

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 25.04.2014

+ CO. PET. 513/2013

**M/S NIMBUS HARBOR FACILITIES
MANAGEMENT PVT. LTD.**

..... Petitioner

versus

M/S MIND & SOUL FITNESS PVT. LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Pankaj Bhagat.

For the Respondents : Mr Rajesh Banati, Mr Ravi Kumar Aggarwal,
& Ms Snigdha Pandey.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present petition has been filed by the petitioner company under Sections 433(e) and 434 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 had failed and neglected to pay a sum of ₹4,43,857/- alongwith interest, which was claimed as due and payable by the respondent company on account of housekeeping services provided by the petitioner to the respondent for their facilities. The respondent disputes the amount claimed by the petitioner and states that only an amount of ₹39,343/- is due and payable by the respondent to the petitioner and the respondent is ready and willing to pay the said amount to the petitioner.

2. The only controversy that needs to be addressed in the present case is whether the defense raised by the respondent is bonafide or a sham defence. And, whether the petition needs to be admitted in view of the defence raised by the respondent.

3. Briefly stated, the relevant facts are that the petitioner company provided housekeeping services to the respondent company at its facilities: Gym Spa Salon Health Care, situated at B-376, Meera Bagh, Paschim Vihar, New Delhi-110063 and also at B-2/22, Ashok Vihar, Phase II, New Delhi-110052. It is stated by the petitioner in paragraph 11 of the petition that the petitioner company raised invoices aggregating an amount of ₹9,73,442/- for the housekeeping services provided at B-2/22, Ashok Vihar, Phase-II, New Delhi-110052 and ₹9,33,716/- for the housekeeping services provided at B-376, Meera Bagh, Paschim Vihar, New Delhi-110063. Thus, in all, the petitioner raised invoices for an amount aggregating to ₹19,07,158/- . It is further stated that out of the said sum of ₹19,07,158/-, the respondent company had paid an amount of ₹14,63,301/- and defaulted in making payment for the balance sum of ₹4,43,857/-. It is stated that the respondent company terminated the services of the petitioner by its email dated 16.09.2011. On receiving the said e-mail, the petitioner discontinued its services and apprised the respondent that an amount of ₹12,44,927/-, as on that date, was still outstanding and payable by the respondent to the petitioner. It is stated that the petitioner sent various emails dated 28.09.2011, 08.10.2011, 22.11.2011, 25.11.2011, 08.02.2012 and 30.05.2013 to the respondent company seeking payment of the outstanding dues, however, the respondent company failed to make the payment.

4. Thereafter, the petitioner served a statutory notice dated 28.06.2013 to the respondent company under Section 434(1)(a) of the Act calling upon the respondent to pay the balance amount of ₹4,43,857/-. The respondent company responded to the said notice by a letter dated 29.07.2013 whereby the respondent disputed the liability of an amount of ₹4,43,857/- but admitted that an amount of ₹39,343/- was only due and payable to the petitioner. The respondent stated that the respondent was ready and willing to pay the said amount. It was further stated that the petitioner company had failed to adjust the Debit Note dated 31.05.2011 and TDS amount of ₹9369/-. The respondent also disputed the invoices dated 17.09.2011 and 01.10.2011 and stated that the said invoices were not payable as the same were raised after the termination of services. The petitioner, by its reply dated 12.08.2013, refuted the contentions of the respondent, however, accepted that an amount of ₹9369/- was liable to be adjusted on account of TDS. The petitioner claimed that after adjustment of the said amount on account of TDS, an amount of ₹4,34,488/- was payable by the respondent company. The petitioner, however, disputed the Debit note dated 31.05.2011.

5. Thereafter, the petitioner filed the present petition claiming that an amount of ₹4,43,857/- alongwith interest is due and payable to the petitioner by the respondent company and as the respondent has failed to pay the same despite receipt of notice under section 434(1)(a) of the Act, and therefore, the respondent company is liable to be wound up.

6. In response to the present petition, the respondent has filed a reply refuting the claim of the petitioner. It is stated by the respondent in its reply

that the invoices mentioned in paragraph 11 of the petition are incorrect and erroneous. It is further stated that the invoices of the petitioner for the month of August 2011 are not payable as the services of the petitioner were terminated in July 2011.

7. The respondent has also further stated that the invoices for the month of August 2011 have been raised twice. Whilst one invoice is with taxes the other is without taxes. It is stated that the petitioner had earlier raised invoice nos.811/532 and 811/533 dated 01.09.2011 for an amount of ₹81,012/- and ₹74,916/- respectively (with taxes). Thereafter, the petitioner again raised invoice nos.811/532/01 and 811/533/01 dated 01.09.2011 for an amount of ₹73,447/- and ₹67,920/- respectively (without taxes). It is contended that, as per the averments made in the petition, the petitioner had added the amount mentioned in the invoices raised subsequently without cancelling the earlier invoices. It is, therefore, contended that the claim of the petitioner is *ex facie* erroneous and the proceedings in the nature of the winding up are not maintainable.

8. It is stated by the respondent that the petitioner has wrongly stated in the petition that the respondent had only paid a sum of ₹14,63,301/- out of ₹19,07,158/-. It is stated that the respondent company has paid an amount aggregating to ₹19,97,592/- which includes ₹19,58,374 paid by cheques and ₹39,218/- towards TDS. It is also contended by the respondent that the petitioner has failed to account for the amount of ₹9369/- towards TDS despite having accepting the same in its reply dated 12.08.2013 as well as in the petition. The respondent company has provided the details of the payment made to the petitioner and the same is extracted hereinbelow:-

“Payments made by the Respondent to Petitioner for the period
01.04.2010 to 19.10.2011

S. No.	Date	Amount in Rs.
1.	14.02.2011	3,18,296/-
2.	14.02.2011	12,598/-
3.	20.04.2011	1,50,000/-
4.	02.05.2011	2,00,000/-
5.	18.05.2011	2,00,000/-
6.	03.06.2011	1,42,098/-
7.	16.07.2011	1,87,532/-
8.	17.08.2011	1,00,000/-
9.	01.09.2011	1,47,850/-
10.	20.09.2011	2,50,000/-
11.	19.10.2011	2,50,000/-
	Total 'A'	19,58,374/-

Statement of TDS

S. No.	Date	Amount in Rs.
1.	31.01.2011	3,219/-
2.	31.01.2011	3,175/-
3.	31.01.2011	45/-
4.	05.02.2011	3,313/-
5.	05.02.2011	3,183/-
6.	28.02.2011	3,288/-
7.	28.02.2011	3,352/-
8.	31.03.2011	3,275/-
9.	31.03.2011	3,342/-
10.	10.05.2011	1,711/-
11.	10.05.2011	1,946/-
12.	14.07.2011	1,876/-
13.	14.07.2011	1,698/-

14.	14.07.2011	1,357/-
15.	14.07.2011	1,394/-
16.	22.08.2011	1,451/-
17.	22.08.2011	1,593/-
	Total 'B'	39,218/- "

9. It is also stated that the petitioner failed to acknowledge the Debit Note dated 31.05.2011 amounting to ₹97,850/- sent by the respondent on account of fault, negligence and carelessness of the staff of petitioner which was deputed for valet parking at the centres of the respondent. It is explained that a car lock of a motor vehicle (Toyota Camry) belonging to one of the customer of the respondent was damaged due to negligence and carelessness of staff of the petitioner and the respondent had to settle the damage by giving three complementary membership to the said customer which was valued at a sum of ₹90,000/-. Besides this, respondent also claims to have paid a sum of ₹7,850/- to M/s Chauhan Motors by a cheque no.006829 dated 31.05.2011 as the cost for repairing the said lock.

10. It is submitted by the respondent that after deduction of the amount of disputed invoices for the month of August, 2011, Debit Note dated 31.05.2011 and the amount towards TDS, the respondent is liable to pay a amount of ₹39,343/- which the respondent is ready and willing to pay to the petitioner.

11. The petitioner in its rejoinder has stated that no invoices have been raised for the same services. It is submitted that, due to the inadvertent error of the finance section of the petitioner, the initial invoices were raised only

towards the half of the man power deployed, and later the mistake was rectified by the petitioner by raising the bills for the remaining man power. It is submitted that both the bills together reflected that amount due on account of the service provided to the respondent in the month of August 2011. It is further submitted that the attendance of the entire work force deployed by the petitioner was duly verified by the respondent.

12. I have heard the learned counsel for the parties.

13. A petition for the winding up of the company under Section 433(e) of the Act is maintainable if the company is unable to pay its debt. A company is deemed to be unable to pay its debt, if a demand is made on the company for the amount due and payable by the company and the company has failed and neglected to pay its debt. It is trite law that a claim made by a creditor would not be an admitted debt if the claim is disputed by the company. A company is deemed to be unable to pay its debts if it fails to pay the admitted debt despite a notice under Section 434(1)(a) of the Act. It is obvious that the said provision would be inapplicable in cases where the debt is not admitted. There can be no presumption of inability to pay debts where the same are not accepted as such. Therefore, the limited enquiry that has to be undertaken by this Court is to determine whether there is admittedly, a debt owed by the respondent to the petitioner, which the respondent has failed to discharge.

14. In the present case, there is no dispute that the services were provided by the petitioner to the respondent company and the respondent is liable to pay for the services being provided to the respondent. However,

the respondent company has disputed the amount claimed by the petitioner is due and payable by the respondent.

15. First of all, it is contended that the invoices for the month of August, 2011 could not be raised as the services of the petitioner were terminated in the month of July, 2011. The said contention is liable to be rejected in view of the e-mail dated 16.09.2011 sent by the respondent to the petitioner. The respondent company, by an e-mail dated 16.09.2011, has terminated the service of the petitioner with effect from 16.09.2011. The relevant portion of the said mail dated 16.09.2011 is extracted hereinbelow:-

“This mail is a formal communication to you for discontinuing your housekeeping service contract with Ment-E Soul, a name under Mind and Soul Fitness Pvt. Ltd.

The products and services rendered by NIMBUS is expensive as compare to industrial benchmarks. The decision is the result of thorough study of prevailing market rates and trends.

You may count your last day of services with us to be 16th Sep 2011.

This is the final notification, Please send in your any unpaid amount due with us.”

16. Secondly, it is contended that the petitioner has raised the invoices twice for the month of August, 2011 i.e. one with taxes (raised earlier) and one without taxes (raised later on) and the amount claimed by the petitioner in the second set of invoices was not payable as the earlier invoices had not been cancelled. In response to this contention, it was submitted by the petitioner that the initial invoices were raised only towards the half of the

man power deployed and the amount mentioned in the second invoice was for the remaining power.

17. The contention whether the invoices for the month of August 2011 have been raised twice over would have to be examined by ascertaining the manpower deployed by the petitioner. It would be necessary to examine whether the two disputed invoices represented the cumulative amount due to the petitioner for the services rendered or whether the second invoice had been raised for the same service which had been billed for in the first invoice. It is contended by the petitioner that the said invoices could be verified from the attendance sheet of the staff which had been accepted by the respondent. However, for this purpose, it would be necessary to conduct the detailed enquiry which is not within the scope of the present proceedings.

18. Thirdly, it is contended that the petitioner has not accounted for the debit note dated 31.05.2011 amounting to ₹97,850/-. The debit note is disputed by the petitioner. A sum of ₹90,000/- has been debited to the account of the petitioner allegedly on account of three complementary memberships granted by the respondent to one of its customers. This claim on the part of the respondent is in the nature of damages and is, prima facie, unsustainable. Both, on account of measure of damages adopted by the respondent as well as on account of remoteness of the loss alleged to have been caused to the respondent. However, it is not necessary to consider the sustainability of the aforesaid claim in the present proceedings. The fact that the respondent had raised the debit note at the material time cannot be

disputed and, therefore, it is apparent that the respondent was not accepting the claim raised by the petitioner as an admitted debt.

19. It is lastly contended by the respondent that the respondent has paid an aggregate sum of ₹19,97,592/- including the amount towards TDS to the petitioner against the invoices raised by the petitioner and not a sum of ₹14,63,301/- as claimed by the petitioner. The learned counsel for the petitioner accepts that the details furnished by the respondent with regard to payment are correct, however, he has contended that the same also include payments on account of invoices which have not been considered by the petitioner while computing the amount of ₹19,07,158/- as claimed in paragraph 11 of the petition. This claim of the petitioner also cannot be readily verified.

20. It is apparent from the above that the issues raised by the respondent are contentious issues and would require a detailed enquiry which is beyond the scope of the present proceedings. It is also well settled that proceedings under Section 433(e) cannot be used by a creditor as a means for recovery of its dues. In the case of **Amalgamated Commercial Traders (P.) Ltd. v. A.C.K. Krishnaswami and Anr.:** [1965] 35 Comp Cas 456 (SC), the Supreme Court has held as under:-

“It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such, petitions. But, of course, if the debt is not

disputed on some substantial ground, the court may decide it on the petition and make the order.”

21. In the given circumstances, I am unable to come to a conclusion that the debts claimed by the petitioner are admitted by the respondent and the respondent has failed to discharge the same. I am unable to arrive at a conclusion that the respondent is a company which is unable to pay its debts.

22. In view of the above, the present petition is dismissed. It will be open for the petitioner to institute appropriate proceedings for recovery of the dues claimed by the petitioner. The parties are left to bear their own costs.

APRIL 25, 2014
RK

VIBHU BAKHRU, J

