

**(2011) 08 CAL CK 0052**

**Calcutta High Court**

**Case No:** C.P. No. 519 of 2010

IAG Co. Ltd.

APPELLANT

Vs

Lakshmi Float Glass Ltd.

RESPONDENT

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**Date of Decision:** Aug. 4, 2011

**Citation:** (2012) 1 CHN 583 : (2012) 174 CompCas 442 : (2011) 109 SCL 429

**Hon'ble Judges:** I.P. Mukerji, J

**Bench:** Single Bench

**Advocate:** A.C. Kar, R. Dutta and P. Jewrajika, for the Company and U. Bose and N. Sengupta, for the Petitioner, for the Appellant;

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### **Judgement**

I.P. Mukerji, J.

This is a winding up application coming up for admission. The statutory notice was issued on 10-8-2010. This application was filed on 23-11-2010 on a claim of Rs. 1,01,48,543.37 without interest, against the Company. In the Affidavit-in-Reply of the petitioning creditor such claim was scaled down to Rs. 50,08,921.

2. This petitioning creditor is a Delhi Company. For several years it has been dealing with the respondent-Company which has its registered office at 3, Hungerford Street, Kolkata - 700 017. For the last 25 years the Company has been supplying glass and allied products to the petitioning creditor maintaining a mutual open and current account. It appears that this account was discussed between the parties on 14-9-2009. The minutes of discussion are annexure "B" to the petition at page 26. According to these minutes the Company admitted that it had dues towards the petitioning creditor of a sum of a little over Rs. 1.1 crores. Hearing the submissions of the learned Counsel for the parties, I have understood that the petitioning creditor used to keep in deposit substantial sums of money with the Company. The Company used to supply glassware as stated above. The price of the goods was adjusted by the Company against the deposits made by the petitioning creditor.

3. It appears that the parties agreed on 14-9-2009 that not more than rupees twenty thousand would be adjusted against each consignment sold by the Company to the petitioning creditor. Now, according to the learned Counsel for the petitioning creditor this arrangement was never acted upon.

4. The Company issued a statement of account from 1-4-2010 to 31-5-2010 where it was shown that Rs. 91,48,543.37 was the balance to the credit of the petitioning creditor. This is at page 50 of the petition being part of annexure "C". On 23-6-2010 the Company sent a statement of accounts to the petitioning creditor. It referred to the petitioning creditor's letter dated 15-6-2010. This letter dated 15-6-2010 has not been disclosed in this proceeding. But the learned Counsel for the petitioning creditor tells me that in this letter they had disputed the statement of accounts. The revised statement of accounts sent on 23-6-2010 said "therefore balance as on 23-6-2010 is Rs. 1,01,48,543.37." Now this statement of accounts is relied on by the petitioning creditor to argue that there was an unconditional acknowledgement on the part of the Company that they were liable to pay Rs. 1,01,48,543.37 to the petitioning creditor.

5. The learned Counsel for the Company argues that the balance confirmation only shows the amount lying deposited with them. This amount lying deposited with them was subject to a deduction of not over Rs. 20, 000 per consignment to be supplied by them to the petitioning creditor. The relationship between the parties had not come to an end. The Company was continuously making supply of goods to the petitioning creditor in terms of the agreement dated 14-9-2009. Therefore, that statement of accounts was subject to the terms of that agreement.

6. Moreover the Affidavit-in-Reply of the petitioning creditor, and more particularly paragraph 6 thereof shows that the adjustments were being made against supply as a result of which Rs. 1,01,48,543.37 was reduced to Rs. 50,08,921 in the hands of the Company. In fact, the seller Company was making more deduction than what was warranted by the said agreement dated 14-9-2009. Between 23-6-2010 and 14-2-2011 substantial goods had been sold by the Company. As a result of this the petitioning creditor was left with a credit of Rs. 50,08,921.

7. There is no doubt in my mind that there is admission by the Company that a sum of Rs. 50,08,921 is held by them on account of the petitioning creditor.

8. I also note the case made out by the Company against the statutory notice, by their reply dated 3-9-2010. It says that the Company denied that they "confirmed, acknowledged or admitted the dues to the extent of Rs. 1,01,48,543.37 or to any other amount or at all". Now this reply to the statutory notice did not talk about the agreement of 14-9-2009 or any adjustment according to that agreement.

9. Secondly paragraph 6 of the Affidavit-in-Reply makes it explicit that Rs. 50,08,921 was held by the Company on account of the petitioning creditor.

10. After all the Company is the supplier and the petitioning creditor is the buyer. Normally, it seems that it is always open to the petitioning creditor to say that they would accept no more supply from the Company and claim return of Rs. 50,08,921, which the Company would be obliged to do. But the Company maintains that the relationship between the parties continues. That is why the Company made deductions from the deposit against subsequent sale. As a result of this the petitioning creditor restrict themselves to the claim of Rs. 50,08,921. Therefore, there is some evidence to suggest that the relationship between the parties continues; but is liable to termination at once.

11. But there is no doubt in my mind that, as of now a sum of Rs. 50,08,921 belonging to the petitioning creditor is retained by the seller Company. The Company has practically no defence. The above findings are prima facie.

12. In this case I will apply the principles in the case of [Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation](#). These principles are held to be applicable in a winding up application. The judgment holds that even when the defendant does not seem to have any defence, the Court may out of sympathy allow it an opportunity to prove his defence by securing the claim of the plaintiff. I would grant such an opportunity to the Company but upon their securing the sum of Rs. 50,08,921 by furnishing a bank guarantee of a nationalised bank for the said amount in favour of the petitioning creditor within four weeks from date. The Company will renew such bank guarantee from time to time at least one week before its expiry subject to orders to be passed by the Civil Court. The petitioning creditor will not invoke the bank guarantee without the leave of the Civil Court. Such leave will be granted by the Civil Court if the Company is unable to prove its right.

13. Since this money admittedly belongs to the petitioning creditor and according to the Company is to be adjusted against sale made by it to the petitioning creditor, which is practically no defence, the suit has to be filed by the Company to establish its claim for Rs. 50,08,921 within four weeks from date. If no bank guarantee is furnished the petitioning creditor will be at liberty to apply for admission of the winding up petition. If no suit is filed, the petitioning creditor will be at liberty to encash the bank guarantee, with the leave of this Court. If no bank guarantee is furnished and the Court is approached the petition would be deemed to have been admitted on the basis of this order and only consequential orders for publication of advertisement and hearing of the winding up application will be passed by this Court. This winding up application is disposed of accordingly.