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

% *Date of Judgment: 08.11.2012.*

+ CO.PET. 107/2012

M/S INLAND ROAD TRANSPORT PVT LTD Petitioner

Through Mr. C. Mukund, Adv.

Versus

M/S INCOM CABLES PVT LTD

..... Respondent

Through Mr. Sushil Shukla, Adv.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 This petition has been filed under Section 433 (e) read with Sections 434 & 439 of the Companies Act. The petitioner (M/s Inland Road Transport Pvt. Ltd.) seeks winding up of the respondent company (M/s Incom Cables Pvt. Ltd.).

2 Case as set up by the petitioner is that since October, 2005, the petitioner had been transporting cable wires of the respondent company to various parts of India from the factory of the respondent situated at Secunderabad, District Bulandshar, UP. Bills were submitted from time to time; payments were made by the respondent till November, 2009; thereafter although the goods of the respondent had been transported by

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the petitioner in December, 2009 but the bills of the petitioner were not paid. As on 28.04.2010, a sum of Rs.64,39,959/- was due and payable from the respondent. A part payment of Rs. 5 lacs was made on 28.04.2010; balance sum of Rs.59,39,959/- still remains due and payable. Apart from this, a sum of Rs.16,03,789/- has also become due on account of interest. Legal notice had been issued at the registered office of the respondent company on 01.12.2011; demand has not been liquidated. Present petition was accordingly filed seeking a winding up of the respondent company.

3 Reply has been filed to the petition. Submission is that the claim of the petitioner is not admitted. The petitioner is in fact indebted to the respondent for which a separate suit i.e. CS(OS) No. 1335/2012 has also been filed; this is a suit for recovery in the sum of Rs.99,77,210/- against the petitioner which suit is pending. The matter is sub-judice. The claims of the petitioner not being admitted and the disputes raised by the respondent being of a bonafide nature, the present winding up petition is not maintainable.

4 Attention has also been drawn to a notice which had been issued by the respondent on 03.11.2010 under Section 10 of the Carriers Act,
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1865; this is an admitted document. In this notice, the respondent has claimed a sum of Rs.19,97,410/- + Rs.12 lacs + Rs.39.2 lacs + Rs.28 lacs = Rs.99,17,410/-; submission being that because of the acts of the petitioner, a loss has been suffered by the respondent which is liable to be reimbursed to him.

5 Record shows that the petitioner had entered into a contract with the respondent for the supply of cable wires manufactured by the respondent to its various consumers. These consignments were dated 07.05.2010 to 12.05.2010. Submission of the respondent is that a theft/pilferage had taken place in the cables so transported; the cable wires were substantially short; a joint inspection was ordered.

6 There is no dispute that a joint inspection had been carried out on 08.06.2010. This is evident from the joint inspection note (page 117 of the paper book). This note notes that in some cases the cables were missing; variation was also noted in the diameter of the cables at both ends. Counsel for the respondent has also drawn attention of this Court to a letter dated 28.05.2010 (page 114 of the paper book) addressed by the respondent to the petitioner which had admittedly been received by the petitioner. Vide this letter, the respondent had informed the

petitioner that a joint inspection of the goods in view of the pilferage/theft pointed out by the respondent would take place and the petitioner should join the proceedings. Admittedly the petitioner did not join the proceedings. Submission of the petitioner is that this letter dated 28.05.2010 in fact shows that the goods of the respondents were insured and the details of the insurance policy also find mention therein; even presuming that there was a theft/pilferage, since the articles of the respondent were insured, he has already got his reimbursement from the Insurance Company; no amount is thus even otherwise due.

7 Although the submission of the petitioner that the suit i.e. CS(OS) No. 1335/2012 has been filed after the affidavit of service had been filed by the petitioner in the present proceedings (10.04.2012) and the suit had been filed only on 23.04.2012 and even presuming that the suit filed by the respondent was a counter blast to the present petition, yet the notice dated 03.11.2010 addressed by the respondent to the petitioner pointing out theft/pilferage and claiming an amount of Rs.99,77,210/- from the petitioner cannot be overlooked. This was in November, 2010 itself when the respondent had raised these disputes qua this transaction with the petitioner. It is also an admitted position that a criminal

complaint for breach of trust, forgery, misappropriation of property and theft had also been filed by the respondent on 10.06.2010 itself.

8 The submission of the petitioner that the respondent has been reimbursed by the Insurance Company also cannot be considered at this stage; apart from the fact that the respondent has not admitted this position, even otherwise, the submission of the respondent holds good to the extent that his claim for reimbursement from the petitioner is not only for the actual value of the goods but also for the tampering of the drums and which had accordingly to be transported back by the respondent at his own costs; as also for the damage which he had suffered and the details of which find mention in his notice dated 03.11.2010

9 In 2010 STPL (Web) 895 SC M/s Iba Health (I) P. Ltd. Vs. M/s Infor-Drive Systems SDN. BHD the Apex Court has held that where a dispute raised by the respondent cannot be termed either as a 'speculative' or 'illusory', a winding up petition may not be entertained; a party to the dispute should not be allowed to use a winding up petition as a means to pay the disputed debt.

10 Facts as emerged show that a dispute had been raised by the

respondent way back in November, 2010 when he had sent the notice under Section 10 of the Carriers Act to the petitioner which is an admitted document. The theft/pilferage had been pointed out and a sum of Rs.99,77,210/- had been claimed from the petitioner. Criminal complaint dated 10.06.2010 was lodged even prior thereto (this is also an admitted document). Suit was filed by the respondent on 23.04.2012. Averments in the suit disclose that the claim relates to this same pilferage/theft which had taken in the cable drums during the transportation which had been effected by the petitioner of the goods of the respondent. Even presuming that this suit has been filed as an afterthought, at the cost of repetition the notice dated 03.11.2010 cannot be overlooked. The criminal complaint dated 10.06.2010 filed by the respondent qua the same transaction is also an admitted document. The letter of 28.05.2010 sent by the respondent to the petitioner informing him of a joint inspection which was conducted on 08.06.2010 also notes the missing cables and variations in the diameter of the cables which had ultimately reached the consumers of the respondent on the transportation effected by the petitioner. The submission that the amount mentioned in the suit is different from the amount claimed in the notice dated

03.11.2010 is also not relevant at this stage.

11 Reliance by the learned counsel for the petitioner upon a judgment reported in (2009) 3 SCC 527 Vijay Industries Vs. NATL Technologies Ltd. is misplaced. There is no dispute that if the dispute raised by the respondent is not bonafide but is merely to ward off the liability of the petitioner, such a defence should necessarily be ignored. Facts and circumstances of each case have been adverted to. Disputes raised by the respondent in the instant case are bonafide. Reliance by the learned counsel for the petitioner upon (1999) 97 Comp Cas 947 (AP) Fibex Inc. Vs. A.B.K. Publications Ltd and (2009) 148 CompCas 751 (Kar) Baywest Power and Energy Pvt. Ltd. Vs. Zipro International Ltd and Another are also in their own factual context and have no application in the instant case.

12 The respondent having raised disputes which were bonafide and the Company Court not being expected to hold a trial in the matter, the petition is liable to be dismissed. It is accordingly dismissed with costs of Rs.10,000/-.

INDERMEET KAUR, J

NOVEMBER 08, 2012

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