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**HIGH COURT OF CHHATTISGARH, BILASPUR****COMP No. 11 of 2015****Judgment reserved on 25-04-2016****Judgment delivered on 08-08-2016**

- Budhia Auto Associate Pvt. Ltd.

All Notices, Processes, etc. is that of its Advocate Shri Anand Mohan Tiwari At SMIG-49, Bajpai Castle, Behind Minocha Colony, Uslapur Road Raipur Chhattisgarh

Registered Office Of The Company is Situated At Budhia Auto Associate Private Limited Plot No. 392, Vijaya Talkies Road Transport Nagar, Korba 495677 Chhattisgarh, India

---- Petitioner

**Versus**

- None

---- Respondent

For Petitioner

For Union of India

For State of CG

Shri Siddharth Dubey, Advocate

Shri N.K. Vyas, Asstt. Solicitor General

Shri P.K. Bhaduri, Govt. Advocate

**Hon'ble Shri Justice Prashant Kumar Mishra****C A V Order**

1. This petition for winding up has been preferred by the company itself without referring to the relevant clause of Section 433 of the Companies Act, 1956 ('the Act' in short), however, in course of

argument it was informed that the petition is under Section 433 (e) of the Act.

2. The petition, only in two pages, states that the nominal capital of the company is Rs.3.50 crores, divided into 35 lac shares of Rs.10/- each having been constituted for carrying on the business of assemblers, importers, exporters, buyers, sellers, stockiest, distributors, suppliers, wholesale and retail dealers, repairers, storers, cleaners, warehouseers, hirers, leasers and worker in motor cars, motor buses, mini buses, motor lorries, motor trucks, trolleys, motor cycles, tractors, vans, launches, boats, aeroplanes, hydro planes, helicopters and aircrafts and other conveyances of all kinds and description suitable for propulsion of land, sea or the air or in any combination thereof whether propelled or assisted means of petrol, diesel, oil, spirit, gas, vapour, electricity, battery, solar energy, automatic energy, animal, manual labour or any other powers whatsoever and of engines, chassis, bodies, tools and implements, spare parts for or in connection with the above mentioned things.
3. It is mentioned in para 7 of the petition that the present petition is being filed as the company is unable to pay its statutory debts under the provisions of the Chhattisgarh Value Added Tax Act, 2005 ('the VAT Act' in short) amounting to Rs.3,06,94,219/-.

4. In course of argument, learned counsel appearing for the petitioner company would submit that in view of demand of huge amount of tax, which is a debt, which the petitioner company is unable to pay, therefore, it has become commercially insolvent, therefore, the company is needed to be wound up.
5. On 18-11-2015 the petitioner has also filed two separate applications for stay of recovery of tax for the assessment period 2011-12 & 2012-13. In the first application it is averred that out of total demand of Rs.1,68,06,577/- for the said periods the petitioner has already paid an amount of Rs.75,65,998/-. Similar statement is made in the second application also.
6. Per contra, learned counsel appearing for the State of Chhattisgarh would submit that the petitioner is a defaulter having failed to make payment of the Value Added Tax ('the VAT' in short), therefore, the company is required to be taken to task as the company is evading tax. Learned counsel would draw attention to Section 529-A and 530 of the Act. It is also argued that collection of tax being sovereign function, this Court may not exercise its judicial discretion in favour of the petitioner company.
7. Learned Assistant Solicitor General appearing for the Registrar of Companies has referred to the decision of the Supreme Court

rendered in **Harinagar Sugar Mills Co. Ltd., Bombay v. M.W. Pradhan (now G.V. Dalvi), Court Receiver, High Court, Bombay**<sup>1</sup> and the judgment rendered by the Andhra Pradesh High Court in **Krishna Kilaru and Another v. Maytas Properties Limited Rep. By its Managing Director, Hyderabad**<sup>2</sup>, to argue that neglect to pay the amount of tax does not amount to unable to pay its debt, therefore, the company petition deserves to be dismissed.

8. A winding of petition under Section 433 of the Act can be entertained by the Court on the following 5 contingencies :

- a) if the company has, by special resolution, resolved that the company may be wound up by the Court;
- b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;
- c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;
- e) if the company is unable to pay its debts;

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1 AIR 1966 SC 1707

2 Comp. Pet. No.70 of 2010 & other connected matters (decided on 21-8-2012) = MANU/AP/0745/2012

9. Even if any of the above stated 5 contingencies has arisen in a given case, it is still the discretion of the Court to direct or refuse winding up in view of language of Section 433 which says the company may be wound up by the Court, if the Court is of opinion that it is just and equitable that the company should be wound up.
10. In **Dundappa Shivalingappa Adi v. S.G. Motor Transport Co. P. Ltd. and Others**<sup>3</sup>, it is held that the provision does not confer on any person a right to seek an order that a company shall be wound up. It confers power of the court to pass an order of winding up in appropriate cases.
11. Similarly, in **New Swadeshi Mills of Ahmedabad Ltd. v. Dye-Chem Corporation**<sup>4</sup>, **Rishi Enterprises, In re.**<sup>5</sup> and in **Navjivan Trading Finance P. Ltd., In re.**<sup>6</sup>, it has been held that a company will not be wound up merely because it is unable to pay its debts so long as it can be revived or resurrected by a scheme or arrangement or when it has still prospects of coming back to life. Although a petition can be filed by the company itself for winding up on any of the grounds mentioned under Section 433 of the Act, the motive behind the filing of the petition is also

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3 (1966) 36 Com Cases 606 (Mysore) (DB)

4 (1986) 59 Com Cases 183 (Guj) (DB)

5 (1992) 73 Com Cases 271 (Guj)

6 (1978) 48 Com Cases 402 (Guj)

irrelevant as held in **Bombay Metropolitan Transport Corporation Ltd. v. Employees of Bombay Metropolitan Transport Corporation Ltd. (CIDCO) and Others**<sup>7</sup>. It is the duty of the company Court to consider the entire facts situation before proceeding to exercise its judicial discretion to direct winding up.

12. In **Krishna Kilaru** (supra) the Andhra Pradesh High Court has held that when a company is commercially insolvent it can be held that it is unable to pay its debts and the petition under Section 433 (e) and Section 434 (1) (c) of the Act is maintainable, however, in the case in hand, in the two pages petition, it has not been elaborated as to what are the assets and liabilities of the petitioner company in addition to the liability in form of tax dues payable to the State Government under the VAT Act. The petition is silent about the assets of the company. It is equally silent about its balance sheet and the accounts for the last few years to demonstrate that the company has no income and is not carrying any business activities. Merely on bald allegation that the company is unable to pay the tax amount raised by the State Government would not be sufficient enough to proceed further to admit a petition for its publication in the official gazette or to direct appointment of provisional liquidator.

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<sup>7</sup> (1991) 71 Com Cases 473 (Bom) (DB)

If the petition of this nature is allowed, every defaulter who owes huge sum to the Government under the provisions of the Value Added Tax Act or the Income Tax Act, would rush to the company Court to declare itself insolvent and avoid payment of tax.

13. In **Satish Chandra v. Union of India**<sup>8</sup>, the Supreme Court held that the power of winding up, conferred by Section 433 of the Act, is drastic. A winding up petition, praying for the economic death of a running and live commercial organisation, is an extreme remedy to be resorted sparingly.

14. Similarly, in **M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja and Another**<sup>9</sup>, it has been held that winding up of a company is not the interest of the applicant but the interest of the stakeholders of the company as a whole and the basic principle is to stave off the winding up of a company as far as possible and an order of winding up is to be resorted to only as a last course. All efforts are to be made for saving the company from being wound up. (Also see: **Ranjana Kumar v. Indian Dyestuff Industries Ltd.**<sup>10</sup>).

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8 (1994) 5 SCC 495

9 (2008) 6 SCC 750

10 (2001) 107 Com Cases 579 (Bom)

15. In **Jugalkishore Benarsidas v. South India Saw Mills (P.) Ltd.**<sup>11</sup>, it is held that the fact that the company is unable to pay its debt, does not necessarily entitle the Court to order winding up of the company as the discretion to pass such an order, even in the case of the inability of a company to pay its debt, is by Section 433 vested in the Court and that discretion has to be exercised judiciously. While exercising the judicial discretion, apart from the non-availability of entire facts regarding the assets and liabilities of the current business of the company, it is also to be seen that in the stay application the company made a statement that an amount of Rs.75,65,998/- has already been paid to the State Government, therefore, it is not a fit case where this Court should exercise its judicial discretion to proceed further in the company petition to direct publication or to appoint the provisional liquidator.

16. As a sequel, the instant winding up petition (company petition) is liable to be and is hereby dismissed.

Sd/-

Company Judge

Prashant Kumar Mishra

Gowri

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<sup>11</sup> (1975) 45 Com Cases 273 (Kerala)