

**(2011) 11 CAL CK 0006**  
**Calcutta High Court**  
**Case No:** CP No. 423 of 2010

In Re: Steel Products Ltd. and  
Savita Rani Agarwal

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** Nov. 29, 2011

**Citation:** (2012) 2 CHN 801

**Hon'ble Judges:** Sanjib Banerjee, J

**Bench:** Single Bench

**Advocate:** D. K. Som, R. N. Basak, Bidyut Dutt and Bijan Datta for the Company,  
Sabyasachi Chowdhury and Satarup Banerjee, for the Appellant;

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**Judgement**

Sanjib Banerjee, J.

There is substantial basis to the petitioning creditor's claim, but it cannot be allowed in this summary jurisdiction on affidavit evidence. The parties have had transactions for a substantial period of time and upon payments remaining due from the company to the petitioner and the petitioner refusing to effect further supplies, the parties' representatives met in July of 2009. The minutes of the meeting of July 30, 2009 recorded, inter alia, that a sum of Rs. 32 lakh would be paid by the company to the petitioner in respect of the previous transactions. The modality of the payment was also indicated in the minutes. The other aspect taken up in the minutes was the course of future supply of goods by the petitioner to the company. The minutes provided that further supplies would be effected against letters of credit to be opened by the company in favour of the petitioner. That, in itself, was the first indication that the petitioner did not have faith in the company's ability to discharge its debts and the company was also constrained to accede to the petitioner's demand of a more secure form of payment than had been the practice thereto before followed by the parties.

2. Out of the sum of Rs. 32 lakh in respect of the previous transactions recorded in the minutes of July 30, 2009, an amount of Rs. 20 lakh was released by the company

to the petitioner and the balance sum of Rs. 12 lakh remained due. The petitioner effected supplies to the company subsequent to the meeting, whether or not against letters of credit it is unclear and altogether irrelevant.

3. The present winding-up petition has been carried on the petitioner's claim of the admitted sum of Rs. 12 lakh that remains unpaid out of the sum of Rs. 32 lakh clearly referred to in the minutes of the meeting held on July 30, 2009. The petitioner has also instituted a suit in the Alipore Court on account of the transactions between the parties subsequent to July 30, 2009, claiming as an unpaid seller. The company has counter-claimed in such suit. The counter-claim indicates that the petitioner did not supply the goods in time to the company following which the company was required to purchase the goods at a higher price from the market. The counter-claim is in respect of the difference of price that the company had to bear allegedly on account of the petitioner herein. Since such other suit is pending, the merits thereof cannot be gone into in the present proceedings.

4. The petitioner says that the transactions prior to July 30, 2009 and subsequent thereto should be seen altogether differently. The petitioner says that notwithstanding the story that has been made out in the response to the statutory notice and the yarn that has been spun in the company's affidavit in present proceedings, it is evident that the company acknowledged and admitted its liability to the petitioner in the sum of Rs. 32 lakh in course of the meeting held on July 30, 2009 and the company unequivocally promised to discharge such debt. The petitioner is right in its assertion that nothing that the company can show in its reply to the statutory notice or in its affidavit can detract from the company's liability in respect of the sum of Rs. 32 lakh or the unpaid portion thereof.

5. However, it is the other part of the petitioner's submission which appears to be fallacious. The petitioner's claim that the transactions prior to July 30, 2009 cannot be linked to the transactions thereafter does not have any legal mandate or factual basis. Even though the petitioner singled out the transactions subsequent to July 30, 2009 in the suit filed before the Alipore Court, there is nothing in law which prevents the company herein to cite the counter-claim that it filed in such suit as adequate defence to resist the attempt to wind up the company. The petitioner says that the company should have set off the amount of Rs. 12 lakh in the suit. Clearly, such position was impossible. For a defendant to claim set off, the defendant has to admit a part of the claim which is reflected in the plaint and set off such admitted amount against the amount that the defendant may claim or counter-claim from the plaintiff. Since the sum of Rs. 12 lakh, which is the balance of the amount of Rs. 32 lakh that still remains unpaid in respect of the transaction prior to July 30, 2009, was not the subject-matter of the petitioner's claim in the plaint filed in the Alipore Court, there was no question of the company claiming any set off against such amount.

6. The company's defence in the present proceedings appears to be in the nature of set off. This is also understandable since the company cannot question its liability to the petitioner in the sum of Rs. 12 lakh, which is the unpaid portion of the amount admitted to be due to the petitioner in the minutes of the meeting of July 30, 2009. The company's defence in the present proceedings is that notwithstanding such amount being due to the petitioner, the company is not liable to be wound up since the company has a valid counter-claim in excess of the quantum of the petitioner's claim in the present proceedings.

7. Reliance in the present context may be made to a Division Bench judgment reported at [SRC Steel \(P\) Ltd. Vs. Bharat Industrial Corporation Ltd.](#), The ratio of the decision is that in the event an improbable defence is made out to a creditor's winding-up petition, the Company Court will be well within its rights to assess the defence and pronounce thereon; however, if the company's defence is based on an action which has been launched before a proper forum, the Company Court would scarcely prejudge the action unless the claim of the company in the other action is palpably demurable.

8. The company's counter-claim in the suit appears to be farfetched. Yet, the company's counter-claim has not been rejected and it would be only upon the rejection of the counter-claim that the petitioner would be clearly entitled to the sum of Rs. 12 lakh that it claims. It is on such basis that the present petition is assessed and is found to be not good enough to progress to admission. The company has not been called upon.

9. C.P. No. 423 of 2010 is permanently stayed.

10. There will be no order as to costs. Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.