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

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Date of decision: 22.02.2018

+ CO.PET. 342/2014 and CA No. 205/2015

M/S PULLING & LIFTING MACHINES (P) LTD..... Petitioner

Through Mr.V.N.Sharma and
Mr.V.K.Malhotra, Advs.

versus

RUSKIN TITUS INDIA PVT. LIMITED. Respondent
Through Mr.Tanuj Khurana and Mr.Jaskaran
S. Narula, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed by the petitioner under Sections 433(e), 434 and 439 of the Companies Act, 1956 seeking winding up of the respondent company.
2. The case of the petitioner is that on 12.10.2013, after visiting the site and holding discussions with the respondent Company, the petitioner quoted its rates for shifting of factory assets and machinery as per letter dated 12.10.2013. On confirmation of the rates, the petitioner company is said to have shifted 950 tons of the machinery @ 1900/- per ton and another 950 tons on supervision charges @ 250/- per ton amounting to Rs.22,94,953/- after service tax. It is stated that on 16.12.2013, the petitioner raised an

invoice for Rs.22,94,953/- on the respondent which included an advance of Rs.2 lakhs. It is also pleaded that on 27.02.2014, the respondent has admitted its liability. Admittedly, a sum of Rs.15,52,427/- has already been paid to the petitioner. The case of the petitioner is that a balance sum of Rs.7,42,516/- is still due and payable. Reliance is placed on a balance confirmation letter dated 27.02.2014 said to have been issued by the respondent to the said effect. As payments were not released to the petitioner, a notice under Sections 433 and 434 of the Companies Act for winding up of the company was issued. No reply has been received from the respondent and hence, the present winding up petition.

3. The respondent have filed their reply. In the reply, they have pointed out that the respondent have all along been stating that the bill in question was for about Rs.15 lakhs. Reliance is placed on certain e-mails received from the petitioner. Reliance is also placed on an invoice allegedly issued by the petitioner for Rs.15,75,062/-. It is pleaded that this was this invoice that was raised on the respondent and necessary payment has been released to the petitioner. Regarding legal notice dated 04.04.2014, receipt of the same has been denied.

4. I have heard learned counsel for the parties.

5. Learned counsel for the petitioner relies upon the balance confirmation letter dated 27.02.2014 where one Mr. Akash Agarwal has on behalf of the respondent confirmed that the balance due is Rs.7,42,516/-

6. Learned counsel for the respondent, however, submits that Mr. Akash Agarwal who is a lawyer by profession was mixed up with the petitioner and this document, namely, confirmation letter dated 27.02.2014 is a procured document. He has in court produced purported original invoice being

Invoice No. 2 of 16.12.2013 purportedly raised by the petitioner for a sum of Rs. 15,75,062/-. He submits that this is the invoice that has been received by the respondent and payment has been made for the same. He also relies upon e-mails sent by the petitioner on 29.11.2012 and 04.12.2013.

7. A perusal of the two invoices relied upon respectively by the learned counsel for the parties would show that both the invoices are dated 16.12.2013 and they bear the same number, namely, 02 and both also have the same book number i.e. book No. 01. The copies of the invoice filed by the petitioner and the invoice relied upon by the respondent show different signatures. The amount of the invoice is also different.

8. It is difficult in these proceedings to come to a conclusion as to which of the two invoices is the actual invoice raised by the petitioner and payable by the respondent.

9. I may note that on 29.11.2013 that is prior to raising of the invoice dated 16.12.2013, an email was sent by Mr. Rakesh Seigell to the respondent where they have confirmed that the total amount of work carried out was for of Rs.15,05,000/- excluding service tax. Similarly, Mr. Rakesh Seigell, the said authorised signatory of the petitioner has also sent an e-mail on 04.12.2013 where he has expressed surprise on a release of a sum of Rs.1,96,000/- being a paltry amount against the proposed bill of Rs.15,05,000/-.

10. It is no doubt true that on 27.02.2014 one Mr. Akash Agarwal is said to have written on behalf of the respondent to the petitioner accepting that the sum of Rs.7,42,516/- is still outstanding and also accepting that the invoice dated 16.12.2013 was for Rs.22,94,953/-. Respondent have disputed this communication stating that Mr.Akash Agarwal was an ex-employee and

his services have been terminated. It was pleaded that a criminal complaint had been filed against him but today in court it has been pointed out that this complaint was not pursued and in any case, no copy of the same is available with the respondent.

11. The entire controversy actually centres around the invoice of the petitioner that was raised. There are available before the court two invoices, one is for Rs.22,94,953/- filed by the petitioner. The other one is for Rs.15,75,062/- filed by the respondent. The amount of Rs.15,52,427/- has already been paid to the petitioner. Keeping in view the above facts, it is not possible for this court to adjudicate this disputed question of fact that have been raised by the respondent.

12. The Supreme Court in *Madhusudan Gordhandas & Co. vs. Madhu Wollen Industries Pvt. Ltd.*, AIR 1971 SC 2600/ (MANU/ SC/0033 /1971), held as follows:

“21. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed.

22. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up

order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.”

13. In *Mediquipsystems (P) Ltd. vs. Proxima Medical System GMBH*, (2005) 7 SCC 42 the Supreme Court held as follows:-

“18. This Court in catena of decisions held that 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.

Similarly, the Supreme Court in *Amalgamated Commercial Traders (P.) Ltd. vs. A.C.K. Krishnaswami*, [1965] 35 CompCas 456 (SC) /MANU /SC /0369 /1965, held as follows:

“13. 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. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

14. In view of the stated legal position and the facts stated above, it is not

possible to allow this petition.

15. It is no doubt true that during the pendency of the present proceedings, the limitation period for filing of the suit by the petitioner may have expired. In any case, keeping in view the factual controversy and in view of the fact that the petitioner was pursuing the present remedy, in my opinion, the petitioner would be entitled to benefit of Section 14 of the Limitation Act. Keeping in view these facts, the present petition is dismissed. Pending applications also stand dismissed.

FEBRUARY 22, 2018/rb

JAYANT NATH, J

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