THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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CP No.75 of 2013
Date of Decision:02.12.2016

M/s Komal Metal (P) Ltd. **.....Petitioner**

Vs.

Cheap Silk Store (P) Ltd. **.....Respondent**

CORAM:- HON'BLE MR. JUSTICE RAKESH KUMAR JAIN

Present:- Mr. Rakesh Bhatia, Advocate for the petitioner.

Mr. Gaurav Tangri, Advocate for the respondent.

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RAKESH KUMAR JAIN, J.(Oral)

This petition is filed under Sections 433(e), 434(F) and 439 of the Companies Act, 1956 (for short, `the Act') read with Rule 9 of the Companies (Court) Rules, 1959 to wind up the respondent- Company for having failed to pay the admitted debt.

In short, it is submitted that the petitioner- Company is in the business of manufacturing and repair of transformers, stabilizers etc. The respondent- Company placed an order on 17.11.2011 for one transformer capacity 215 KVA 11/0.433 which was allegedly supplied vide invoice No.000025 dated 30.11.2011 which includes BT 55 transformer oil 300 ltr. for a sum of ₹3,37,600/-. It is further alleged that the respondent- Company gave an advance of ₹50,000/- vide cheque No.025918 dated 30.11.2011 at the time of placing the order and another cheque No.025974 for a sum of ₹50,000/- was given at the time of delivery of transformer. It is stated that the respondent gave another cheque after a lapse of four months bearing No.117354 dated 18.4.2012 for a sum of ₹50,000/- and thus the total outstanding amount was ₹1,67,600/- along with interest @ 24% per annum calculated from the date of accrual till realization. It is further alleged that the petitioner had served a legal notice before approaching this Court to which no reply is filed. After notice, the respondent has put in appearance and filed its reply in which it is admitted that the respondent has placed the order for purchase of transformer and paid ₹2,20,000/- out of the total amount of ₹3,37,600/-. However, it is categorically denied that the petitioner had delivered the transformer. It is also alleged that the petitioner did not mention in its petition that the respondent has paid ₹2,20,000/- and restricted only to the receipt of ₹1.5 lacs whereas the respondent had paid a sum of ₹70,000/- vide cheque No.117354 dated 16.4.2012. It is further submitted that it is not that the respondent is unable to pay the amount but since the transformer has not been delivered, therefore, the amount has not been paid which is being claimed by the petitioner. It is also averred that the respondent had to purchase the transformer from M/s Nucon Power Controls Pvt. Ltd. for a sum of ₹2,85,979/- despite the fact that a sum of ₹2,20,000/- has already been paid to the petitioner.

The petitioner filed rejoinder in which it is clarified that it had received ₹2,20,000/- but it is denied that they have not delivered the transformer purchased by the respondent. Counsel for the petitioner has thus submitted that once transformer has been delivered, invoice has been admitted by the respondent, the part payment is also admitted, the respondent is liable to pay the remaining amount which is an admitted debt for which the petitioner has a right in terms of the provisions of the Act.

On the other hand, counsel for the respondent submits that the respondent is not admitting its liability to pay the remaining amount because the petitioner did not deliver the transformer despite receiving ₹2,20,000/- in advance for which the respondent shall take appropriate proceedings in accordance with law against the petitioner. He has also referred to a Division Bench judgment of this Court rendered in the case of Yadavindra Industries (Drinks and Agencies) Pvt. Ltd. v. Ulka Advertising Pvt. Ltd., Company Appeal No.6 of 1989, dated 24.03.1995, 1995(3) R.R.R. 555, to contend that the words used in the provisions "unable to pay" has a great significance as it is to be distinguished from other works like `refusing to pay' or `neglecting to pay' or `disputing its liability to pay'.

After hearing learned counsel for the parties, I am of the considered opinion that the petition deserves to be dismissed because of the disputed questions of fact about the deliver of goods purchased by the respondent for which the Division Bench has held that if the triable issues are raised, the summary jurisdiction of the Company Court cannot be invoked in order to compel the company to pay the amount on pain of being wound up. The part of the aforesaid decision, is also reproduced as under:-

> 9. The various clauses of Section 443 lays down the circumstances in which company may be wound up by the Court. Clause (e) is relevant for the present case. It lays down that a company may be wound be up by the Court "If it is unable to pay its debts." The use of the word "unable" is very significant. It is to be distinguished from other words like `refusing to pay' or `neglecting to pay' or `disputing its liability to pay'. In the context, the expression "unable to pay" indicates

that the inability to pay arises out of the solvency or financial position of the company. The expression "unable to pay its debts" occuring in clause (e) of Section 433 is statutorily defined in Section 434. The relevant clause for the present case is clause (a) of sub-section (1). In order to attract its applicability inter alia, it must be proved that the company is indebted to the particular creditor. It is well settled law that machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a company. In **re: Bengal Flying Club (1986) 2 Comp. LJ 213.** In **Amalgamated Commercial Traders (Pvt.) Ltd. v. Krishna Swami (A.C.K.) (1965) 35 Com. Cases 456 (SC)** the Supreme Court quoted with approval the following passage from Buckley on the Companies Acts, (13th Edn. p. 451):

> "It is well settled that a winding-up petition is not a legitimated means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petitioner presented ostensibly for winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the Court. At one time petitioners founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to deliver that the debt, if established, would not be paid, the

petition was dismissed. The modern practice has been to dismiss such petition. But, of course, if the debt is not disputed on some substantial grounds, the Court may decided it on the petition and make the order.... If the debt was bona fide disputed, as we hold it was, there cannot be "neglect to pay" within section 434(1)(a) of the Companies Act. If there is no neglect, the deeming provision does not come into play and the ground of winding-up, namely, that the company is unable to pay its debts is not substantiated."

It follows that if triable issues are raised, the summary jurisdiction of the Company Court cannot be invoked in order to compel the company to pay the amount on pain of being wound up. This view as taken by a Division Bench of this Court in a recent decision in **M/s Punjab Ceramics Ltd. v. Punjab State Industrial Development Corporation Limited, Chandigarh, 1990-I PLR 526**. There is no material on record to show that the appellant- Company is unable to pay the debt in dispute."

In view of the aforesaid discussion, I do not find any merit. Hence, the present petition is hereby dismissed.

December 02, 2016 **(RAKESH KUMAR JAIN)**
renu **JUDGE**

Whether Speaking/reasoned Yes/No
Whether Reportable Yes/No