IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

C.A. No.124-127 of 2006 and
C.P. No.17 of 2006
Date of Decision:17.04.2009

Priyaraj Electronics Limited ..... Petitioner

Versus

Motorola India (Priviate) Limited ..... Respondent

**CORAM:** Hon'ble Mr. Justice K. Kannan

Present: Mr. Ashwani Chopra, Sr. Advocate with
Mr. Sumit Goel, Advocate for petitioner.
Mr. Jawahar Lal, Advocate and
Mr. Deepak Suri, Advocate for respondent.

**K. KANNAN, J**

**I. Scope:**

1. This petition has been filed under Section 433, 434 and 439 of the Companies Act, on behalf of the petitioner for winding-up respondent-company i.e. Motorola India Pvt. Ltd.

2. The basis of the petition is the alleged admitted liability of the respondent-company to the petitioner in a sum of Rs.1,12,51,871/- for various goods sold and services rendered by the petitioner to the respondent-company under a Infrastructure Supply and Services Agreement dated 7.1.2002 (hereinafter called the agreement). The agreement came to be executed for implementing the respondent company's GSM project at BSNL and non-BSNL sites in the States of Andhra Pradesh/ Kerala.

**II. The petitioner's claims:**

3. The averments in the petition are that the petitioner had to complete the work entrusted to it by the respondent under the terms of the aforesaid agreement by 27.7.2002. The agreement spells out the terms of payment and the admitted case is that all the payments have been made

except 20% of the price of the purchase order that is alleged to have been withheld by the respondent, notwithstanding the fact that it has received the last payment due from BSNL. The petitioner claims the payment due to it to be an admitted claim and that the respondent company has made provision for Rs.86,22,077/- as due and payable to the petitioner company in its audited statements and has also referred to the same in a company petition filed before this Court in C.P. No.7 of 2006 seeking for approval of a Scheme of Amalgamation of itself and its group/associated companies. The statutory notice demanding the payment issued on 22.12.2005 (Annexure P-5) to the respondent company was responded by stating that it had itself not received the full payment from BSNL under the agreement and so long as the last due payment from BSNL has not been received, it was entitled to withhold at least 20% of the price of the services referred to in the purchase order. The petitioner claims that the contingency of non receipt of the last payment from BSNL has been taken up by the respondent for the first time only in the reply and the respondent company has actually, without any valid or bona fide reason, failed and neglected to make the payment without sending the amount to the petitioner. In its assessment, the respondent-company has been clearly "unable to pay its debt" and hence it is liable to be wound up.

**III. <u>The respondent-company's defence:</u>**

4. The respondent company denies the claim of the petitioner by reference to the fact that under Clause 4.3.4 of the Agreement, the final payment of 20% would be become payable only when the respondent itself received the last payment from BSNL. The respondent has stated on oath in its reply through its Director that the last payment had not been received

from BSNL and also filed additional affidavit dated 19.3.2009 at the time of argument to state that the respondent had not received approximately 16.25% of the purchase order value placed by BSNL on the respondent. It is the contention of the respondent that two arbitration cases are still pending between the respondent and BSNL and under such circumstances, the debt has not become due and payable to the petitioner.

5. The legal contention of the respondent is that the amount claimed by the petitioner as a debt is not a "debt" within the definition of the Companies Act. Since the obligation did not exist *in praesenti* but only payable *in futuro* when the respondent company itself received the last payment from BSNL. The further contention of the respondent is that the petitioner was bound to furnish the proof of payment of all applicable taxes, as required to be done under Clause 13 of the Agreement and in the case of such default, the respondent is not liable to make the payment to the petitioner. The respondent has also contended that the petitioner had failed to fulfill certain obligations relating to the works entrusted to it and consequently respondent company had itself completed the work and seeks for deduction to the tune of Rs.53,43,264/-. This amount according to the respondent was liable for deduction as per Clause 14.1 of the Agreement as claim for damages for delayed completion of the works. The respondent would counter the petitioner's claim of the so called admitted liability by its reference to the audit and the statements in the balance sheet by stating that the Accounting Standards (AS) framed by the institute by the Chartered Accountant of India has been given statutory force and AS-29 dealing with the provisions, contingent liability and contingent assets etc. requires that the company is bound to make a substantial degree of estimation and what

was stated in the balance sheet was in compliance of the Best Accounting Practices and that the said amount has been subject to the contingency of the receipt of last payment from BSNL.

**IV. Other contentions, as found in pleadings:**

6. Apart from this argument, it is contained in the petition and the statement filed by the respondent company that the petitioner stakes its claim also on the basis of inchoate contract that the services which it had rendered was not meant to be gratuitous and therefore, the petitioner was also entitled to make the claim for value of the services had and received by the respondent company. The respondent would answer this contention in its counter by stating that the Section 70 of the Contract Act itself could be invoked only in the absence of valid and subsisting contract and there was no scope for invoking 'implied terms' by reference to doctrine *quantum meruit,* where parties to the contract are governed by express terms.

**V. Definition of Debt, the core issue :**

7. The parties, therefore, are locked up in lis before this Court and the central point to be resolved is whether there exists a “debt” within the provisions of Companies Act and whether the company could be deemed to be “unable to pay” as required under Section 434 of the Companies Act. The terms “debt” itself has not been defined under the Companies Act and if we must make reference to the P Ramanatha Aiyar's Concise Law Dictionary, 2004 Edition Law Lexicon it is defined as “a sum of money due under an express or implied agreement (as) a bond of bill or note; amount due or payable from one person to another in return for money, services, goods, or other obligation.”

8. The Act again does not make any specific reference as to

whether the debt shall be a debt already owed by the company or it could even be yet a debt payable in future by the company. These two expressions "debt owed" or "debt payable" shall be ascertained or certain amount, which is opposed to inchoate, contingent, future un-ascertained or imperfect obligation. In a case where the liability is contingent, it cannot be said to be "debt owed" by the company. The "debt payable", on the other hand could be even a contingent liability. P Ramanatha Aiyar's Concise Law Dictionary, 2004 Edition defines the term 'payable' as having two meanings: (1) owing and (2) payable at a particular point of time, and when this expression is used without any qualification it generally means payable at once. This assumes importance only because a petition for winding up under the Companies Act could be invoked only for an amount that is ascertained and owed by the company. That is why there is a statutory requirement of having to issue a notice. In case where a creditor complains that the company is unable to pay its debts and as such the presumption is available under Section 434 (1) (a) if the company is indebted in a sum exceeding one lakh rupees and company is unable to pay for three weeks after the demand is made. The "sum due" as referred to under Section 434 must, therefore, mean what has fructified and can not merely be a contingent liability or deferred payment. If the liability has not fructified within 21 days from the time the date of service of notice, it cannot be said to be a debt which company is unable to pay, in order that the Court could find a justification for winding up the company.

9. The contingent liability has reference under the Scheme of the Act in relation to winding up only as a factor among other events which the Court shall consider whether the Company shall be required to be wound up or

not. This finds expression in Section 434 (1) (c) where the section spells out that if it is proved to the satisfaction of the Court that the company is unable to pay its debt, the Court shall take into account the contingent and prospective liability of the companies (also). In other words, the Court shall first see whether there exists a debt which payable and whether the amount has not been paid within 3 weeks from the date of the demand or it has neglected to pay such sum. Every non-payment will not be a ground of winding up the company. The Court shall have due regard to the contingent and prospective liability for making such inference. The justification for applying for winding up the company will have to be therefore seen in such a context whether the debt has become payable on the date when the notice was issued or any time after receipt within 3 weeks from the date of the demand.

**VI. <u>Future liability or contingent liability is not a "debt":</u>**

10. The services rendered by the petitioner company itself is not in doubt. Although objection to the exact amount is made by the respondent by reference to certain aspects such as delay in completion of the work, non furnishing of proofs of tax returns of the petitioner company, they would fall to way side, if we address the core issue as to the nature of liability, especially having regard to the provision being made by the respondent company in its balance sheet admitting the liability though not to the entire sum as claimed in the notice but to substantial amount thereof. The liability springs from a clause which both parties have referred to under Clause 4.3.4 which reads: "The claim of the petitioner becomes due and payable upon the respondent's receipt of the last payment in relation to the contractual works from the BSNL." The petitioner claims the liability as having arisen by its

statement in para 7 (d) when it says that BSNL has already made the last payment to the respondent in January 2004 and as such 20% of the contractual price is due and payable since then. This assertion of the petitioner has been unsubstantiated, particularly when the respondent company even sworn to an affidavit saying that about 16.5 % of the contract price has not been paid by the BSNL and that there are arbitration proceedings pending between the respondent and BSNL before the Kerala High Court and before the Arbitrator. Under such circumstances, I have no doubt in my mind that debt has not become payable on the date of filing of the petition.

11. The expression whether the liability to pay in future would also be considered as a debt for the purpose of invoking Section 433 was considered by the High Court of Gujarat in the ***Registrar of Companies, Gujarat vs. Kavita Benefit Pvt. Ltd.*** reported in **1978 (48) Company Cases 231.** The learned Counsel for the respondent relies on this judgment, which referred to a petition for winding up of a chit fund company where the company had its liability to repay subscription to several persons who were members of the chit fund. The court found that the liability was contingent and that such liability would not be a debt *in praesenti* and dismissed the petition. The similar statement of law was also made in a decision of this Court in ***Registrar of Companies vs. Ajanta Lucky Scheme and Investment Company Private Ltd. And Ors.*** decided in Civil Original No.87 of 1971 on 28.9.1972. This Court had held that the term 'debt' really meant an amount which was due and could be claimed by creditor, so that if the demand was not met, the company could be said to be unable to pay its debts. But if a debt had not accrued due and no demand could be made and

the mere fact that certain liabilities would accrue due in future, it would not unnecessarily lead to the conclusion that the company was unable to meet its liability even in instances where the future liabilities could be more than the value of the present assets of the company. The matter ought to rest there, viz., the debt cannot simply be contingent, to found an action for winding up. That is precise by what it is.

**VII. Effect of provision in balance sheet – not conclusive as to liability**

12. The effect of provision for payment in the balance sheet would be the next key point for consideration. The learned counsel for the petitioner refers me to the accounting standard already detailed above where it is more in keeping with probity of the financial dealings and making available to people the knowledge of the contingent liabilities. This point has been answered according to the learned counsel for the respondent in ***Walnut Packaging Private Limited vs. The Sirpur Paper Mills Limited and Anr.*** reported in 2008 (144) Company Cases 454 (AP) where the Andhra Pradesh High Court considered the effect of the statement and balance sheet and found that even for the purpose of extending the period of limitation under Section 18 of the Limitation Act, it could not be termed as acknowledgment of liability.

13. I have already pointed out that the liability has been disputed by the respondent company also on other grounds which I do not feel constrained to join issues with, having regard to the finding that I have returned that the debt on which the petition is filed is not “due and payable” on the date when the petition was presented. Even otherwise, it is pointed out that by learned counsel for the respondent that the respondent company has reserves of Rs.135, 85, 69,479 and cash in hand to the tune of Rs.

12,08,35,753/- as on 31.3.2006. Under the circumstances, it would be difficult to find that the company circumstance deserves to be wound up. I am not also examining the question of the liability of the respondent under *quantum meruit* for the reason that the parties are governed by express terms of contract and there is no scope for invoking any implied liability for services rendered, as contemplated under Section 70 of the Contract Act.

14. The Company petition, therefore, deserves to be dismissed but in the circumstances there shall be no direction as to costs.

17.4.2009 ( K. KANNAN )
rajeev JUDGE