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

+ **CO.PET. 425/2013**

FORTUNE METALS LTD Petitioner
Through **Mr.Aman Leekha, Advocate.**

versus

MESSRS KANWAR ENTERPRISES PVT LTD Respondent
Through **Mr. Rajiv Bakshi, Advocate.**

CORAM:
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

SUDERSHAN KUMAR MISRA, J. (ORAL)

1. This petition seeks winding up of the respondent/Messrs Kanwar Enterprises Pvt. Ltd., on the ground of non-payment of Rs.26,45,064.75/- (Rupees twenty six lacs forty five thousand sixty four and seventy five paise only).
2. The petitioner is in the business of manufacturing steel, including TMT steel bars. The respondent is, *inter alia*, in the business of civil, industrial infrastructure, building and fabrication of works etc.
3. The petitioner alleges that the respondent was supplied material of different grades and specifications against invoices raised from time to time; and from 11.04.2012 till 08.06.2012, it supplied to the respondent material worth Rs.1,86,90,660.75/- (Rupees one crore eighty six lacs ninety thousand six hundred sixty and seventy five paise only); however, the respondent has only paid an amount of Rs.1,60,73,297/- (Rupees one crore sixty lacs seventy three thousand two hundred and ninety seven only); and as such an amount of Rs.26,17,363.75/- alongwith

Rs.27,701/- as bank charges totalling Rs.26,45,064.75/- (Rupees twenty six lacs forty five thousand sixty four and seventy five paise only) with interest @16% per annum is due from the respondent.

4. The petitioner served a notice of winding up dated 01.05.2013 on the respondent calling upon it to make the payment of the aforesaid amount. The petitioner contends that since the respondent failed to pay the aforesaid amount; and has raised no bonafide defence in its reply to the said notice of winding up; it must be deemed to be unable to pay its debts in terms of Section 433(e) read with 434 of the Companies Act, 1956.

5. The petitioner has placed reliance on a ledger account, allegedly maintained by it in the regular course of business, showing a total debit of Rs.1,86,90,660.75 for the relevant period, (i.e., from 11.04.2012 to 08.06.2012) in respect of sales made by it. The petitioner further relies on the invoices raised by it on the respondent mentioning the relevant dates and the amounts due. In addition, the petitioner has claimed that the respondent company has been in financial distress continuously. Significantly, counsel for the petitioner contends that in fact the respondent has admitted its liability in its reply to the petitioner's statutory legal notice.

6. Admittedly, the respondent had commercial transactions with the petitioner whereby material of different grades and specifications was supplied by the petitioner to the respondent. In its reply to the winding up petition, the respondent also admits to having paid the petitioner Rs.1,60,73,297/- against the material supplied by the petitioner; and at the same time, it also claims nothing further to be due from it to the petitioner.

7. A perusal of the statutory notice of the petitioner dated 01.05.2013 shows that it gives no material particulars as to how the debt or liability of the noticee/respondent arises. In fact, it is only in the winding up petition that the petitioner has, for the first time, chosen to provide details of invoices etc. to substantiate its claim against the respondent. In substance, the notice of winding up shows nothing more than a one line statement that an amount of Rs.26,45,065.75/- is due. The relevant para of the legal notice in this regard is as under;

“3.That a perusal of book of accounts maintained in the regular course of business show an outstanding amount of Rs. 26,45,064.75 (Rupees Twenty Six Lac Forty Five Thousand Sixty Four and Seventy Five paise Only) as on 30.04.2013. The same however does not completely account for the interest element payable on account of delayed payments which you have committed to pay. The same also needs to be paid with effect from the date you have defaulted in payments by the due date calculated @ 16% per annum till the date the payments shall be received by us.”

All that this says is that, after a perusal of its own books of accounts maintained by the petitioner in its regular course of business, this amount is shown as outstanding.

8. It has been put to counsel for the petitioner that in the notice of winding up demanding payment, at the very least, sufficient particulars are required to be given with regard to the amount allegedly due, to the recipient of that notice, to enable him to respond after considering all relevant particulars. Counsel, however, is emphatic that this is not the requirement of the law. For this, he has relied on a decision of this

Court in *Mayar Traders Ltd. v. Akhil Services Ltd.*, (1993) 52 DLT 577.

In other words, according to counsel for the petitioner, even a bald, one-line demand saying that Rs.26,45,065.75/- is due, is sufficient; and if the same meets with an equally bald denial; and remains unpaid within the time envisaged under the notice of winding up, the respondent is liable to be wound up.

9. Counsel goes on further to say that the said amount demanded by the petitioner in its winding up notice as aforesaid, does not completely account for the interest element payable on account of delayed payment. In other words, the payment being claimed as due by the petitioner in this petition has not been debited in the account of the respondent company maintained by the petitioner itself. This is obvious from paragraph 3 of the legal notice, which also indicates that notwithstanding the fact that the petitioner has claimed interest at the rate of 16% per annum in its notice; no interest has been debited in its books of accounts. It follows, therefore, that even according to petitioner's own statement of account, that amount is not outstanding. When counsel is confronted with the second sentence of paragraph 3 of the notice, which states that, "*The same however does not completely account for the interest element payable on account of delayed payments which you have committed to pay....*", he submits that this has been inserted since certain bank payments, which have been incurred by the petitioner, have been since debited to the account of the respondent company in the account maintained by the petitioner. I am afraid, I do not agree with this. Reading of paragraph 3 of the notice does not indicate any such thing and such an averment has no basis whatsoever.

10. In addition, I find an interesting inclusion in the notice of winding up, which, at least, till date I have not come across; that is as follows;

“Additionally, we have also advised our client to apprise various Banks, Financial Institutions, Credit Rating Agencies, Suppliers and Other Regulatory Bodies regarding your financial incapacity as a note of caution while dealing with your company.”

Ex facie, this is nothing but a threat to defame a company with the aim of extracting its claims by this method.

11. Obviously, when confronted with such a notice, the respondent has chosen to respond on 03.06.2013 as follows;

“....3. That the contents of Para no.3 of the legal notice are wrong and denied. It is denied that Rs. 26,45,065.75 (Rupees 'Twenty Six Lac Forty Five Thousand Sixty Five and Seventy five paisa only) is pending against my client. It is submitted that my client has already made the entire amount/payment to your client.”

The respondent, vide this reply, has in fact also invited the petitioner “for reconciliation of accounts”. It bears noting here that in its reply to the petition for winding up; which discloses the relevant facts for the first time; the respondent has also claimed that two of the invoices raised by the petitioner are false and fabricated; and that it received no goods against the same.

12. Counsel for the petitioner has contended that mere denial of liability on part of the respondent cannot be a valid defence. To support this proposition, he has again relied on Mayar Traders(*supra*). A perusal

of the judgment shows no deviation from the basic proposition that a notice of winding up must contain all material particulars; and a mere bald assertion which meets with a similar denial from the respondent cannot lead to a conclusive presumption of an admitted, undischarged debt due from the respondent to the petitioner, by itself sufficient to compel the Company Court to proceed to wind up the company. The decision of Mayar Traders (*supra*) is predicated on the issuance of a letter whereby the dispute between parties was duly settled; and the respondent had refused to then pay even that settled amount, thus prompting the petitioner to move for winding up. It was in these circumstances, that it was concluded by the court that it does not lie with the respondent to now raise any dispute with regard to the settled amount; and any attempt to do so, could not, under the circumstances be said to constitute a *bonafide* defence.

13. However, notwithstanding the above circumstances in which that judgment of Mayar Traders (*supra*) came to delivered, counsel places reliance on paragraph 6. He seeks to pick one line from this entire paragraph which states as follows;

“....mere denial of liability is no defence
what to talk of *bonafide* defence....”

He is invoking this to support his proposition that, merely because the respondent has not given any particulars about the payments made to the petitioner during the course of their ongoing dealings, in its reply to notice of winding up while denying its liability, therefore, it must be presumed that the respondent has no *bonafide* defence. To my mind, such a proposition cannot arise at all. Paragraph 6 of Mayar Traders (*supra*) is concerned with the examination of relevant factors in that matter, including, *inter alia*, the aforementioned letter dated 29.01.1992 in which the parties settled for a specific amount; which the respondent's

counsel claimed should be ignored because, according to him, it was procured. However, since there was no further explanation coming with regard to the admission in that letter, excepting to state that the said letter or document was procured, the court concluded that no *bonafide* dispute existed between the parties in view of that letter of 29.01.1992, in which the respondent had admitted the debt due. It was in the context of those facts that the court concluded that the respondent's reply to the petition seeking winding up neither discloses a substantial defence nor a *bonafide* dispute; and, it was in that context, that the court stated that mere denial of liability is no defence what to talk of a *bonafide* defence. All this is quite different from a denial to a bald claim, raised in a notice of winding up without giving any particulars of the relevant facts and circumstances under which that claim had arisen. Furthermore, *Mayar Trader's* case (supra) does not even examine the question raised here, which is with regard to the nature of the notice of winding up / demand that was sent by the petitioner to the respondent in the first place and the respondent's reply to the same.

14. Counsel for the petitioner states that there are decisions of this Court that have repeatedly held that a bald denial does not amount to a proper denial. I do not think that the same have any application in the present circumstances. Firstly, all these pronouncements are with regard to pleadings in court, that are governed, either specifically or generally by the principles of Orders VII and VIII of the Civil Procedure Code; and the effect of what the courts have held amounts to be a, 'non-traverse'; and not to the circumstances, such as obtaining in this case, which essentially deal with what might be generally referred to as, pre-trial proceedings; in that the issue before the court is one of a notice of demand being raised on the respondent under Section 434 of the

Companies Act, 1956, and its response to the same. In any case, the requirement for a specific denial has to be in the light of a specific assertion of the fact relied upon, along with all material particulars. It cannot be that on the one hand, it is available to a claimant to raise a bald demand without giving any material particulars; and thereafter, to expect the respondent to keep assuming and imagining all relevant circumstances out of which the demand may have arisen, and based on such assumptions, to start giving a specific reply to each and every such assumption.

15. A perusal of the reply to the legal notice shows clearly that the respondent is denying the claim raised for want of knowledge of complete and material particulars, and reiterating the position of the respondent that all payments as due have already been made to the petitioner, and that nothing is due. The respondent has further pointed out that no amount was ever admitted by the respondent as currently due and payable to the petitioner, while inviting the petitioner to reconcile accounts.

16. Counsel for the petitioner then relies on a rejoinder sent by his client to the respondent's reply to the aforesaid winding up notice. Again, not even a single date is given there despite a specific stand having been taken by the respondent that the notice is bereft of material particulars; the petitioner has chosen to give a general rejoinder on the following terms;

“2. That the story put forth by you regarding the payments made to my client for various supplies made by it to you is completely false, baseless and concocted on the face of it. Though an amount of Rs. 26,45,064.75 (Rupees Twenty Six Lac Forty Five Thousand Sixty

Four and Seventy Five paise Only) alongwith interest @ 16% per annum stands admitted by you on the basis of material supplied by my client and duly received at your end, on the basis of invoices raised from time to time, you have not made any payments to my client till date and further you have also not mentioned as to in what manner the said payments, if any, have been made and at what point of time. Therefore your defense regarding payments having been made is absolutely meaningless. This is nothing but an attempt on your part to further delay the admitted outstanding payment. The fact of the matter remains that you have admitted the debt and are liable to pay the same.”

To my mind, even in its rejoinder, the petitioner merely goes on to reiterate its own position without providing any materials with regard to the details of specific invoices that are allegedly raised, the amount raised against each invoice, the amount outstanding, if any, etc. Significantly, the petitioner has nothing whatsoever to say to the respondent's offer to reconcile accounts.

17. Counsel for the petitioner also states that the defence raised by the petitioner in its counter affidavit has changed, in that the petitioner's invoices are being disputed by the respondent for the very first time. It bears repetition that there was no mention of any relevant particulars such as invoice numbers etc. by the petitioner in his winding up notice. It was not pointed out how, and in what manner, the amount had become due. Knowledge of these facts came to the respondent only after examining the petition filed in this Court. Consequently, it was clearly open to the respondent to raise all objections that were available to it after receiving them; to hold otherwise, would tend to make a mockery

of the legal process, and give unscrupulous litigants a handle to exploit respondents by practicing a type of deceit by initially issuing a bald notice of demand, and thereafter, when the same is denied, to file a detailed petition setting down material particulars. And once this is done, to seek to block a material defence against the same on the ground that the defence now raised was not reflected in the reply to the notice of demand. To my mind, specially in the light of this stand, which is so emphatically taken at the Bar, this petition is nothing but an abuse of the process of court.

18. Even after it has become obvious, counsel still presses his petition and states that actually the respondent had the invoices in question and therefore it had all the material particulars at their command; and it was therefore for the respondent to have sort of deduced that the demand raised in those invoices was, in fact, relatable to this very notice, and from there, the respondent ought to have then worked out its defence on material particulars while anticipating the material particulars that may be placed by the petitioner in support of its petition for winding up, that was yet to be filed; and since the respondent has chosen not to take that path in its reply to the notice of demand / winding up, it must be held that the defence raised by the respondent on merits to the petition in Court is a sham. In other words, the petitioner has taken the position that the respondent's defence to the petition is a sham and an illusory one on the sole ground that this stand was not taken by the respondent in its reply to the petitioner's notice of winding up. And therefore also, it is nothing but an afterthought.

19. It bears repetition that the petitioner has adopted what, to my mind, appears to be a very novel approach. To begin with, he has raised

a bald demand in his notice of winding up sent to the respondent company. The only substantial thing he says in the notice is that according to the petitioner, the respondent has to pay a sum of Rs. 26,45,064.75/-; but he gives no clue in his notice as to how he has come about that amount. And thereafter, when the respondent replies by saying that he is denying it for want of material particulars, and that according to the respondent, nothing is due; the petitioner rejoins by once again making circumlocutory statements, simply re-affirming his original position without supplying material particulars even now. In Court, he then takes the position that such a denial by the respondent constitutes a bald denial on the basis of one line in a decision of a Single Judge by this Court in the case of Mayar Traders (supra), and invites this Court to conclude that such a bald denial is no denial and that it, therefore, follows that the amount claimed by the petitioner in his notice of demand stands admitted, and the respondent is precluded from saying anything to the contrary in his reply to the winding up petition filed later on disclosing the relevant particulars for the first time.

20. Not only that, he has chosen to take the proposition further by stating that the respondent's decision to set up a substantial defence, setting down all the material particulars in response to the petition for winding up moved by the petitioner in Court later on; and which petition, for the first time, contains all material particulars with regard to the amount claimed, such as, particulars of invoices, payments etc.; is a sham defence because it is being raised for the first time, and that it deserves rejection on this ground alone. To my mind, such a practice is nothing short of deceit. Even if one was to permit the petitioner to equate the requirements of a notice of demand and its reply, with rules applicable to pleadings in Court, then also, a specific denial has to come

in the face of a specific pleading where all material particulars are set down. It cannot be that if a plaint is filed stating only one sentence, ‘the defendant owes the plaintiff Rs. X, and the decree be passed for Rs. X’; no documents are filed, no list of witnesses is filed; nothing is done; only court fee is paid; is it not open to the defendant in the written statement to say, ‘nothing is due’, and that, ‘the plaintiff is put to strict proof for want of particulars’. What is the nature of the specific denial the defendant is supposed to give in such a situation? It cannot be that the defendant is expected to thereafter go into the realm of all possible basis that the plaintiff may have for his claims, and to raise defences with regard to each of them keeping in mind all the knowledge that the defendant has about his relationship with the plaintiff. This cannot be. All relevant facts; which, as we know, are defined as not only facts in issue but also those facts that go to prove or disprove a fact in issue; that go to establish the claim of the plaintiff, must be set down. The rule positing that a bald denial is no denial in law, does not mean that a party asserting a right is exempted from setting down all relevant facts that may have a bearing on the relief claimed, whether in a suit or other petition before the Court; or even in any claim raised against the opposite party in the first instance, as required by a statute. Another way of looking at the same issue is that had the petitioner genuinely believed that the limited disclosure of material facts in its notice of demand were sufficient to enable and oblige the respondent to take all material defences that are available to it in law at that stage, then it would not have considered it necessary to set down additional facts, including particulars of all invoices etc., upon which the claim was based in its winding up petition filed before this Court, none of which were mentioned in the petitioner’s notice of winding up.

21. Further, as regards the position of counsel that the respondent's denial to the petitioner's notice of winding up is a mere bald denial, and therefore, either it should be taken as an admission; or, in any case, any specific defence raised later on in response to the winding up petition filed thereafter, should be considered as an, "afterthought", and a, "sham defence", because he had failed to raise it in his reply to the notice, is entirely untenable for the following reasons; - Firstly, because even if a notice of winding up does not elicit any response whatsoever, it is not taken to automatically amount to an admission of the debt, disbarring the respondent from setting down all material particulars in his reply to defend the winding up petition. If a defence raised to the winding up petition, cannot be said to be a sham on the sole ground that no reply at all was given by the respondent to the notice of winding up, then surely, a similar defence cannot be dismissed as a sham on the mere ground that a bald denial was given in reply to an equally bald notice of winding up. Even in pleadings before the Court, presumptions arising in the case of a 'bald denial' by a defendant must not, and cannot be used to legitimize an equally 'bald' assertion by a petitioner or a plaintiff; thereby raising what would normally be relegated to a pleading lacking in material particulars, to the level of an irrefutable, proven fact, based on an admission by the other side. Secondly, the case of an afterthought is quite different. To my mind, an afterthought is an explanation, or a defence, that has occurred to someone later on; i.e., after the opportunity to give his explanation had already been given to him; and he chose to offer some other explanation at that time, but not the one he is seeking to put forward now; even though all the relevant facts had already been brought home to him beforehand. This is not the factual situation here. Here the opportunity given in the form of a notice of demand discloses no material particulars at all. It follows therefore that the stand taken by

the respondent in its reply to the petition for winding up filed in the Court, which is in response to further material particulars disclosed for the first time by the petitioner in the petition, cannot be said to an afterthought.

22. Furthermore, in the case at hand, no attempt has been made to press any facts demonstrating the admission of any amount that could have become due and payable to the petitioner by the respondent. All that the respondent has been saying is that the petitioner should render complete and material particulars of all transactions, invoices etc. between the parties; and to come forward for a proper reconciliation of accounts.

23. Keeping in view the unique and peculiar circumstances of this case, especially the type of notice for winding up that was issued by the petitioner to the respondent, I do not think that the respondent has taken any unreasonable position.

24. All this, coupled with the nature of the threat held out by the petitioner in the concluding paragraph of the notice of demand, makes it obvious that the petitioner has sought to abuse the jurisdiction of this Court with a view to coercing and pressurising the respondent to pay its demands, including interest demanded by it, without standing the test of evidence and cross-examination or even paying the court fee to recover its dues from the petitioner at civil law.

25. On a query put to him, counsel for the petitioner also informs this court that there can be no settlement with the respondent in the matter.

26. Consequently, petition is dismissed with costs assessed at Rs.50,000/- to be paid within one week from today.

Co. Appln. Nos. 1411-1412/2013

In view of the orders passed in the main petition, these applications are rendered infructuous and the same are disposed off as such.

SUDERSHAN KUMAR MISRA
Judge

FEBRUARY 23, 2015