

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **COMPANY PETITION NO. 153 OF 2009**

AND

COMPANY APPLICATION NO. 466 OF 2009

Reserved on : October 26, 2009
Date of Decision : December 22, 2009

M/S EUROPEAN METAL RECYCLING LIMITED

.....Petitioner

Through Mr. Rajiv Nayyar, Sr. Advocate with
Ms. Smarika Singh, Advocate & Ms. Binsy
Susan, Advocate

Versus

M/S BLUE PRECISION LIMITED

.....Respondents

Through : None.

**CORAM :
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

SUDERSHAN KUMAR MISRA, J.

1. This is a petition under S.433 and S.434 of the Companies Act, 1956, for winding up the respondent company i.e M/s Blue Precision Limited, along with an application under S.450 of the Companies Act, 1956 praying for the appointment of a provisional liquidator in the matter. The petitioner's claim is based on certain

invoices issued in respect of contracts stated to have been entered into with the Respondent company.

2. The petitioner is a company incorporated under the laws of the United Kingdom, having its registered office at Sirius House, Delta Crescent, Westbrook, Warrington, WAS 7NS, UK. It is engaged in the business of recycling metal-rich waste streams arising from end-of-life vehicles/consumer products, industry and construction/demolition, resulting in sales of recycled commodities.

3. The respondent M/s Blue Precision Limited, having its registered office at 46, Shardanand Marg, Delhi – 110046, is a company that was incorporated under the Companies Act, 1956 on or around 21st March, 1995.

4. According to the petitioner, various Cost and Freight contracts were entered into by it with the Respondent company for the sale and purchase of non-ferrous scrap. The contracts in question are Contract No. 25442 and Contract No. 25716, details of whose invoices are given as under, annexed as Annexure N to the petition:

S.No .	Invoice no., stated to be evidence of debt	Amount supplied (in MT)	Price quoted by petitioner (in USD)	Total value of sale to respondent	Price quoted by petitioner to 3 rd party (in USD)	Total value of sale to 3 rd party	Price differential
1.	25442/01	45	2450	110,250	1305	58,725	51,525
2.	25442/02	15	2450	36,750	1305	19,575	17,175
3.	25716/01	11.64	2550	29682	1305	15,190.20	14,491.80
4.	25716/02	15.76	2550	40188	1305	20,566.80	19,621.20
5.	25716/03	15.09	2550	38,479.50	1305	19,692.45	18,787.05
6.	25716/04	15.09	2550	38,352	1305	19,627.20	18,724.80

5. The petitioner avers that it purchased the contracted goods for the Respondent and shipped them to India, and that on

arrival of the contracted goods in India, the Respondent failed to take possession and make payments for the same. It is further averred that, because of the Respondent's failure to take delivery of the goods, the Petitioner issued a legal notice dated 26th December, 2008 to the Respondent company, informing them that the Petitioner had taken delivery of the goods and was storing them at a warehouse close to the port in order to avoid paying port detention fines. The said notice also called upon the Respondent to confirm their intention to make payment for the contracted goods within 7 days of receipt of the legal notice, for a total amount of USD 1,171,000. It may be noted here that this notice dated 26th December, 2008 was addressed to the Respondent, and referred to a total of 7 contracts in support of its claim, out of which only two contracts, namely, Contract No. 25442 and Contract No. 25716, were entered into with the Respondent company, and the remaining 5 contracts mentioned in this notice addressed to the Respondent were entered into between the Petitioner and another company, namely, Blue Engineering Pvt Ltd.

6. On receiving no reply to the notice dated 26th December, 2008, the Petitioner contracted to sell the goods to a third party buyer, i.e. M/s Century Metal Recycling Private Limited and issued invoices No. 25442/01, 25442/02, 25442/02, 25716/01, 25716/02, 25716/03 and 25716/04, all dated 14th January, 2009, in this regard.

7. Thereafter, the Petitioner issued a notice of winding up dated 12th March, 2009 under S.433 and S.434 of the Companies Act, 1956, again calling upon the Respondent to make a payment of USD 140.324.85, which was the amount due to the Petitioner, within three weeks of the deemed receipt of the notice of winding up. By way of

this notice, the Petitioner informed the Respondent that the goods had been sold to a new buyer/third party, in order to mitigate the Petitioner's loss and to avoid paying further demurrage and warehousing charges, and the amount claimed in the said notice by the Petitioner was the total differential price of the goods, i.e the difference between the purchase price, as per the contract with the Respondent, and the price at which the goods were sold to the third party buyer.

8. This petition was filed on 6th April, 2009, praying for an order of winding up to be passed in respect of the Respondent, along with an application under S.450 of the Companies Act, 1956 for the appointment of a provisional liquidator. A further prayer for costs amounting to USD 140,324.85 is also made, this being equal to the total price differential of the contracted goods, as calculated by the Petitioner.

9. Notice was issued to the respondent to show cause as to why winding up proceedings be not initiated on 15th April, 2009 and is stated to have been served on 18th September, 2009. The affidavit of service in this regard is also on record. There has been no appearance on behalf of the respondent.

10. The petitioner has also relied on various communications that were exchanged between the Petitioner and the Respondent company, with regard to the contracts in question. It is further submitted that there is no bona fide dispute with regard to the liability of the Respondent company to pay the amount due to the petitioner, and the its non-payment raises a statutory presumption that the Respondent Company is commercially insolvent and is unable to repay

its debt to the Petitioner. Hence, the petitioner contends that the Respondent company is liable to be wound up by this Court under the provisions of S.433 and S.434 of the Companies Act, 1956.

11. What remains to be seen, thus, is whether the petitioner has made out a prima facie case that the respondent is unable to pay its debts. The issue that arises is, what is the nature of the amount that is claimed to be an 'unpaid debt'? Is it the balance principal amount due on a contract, i.e. the balance consideration that was payable towards the sale of goods under the contract as undertaken by the respondent, or is it a measure of damages payable to a party on account of breach by the other party? If it is the latter, then the liability to pay can only arise once there is a judicial determination of the quantum. The only instances in which the Company Court would exercise jurisdiction are where damages can be said to be quantified without need for a trial. For example, where the contract itself provides for liquidated damages or the party in breach has admitted his liability to pay the damages.

12. On an evaluation of Annexure "N", wherein the Petitioner has submitted a tabulated form of the details of the abovementioned contracts entered into between the Petitioner and the Respondent company, there are as many as 10 instances where the quantities stated to have been supplied by the petitioner, the value of the sale to the respondent; the value of the sale to the new buyer/third party and the resulting price differential, are incorrect, when compared to the copies of the invoices annexed to the petition. The net result is that the total price differential, when calculated as per the figures in the

invoices annexed to the petition, comes to an amount of USD 149,566.55. Details of these are as follows:

Invoice no.	Amount supplied (as per copy of invoice annexed to petition)	Total value of sale to respondent (In USD)	Total value of sale to 3rd party (in USD)	Price differential (in USD)
25442/01	54.52 (incorrectly stated as 45 in Annexure E and N to the petition)	133,574 (stated incorrectly as 110,250 in Annexure N to the petition)	71148.60 (stated incorrectly as 58,725 in Annexure N to the petition)	62,425.40 (stated incorrectly as 51,525 in Annexure N to the petition)
25442/02	13.44 (incorrectly stated as 15 in Annexure E and N to the petition)	32928 (stated incorrectly as 36,750 in Annexure N to the petition)	17539.20 (stated incorrectly as 19,575 in Annexure N to the petition)	15,388.8 (incorrectly stated as 17,175 in Annexure N to the petition)
25716/04	15.09	38,479.50 (stated incorrectly as 38,352 in Annexure N)	19627.20	18,852.30 (stated incorrectly as 18,724.80 in Annexure N to the petition)

13. Furthermore, while both Contract Nos.25442 and 25716 are in the name of 'Blue Precision Ltd, Plot No. 111, Sector 59, HSIDC Industrial Area, Faridabad, Haryana'; only one invoice No.25716/03 is in the name of 'Blue Precision Ltd.'. All the other invoices, namely, nos. 25442/01, 25442/02, 25716/01, 25716/02 and 25716/04, are in the name of 'Blue Engineering Pvt Ltd.' All the Bills of Lading with regard to all the abovementioned invoices, are in the name of 'Blue Engineering Pvt. Ltd.'

14. The only invoice in the name of the respondent 'Blue Precision Ltd' i.e. No. 25716/03 is for an amount of USD 38, 479.50, which was resold to the new buyer for an amount of USD 19,692.45,

resulting in a price differential of USD 18,787.05. This leads to a prima facie conclusion that the amount payable by the Respondent company, i.e. M/s Blue Precision Pvt. Ltd, is USD 18,787.05, as against the amount of USD 140,324.85 claimed by the Petitioner.

15. Since there has also been no appearance on behalf of the respondent, the petitioner's averments remain unrebutted. The respondent's failure to respond to the statutory notice of winding up sent on 12th March, 2009 does not mean that winding up orders must invariably be passed, as this Court has held in **Resham Singh & Co Pvt Ltd v Daewoo Motors India Ltd**, [2003] 116 CompCas 529 (Delhi), that "where no response had been made to the statutory notice the Respondent Company runs the risk of a winding-up petition being admitted for hearing at the threshold stage itself." It has further been held, in the same case, that "Normally, the Company Judge considers it prudent in the first instance to issue notice to the Respondent so that its defense to the possible far-reaching and fatal winding-up orders can be considered. The admission of the Petition at its first hearing is possible because, by virtue of Section 434 of the Companies Act, a presumption of the indebtedness can be legitimately drawn by the Court where no Reply to the statutory notice is forthcoming. The risk of the admission of the Petition, as well as the appointment of a Provisional Liquidator is thus broodingly and ominously present in all those cases where the Respondent Company neglects to send any Reply to the winding-up notice. But this is as far as the danger extends."

16. In **Mediquip Systems Pvt. Ltd v Proxima Medical System GmbH**, (2005) 7 SCC 42, the Supreme Court has held in paragraph 18 thereof, as follows

“an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression 'unable to pay its dues' in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realising debts due from a company.”

17. The court in the **Mediquip Systems Pvt. Ltd v Proxima Medical System GmbH** (supra) also referred to a decision of the Madras High Court in **Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd.**, (1990) 3 Comp LJ 322, where the following principles relating to bona fide dispute had been evolved:

“(1) If there is a dispute as regards the payment of the sum towards principal, however small that sum may be, a petition of winding up is not maintainable and the necessary forum for determination of such a dispute existing between the parties is the Civil Court;

(2) The existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to decide such a dispute before the Civil Court and in such an eventuality, the Company Court itself is competent to decide such a dispute in the winding-up proceedings; and

(3) If there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing of a civil suit as well as filing of a petition for winding-up of the company.”

18. These principles have been reiterated in **Vijay Industries v NATL Technologies Limited**, reported as (2009) 3 SCC 527. In the landmark decision of **Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd** [1972] 2 SCR 201, regarding a petition for winding up that dealt with a disputed debt, it was held that if the debt is bona fide disputed and the defence is a substantial one, the Court will not wind up the company. The decisions in **Pradeshiya Industrial and Investment Corporation of Uttar Pradesh v North India Petro-Chemical Ltd and Anr**, (1994) 2 CompLJ 50 (SC), and in **Amalgamated Commercial Traders (P) Ltd v Krishnaswami**, (1965) 35 CompCas 456 (SC) support the same proposition.

19. The parties entered into a contract for the sale of certain goods, which were procured and shipped. The buyer, i.e. the Respondent herein, did not take delivery of the goods, for reasons unknown as there has been no appearance on behalf of the Respondent in the present proceedings. The Petitioner then sold the goods to a third party. In essence, the Petitioner has tried to mitigate the damages to which he is entitled, by selling the goods in the open market and then deducting the price from the contracted amount due to him. What remains to be seen is whether an action under contract law, i.e. the claim of the petitioner if entitled to sue, which may be a claim for unpaid principal towards the sale of goods, or a claim for unrealized damages after having resorted to the sale of goods whose delivery wasn't taken towards mitigation of damage, would amount to 'debt' in terms of S.433(e) of the Companies Act, 1956 for winding up purposes.

20. In **Union of India v Raman Iron Foundry**, (1974) 2 SCC

231, in para 6 & 7 thereof, the Supreme Court held as under;

“..The classical definition of 'debt' is to be found in Webb v. Stenton [1883] 11 Q.B.D. 518 where Lindley, L.J., said :"... a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be debitum in praesenti; solvendum may be in praesenti or in future- that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in People v. Arguello [1869] 37 Calif. 524 which was approved by this Court in Kesoram Industries v. Commissioner of Wealth Tax, [1966] 59 ITR 767 (SC) clearly brings out the essential characteristics of a debt:

‘Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is debt due.’

This passage indicates that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money in praesenti, it is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in praesenti or in other words, which is presently payable.”

21. It was further held, in paragraph 9 of the **Raman Iron Foundry case (supra)**, that

“The law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due From the other party. The only right which the

party aggrieved by the breach of the contract has is the right to sue for damages.

...As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

22. **McGregor on Damages** (13th Edition, 1972, Sweet and Maxwell) says that "the principal meaning of the term 'mitigation' comprises three different, although closely interrelated, rules:

1) The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided, but has failed, though unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.

2) The second rule is the corollary of the first and is that where the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing; this is so even although the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the plaintiff can recover for loss incurred in reasonable attempts to avoid loss.

3) The third rule is that where the plaintiff does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the

benefit accruing from the plaintiff's action and is liable only for the loss as lessened; this is so even although the plaintiff would not have been debarred under the first rule from recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by reason of these steps not being the ones which were required of him under the first rule. Put shortly, the plaintiff cannot recover for avoided loss."

23. Two principles with regard to compensation for loss of damage caused by breach of contract, as envisaged by Section 73 of the Indian Contract Act, 1872 have been explained by the Supreme Court in **Murlidhar Chiranjilal v. Harishchandra Dwarkadas**, AIR 1962 SC 366, as follows:

"(i) As far as possible he who has proved a breach of bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed, but

(ii) that there is a duty on him of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."

Following this decision, the Delhi High Court in **Highway Engineering Pvt Ltd v Union of India and Anr**, 63 (1996) DLT 833, held that the non-defaulting party was required to show that it not only suffered loss due to the failure on the part of the defaulting party to perform its obligations under the contract, but it had also to show that it had taken every possible step to mitigate the loss consequent on the breach of the contract.

24. The Supreme Court has also held in **M. Lachia Setty & Sons Ltd. v. Coffee Board, Bangalore**, AIR 1981 SC 162, that "the principle of mitigation of loss does not give any right to the defaulting party, but the concept has to be borne in mind by the Court while awarding damages." In the facts of that case, the court did not accept

the contention of the defendant that the auctioneer had deliberately resold at a lower price.

25. **Chitty on Contracts**, 30th Edition, 2008, Vol I, p.26-110, says that

“In contracts for the sale of goods, the normal rule for the measure of damages assumes that the innocent party should act immediately upon the breach, and buy and sell in the market, if there is an available market. The market price rule is fundamental to the sale of goods...

An instance of mitigation arises where the defendant in breach of contract refuses to accept goods which he has agreed to buy, but (where) the claimant is able to sell the goods at the same price to a third person, if the state of the market is such that demand exceeds supply, so that the claimant can always find a purchaser, he is entitled to only nominal damages, not his loss of profit on the repudiated sale, as he sold the same number of articles and made the same amount of fixed profits as he would have done if the defendant had duly performed his contract.”

26. In that view of the matter, the Respondent company, had it put in an appearance, may well have taken the defence that the Petitioner did not take ‘reasonable steps’ to mitigate its loss. This would have had an impact on the price differential claimed by the Petitioner as due and payable by the Respondent. While no such point has been raised in the present proceedings, it may well be a ground for dispute over the amount due to the Petitioner. It is a fundamental principle in such cases that the petitioner is bound to try and obtain the best price for the goods in the open market. The onus of proving that this was the best price available would be on the petitioner, to be discharged in a Civil Court. Referring to McGregor on Damages, 17th Edition, 2003, (para 212 in the 13th Edition) the Bombay High Court in

Maharashtra State Electricity Distribution v DSL Enterprises

Pvt Ltd, 2009 (111) Bom LR 1246, has held that the onus of proof, of mitigation is on the Defendant, and that “if he fails to show that the claimant ought reasonably to have taken certain mitigating steps, then the normal measure will apply.”

27. The other question that arises but is not answered in this petition is as follows:

a) If the Sale of Goods Act, 1940 applies to the contracts in question, whether the petitioner/seller had a statutory right to resell at all, in view of not having given a notice of resale to the respondent/buyer, which is statutorily required by S.54(2) of the Sale of Goods Act, 1940 in order to claim the difference between the purchase price and the price at which the goods were resold?

28. The petition and its annexures do not indicate the terms of the contracts, or the intention of the parties, to the effect that the Sale of Goods Act, 1940 does not apply to the contracts in question. Thus, if the Sale of Goods Act, 1940 were held applicable to the contracts in question, then S.54 of the said Act would deal with the rights of an unpaid seller against the goods. ***Mulla on the Sale of Goods Act***, 6th Edition, Butterworths India (2002) states that, “The statutory power for resale under sub-section (2) of S.54 arises only when property in the goods has passed to the buyer...The seller can claim as damages the difference between the contract price and the amount realized on resale of the goods where he has a right of resale. Where property in the goods has not passed, the seller has no right of resale under S.54(2) and the claim to recover the deficiency on resale would not be sustainable...”

29. The Supreme Court has affirmed this position in **P.S.N.S. Ambalavana Chettiar & Co. v Express Newspapers Ltd., Bombay**, AIR 1968 SC 741.

30. Further, as per the provisions of S.54(2) of the Sale of Goods Act, 1940, the petitioner's statutory right to resale would arise only when a notice of resale was served on the buyer, as per S.54(2) of the Sale of Goods Act. This has not been done in the present case.

31. In the instant case, there is also nothing on record to indicate the financial position of the Respondent company. Admission of the petition, as prayed for, and the consequent advertisement itself does not amount to a direction regarding liquidation. Yet, as a Division Bench of the Madras High Court has held in **NEPC India Limited v Atlantic Bridge Aviation Limited**, [2009] 94 SCL 296 (Mad), it is an "initial, albeit an important step." In the same case, it has further been held that 'At the stage of considering these aspects, obviously, the Court is only required to come to a prima facie conclusion regarding the existence of debt and neglect on the part of the Company to pay such amount inspite of statutory notice. It is no doubt true that by publication of the advertisement the company's reputation is likely to be tarnished and, therefore, the Company Court requires existence of a strong enough prima facie case for initiating such proceedings'.

32. A Division Bench of the Bombay High Court in **Pfizer Ltd v Usan Laboratories Pvt Ltd**, [1985] 57 Com Cas 236 (Bom), the company judge is "required to consider the claim of the petitioners in respect of the principal amount and to come to a conclusion whether or not there was any real and substantial dispute with regard to the said claim. If there was a genuine and bona fide dispute, then certainly

it was within his discretion and jurisdiction to dismiss the petition and regulate the petitioner to claim the amount by regular suit.”

33. In the present petition, the petitioner has made incorrect claims against the respondent company, who has, in turn, not challenged them so far. The amount claimed by the petitioner may be disputed, and thus does not amount to a ‘debt’ for the purposes of winding up proceedings, as the term has been interpreted by the Supreme Courts and various High Courts. The petition and the application are not maintainable in this court at this stage and are, therefore, dismissed, without prejudice to the right of the petitioner to recover the amount it claims as due in a civil court.

SUDERSHAN KUMAR MISRA, J.

DECEMBER 22, 2009

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