

(2014) 04 DEL CK 0080**Delhi High Court****Case No:** Co. Pet. 341/2012 & Co. Appl. 1346 of 2012

V.V. Enterprises

APPELLANT

Vs

Rungta Irrigation Ltd.

RESPONDENT

Date of Decision: April 25, 2014**Acts Referred:**

- Companies Act, 1956 - Section 433(e), 434, 434(1)(a), 439

Citation: (2014) 209 DLT 748**Hon'ble Judges:** Vibhu Bakhru, J**Bench:** Single Bench**Advocate:** Pankaj Aggarwal, Advocate for the Appellant; Pramod Ahuja, Advocate for the Respondent**Final Decision:** Allowed**Judgement**

Vibhu Bakhru, J.

The present petition has been filed by the petitioner u/s 433(e), 434(1)(a) and 439 of the Companies Act, 1956 (hereinafter referred to as the "Act") inter alia praying for winding up of the respondent company on the ground that the respondent company has failed and neglected to pay a sum of Rs. 2,20,320/- along with interest, due and payable to the petitioner and is, thus, unable to pay its debts. The respondent had also paid a cheque for the said amount, however, the same was not honoured by the drawee bank and is also stated to have been misplaced during its transmission through banking channels. The respondent states that the respondent cannot be faulted for non-encashment of the cheque. The respondent has also declined to replace the cheque, contending that it is now not liable to pay any amount to the petitioner. The only controversy that needs to be addressed in the present case is whether the defence raised by the respondent is bona fide or a sham defence.

2. Briefly stated, the facts are as under:

2.1. The petitioner is in business of manufacturing machinery for PVC pipe (Processing) Machinery and whereas the respondent is engaged in manufacturing and trading Aluminium sprinkler sets, HDPE pipe base, Sprinkler irrigation Systems, PVC pipe, etc.

2.2. The respondent placed a purchase order for a Mixer Hopper Loader on 15.7.2011, for a sum of Rs. 2,44,800/- . The respondent also made a part payment of Rs. 24,480/- being 10% of the agreed purchase consideration. In terms of the purchase order the said equipment was to be delivered immediately and the purchase order also specified that the equipment would be installed by the engineers of the petitioner.

2.3. The petitioner sent an e-mail dated 8.8.2011, informing the respondent that the machine was ready for dispatch and called upon the respondent to pay the balance sum of Rs. 2,20,320/- as per the Performa Invoice. The petitioner also provided the details of its bank account to enable the respondent to directly remit the balance consideration through banking channels. The petitioner sent another e-mail dated 3.10.2011 once again informing the respondent that the machine had been ready for dispatch for the past two months and called upon the respondent to immediately make the balance payment.

2.4. The machine was delivered to the respondent on 1.12.2011 and an invoice being invoice No. 481 dated 1.12.2011 was raised by the petitioner. The respondent also issued a cheque bearing No. 074699 dated 29.8.2011 for a sum of Rs. 2,20,320/- drawn on Allahabad Bank, IFB, New Delhi Branch, Allahabad Bank Building, 1st Floor, 17 Parliament Street, New Delhi. While it is the case of the petitioner that the said cheque was handed over to the petitioner on 1.12.2011 at the time of delivery of the machine, the respondent has asserted that the said cheque was handed over to the petitioner in August, 2011.

2.5. On 18.1.2012, the petitioner received a letter from HDFC bank with reference to the said cheque informing that on 3.12.2011, the said cheque was returned unpaid by the drawee bank with a remark "Instrument Mutilated, required bank confirmation". The said bank also informed the petitioner that the physical cheque had not been returned to them and referred to the said cheque as being "misplaced".

2.6 It is stated by the petitioner that the petitioner was in continuous touch with the respondent for replacement of the cheque, however, the respondent failed to replace the same. The petitioner received a letter dated 15.2.2012 from the respondent with a caption "Reminder IV" calling upon the petitioner to make the necessary arrangements to install the machines. The said letter was immediately responded to by the petitioner by a letter dated 16.2.2012, whereby the petitioner referred to the caption of the letter dated 15.2.2011 and refuted the suggestion that there was any prior correspondence by the respondent.

2.7 Given the fact that the payments due had not been effected by the respondent, the petitioner issued a notice dated 3.3.2012 under Sections 433(e) & 434 of the Act, calling upon the respondent to inter alia pay the balance consideration of Rs. 2,20,320/- along with interest at the rate of 18% p.a. This notice elicited no response from the respondent.

3. In view of the fact that the payments had not been made by the respondent despite notice u/s 434(1)(a) of the Act, the petitioner filed the present petition. The respondent filed a reply to the petition stating that there had been a delay of 4 months and 17 days in supply of the machines and the petitioner had failed to comply with the terms of the purchase order. The respondent further complained that even after the machines was supplied, the petitioner had failed to install the machines.

4. The learned Counsel for the respondent states that respondent company is not liable to pay the amount claimed by the petitioner because the machines had been lying in idle condition since 2.12.2011 and is of no use to the respondent. The learned Counsel for the respondent further contended that he is entitled to the refund of a sum of Rs. 24,480 (10% of the total amount) which was paid at the time of acceptance of order by the petitioner and other damages suffered.

5. I have heard the learned Counsel for the parties at length.

6. It is well settled that in case of a substantial and bona fide dispute between the parties with respect to the debt claimed against a company, a winding up petition u/s 433(e) of the Act would not be maintainable. However, it is equally well settled that in a case where a company creates an illusory or specious dispute to avoid its obligation to pay its debt, the rights of a creditor to pursue a petition u/s 433(e) of the Companies Act, 1956, would not be negated. This has been explained by the Supreme Court in the case of IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., and the Court has held as under:

20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the Court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion,

but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.

7. In the given circumstances, the essential question that requires to be addressed is whether the defence raised by the respondent in the present case is a subterfuge to show that the debt claimed by the petitioner is disputed. A bare examination of the facts clearly indicates that the stand adopted by the respondent is ex-facie a dishonest one. There is no dispute that a purchase order for the machine in question had been placed by the respondent on the petitioner. The learned Counsel for the respondent has submitted that there had been a delay 4 months and 17 days in supplying the machine, as it is contended that the machine had to be supplied immediately on the purchase order being placed. The contention of the respondent that there had been an inordinate delay in the supply of the machine is clearly erroneous and not sustainable. First of all, the purchase order recorded that 10% of the purchase consideration had to be paid in advance, which was not done at the time of placing the purchase order (i.e. on 15.7.2011). Admittedly, this payment was made by a cheque dated 20.7.2011. Secondly, the petitioner had by an e-mail dated 8.8.2011 informed the respondent that the machine was ready for purchase and called upon the respondent to pay the balance consideration. Apparently, the respondent failed to do so. The petitioner had once again called upon the respondent, by an e-mail dated 3.10.2011, to pay the balance amount in order that the machine could be dispatched. It is thus apparent that there was no delay on the part of the petitioner in supplying the machine to the respondent. In any event, the controversy whether there was any delay in delivery of the machine in question is a non-issue as, admittedly, the machine was finally dispatched on 1.12.2011 and there is no dispute that the said machine was received by the respondent without any protest or any reservation. In the circumstances, the contention that the respondent was not liable to pay the payment on account of delay in supply of the machine is clearly a sham defence.

8. It is admitted by the respondent that the balance consideration was payable on dispatch of the said machine. It is further admitted that a cheque for the balance consideration was also issued by the respondent to the petitioner. The petitioner has contended that the said cheque was received at the time of delivery of the machine. The respondent has disputed this contention and stated that the cheque was handed over much earlier in August, 2011 as, admittedly, the cheque in question was dated 29.8.2011. This contention raised by the respondent also does not seem to be correct as there would be no occasion for the petitioner to send an e-mail dated 3.10.2011 calling upon the respondent to make the balance payment in the event that it had received the cheque. The e-mails dated 8.8.2011 & 3.10.2011 have not been disputed by the learned Counsel for the respondent. It is thus apparent that the petitioner had been pursuing with the respondent for issuing the balance consideration in order to dispatch the machine in question. It is also not in dispute that the cheque in question was presented to the respondent's bankers on

3.12.2011. There is no conceivable reason why the petitioner would not have presented the cheque earlier in the event the petitioner had received the same in August 2011. The learned Counsel for the respondent has also not offered any explanation why the presentation of the cheque would have been delayed by the petitioner. Although, the statement of the respondent that it had handed over the cheque to the petitioner in August, 2011 is apparently incorrect, the same is also not relevant for determining the controversy in the present petition, as it is not disputed that the respondent had in fact handed over the cheque to the petitioner and had received the machine.

9. The cheque handed over by the respondent was admittedly not honoured by its bankers. In the normal course, the respondent ought to have immediately replaced the same. However, it is contended by the respondent that the respondent was not called upon to replace the cheque till 16.2.2012. This contention too is ex-facie not believable and is belied by the contemporaneous correspondence between the parties. The respondent has produced the petitioner's letter dated 16.2.2012 along with its reply. The said letter clearly states that the petitioner had been pursuing with the respondent for the cheque to be replaced. The respondent had responded to this letter by a letter dated 2.3.2012, however, this statement of the petitioner was not controverted. It is also obvious that in the normal course of events, a recipient of a cheque that has been misplaced would call upon the drawer to replace the same. The contention that the cheque given by the respondent was dishonoured on 3.12.2011, yet the petitioner had not requested for its replacement till 16.2.2012, is not credible.

10. The respondent has further relied upon the letters dated 12.9.2011, 11.11.2011 and 22.12.2011 to contend that the respondent had been pursuing the petitioner for delivery of the machines. However, the petitioner had inordinately delayed the same. First of all, the letters have been disputed by the petitioner; secondly, it is also relevant to note that the said letters have no reference to the e-mails sent by the petitioner (which are not disputed); thirdly, the said letters have been sent under certificate of posting while the other correspondence by the respondent has been by registered post. In my view, the said letters have been created merely to indicate a dispute after the machine had been delivered and cannot be relied upon. Even otherwise, if one examines the matter closely, one finds that the letters only seek to create an illusion of dispute where in fact none existed at the material time. The respondent has also sent a letter dated 15.2.2012 calling upon the petitioner to install the machines. Thus, indisputably the respondent had accepted the delivery of the machine and even as late as 15.2.2012 was calling upon the petitioner to install the same. In the circumstances, the dispute that the respondent was not liable to pay for the same on account of a delay in delivering the same cannot be accepted.

11. In my view, this is a case where the respondent has attempted to create a dispute only to avoid making payment to the petitioner. Shorn of the illusion that is

sought to be created by the respondent by the abovementioned disputed letters, the indisputable facts are (a) that the petitioner placed an order for the machine, (b) the petitioner was obliged to pay 10% in advance and the balance 90% on dispatch of the machine, (c) that the respondent received the machine but has failed to pay the consideration for the same. The contention that since the machine had not been installed by the petitioner, the respondent is not liable to pay for the same, also cannot be accepted in view of the fact that the respondent was obliged to pay the consideration of the machine on dispatch and the question of installing the same would only arise after the payment had been effected. In the instant case, the respondent has failed to make the payment as the cheque had not been honoured on presentation. The learned Counsel for the respondent has contended that the respondent had handed over the cheque to the petitioner and had thus discharged his obligation. This argument is also unacceptable. The obligation of the respondent was to pay the entire consideration and on non-realization of the cheque the respondent was obliged to replace the same or remit the consideration through other means. However, it is apparent from the facts of the case that the respondent has deliberately avoided making payment to the petitioner. And, in absence of receiving the entire consideration, the petitioner was not liable to install the machine in question.

12. The disputes raised by the respondent are a mere ruse to avoid paying the amount due to the petitioner. In this view, the respondent is deemed to be unable to pay its debts on account of its failure to discharge the debt owed to the petitioner.

13. In view of the above, the present petition is admitted. The petitioner is directed to publish the citation in "Statesman" (English) and "Jansatta" (Hindi). The citation be also published in Delhi Gazette for hearing to be held on 17.7.2014.

14. The Official Liquidator is appointed as a Provisional Liquidator to take charge of the assets and books of accounts of the respondent company. The Directors of the respondent company are directed to file the Statement of Affairs within a period of 21 days from today. The Managing Director shall also file an affidavit indicating the current addresses of all the offices of the respondent, the addresses of all its Directors, as well as the details of all bank accounts of the respondent company.

15. However, in order to enable the respondent company to settle the amounts payable to the petitioner, I deem it appropriate that the directions for publication of the citations and appointment of Official Liquidator be not given effect to before the expiry of two weeks from today. If in this period, the respondent and the petitioner are able to arrive at a settlement for discharge of the dues of the petitioner, the petitioner shall inform the Official Liquidator about the settlement and the direction for publication of the citations and appointment of Official Liquidator as Provisional Liquidator shall not be implemented.

16. CA No. 1346/2012 stands disposed of. Renotify on 17.7.2014.