v. New Era Mfg. Co. Ltd. [1965] 1 CLJ 179 (Ker.) also does not in any manner improve the case of the respondent.

35. Having accepted the order of the learned Company Judge by not challenging the same what needs to be seen in this appeal is, whether the underlined portion of the order should have been passed or not, Mr. K.D. Sood, learned counsel for the appellant in this context urged that there was firstly no dispute regarding interest part and secondly even if it be assumed for the sake of argument without being conceded that there was any dispute, such a question was firstly required to be determined as per law. According to him, if the respondent paid a sum of Rs. 30 lakhs by or before 31-12-2002, the proceedings would stand closed without the question regarding existence of bona fide dispute or otherwise being adjudicated upon. He even urged that unless finding was recorded regarding existence of a bona fide dispute, his client could not be directed to go to civil court as was urged on behalf of the respondent while projecting that there exists a bona fide dispute and the debt claimed in the company petition is not due and outstanding.

36. We have gone into the facts and law in this appeal, as both sides had argued the matter at length and had invited decision on both.

37. In our considered view, learned Company Judge while directing the respondent to pay Rs. 30 lakhs on or before 31-12-2002 ought not to have said anything further except for postponing the advertisement of the company petition on the failure of the respondent to do the needful. Accordingly, the aforesaid underlined portion of the order passed by the learned Company Judge in his order dated 16-4-2002 is hereby quashed and set aside and to this extent appeal is

allowed. The matter is ordered to be listed before the learned Company Judge in the first week of January 2003 for proceeding further in the light of what has been said hereinabove for determination of the fact thereafter as per law whether there exists any bona fide dispute or not. No costs.

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