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

% ***Date of decision:* 06.07.2018**

+ **CO.PET. 444/2016 & CA 1909/2016**

FLIPKART INDIA PRIVATE LIMITED Petitioner
Through **Mr.Amitesh Kumar and Ms.Prerita Aggarwal, Advs.**
versus
DISCOVERY PUBLISHING HOUSE PVT.LTD. Respondent
Through **Ms.Neha Garg, Adv.**

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. This petition is filed for winding up of the respondent company under sections 433(e), 434 and 439 of the Companies Act, 1956(*hereinafter referred to as the 'Act, 1956'*).
2. Brief facts are that the parties entered into a Vendor Agreement on 29.10.2011. In terms of the said vendor agreement, the petitioner company was to purchase the products of the respondent company, namely, books and then market and distribute the said products. The petitioner purchased various books from time to time worth Rs.87,24,781/-. Necessary payments have also been made to the respondent company.
3. However, over a period of time it transpired that the books purchased by the petitioner from the respondent company were not moving and had no buyers/takers in the market. As a consequence, the petitioner company was left with a huge inventory and piled up stock of the unsold books. Hence, the petitioner requested the respondent company to take back the unsold books

and remit the amount due on account of return of the books. It is pleaded that the unsold books were sent back to the respondent and hence, the respondent is now liable to pay to the petitioner a sum of Rs.66,27,991/-. It is pleaded that this amount has been duly acknowledged by the respondent company. Subsequently on 04.02.2016 a winding up notice was sent to the respondent company. On 08.02.2016 the respondent have sent their reply. In the reply, it was stated that failure of the petitioner to sell the books cannot be said to be on account of any default on the part of the respondent. It was also stated that the respondent had never agreed to take back the unsold books. Only as a goodwill gesture, a return of books was accepted to accommodate the petitioner so that the respondent could adjust the amount in the next consignment. However, the respondent never agreed for refunding the amount.

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

5. The learned counsel for the petitioner vehemently relied upon the statement of account whereby it is pleaded that the respondent have acknowledged the pay of Rs.66,24,136/-. Based on this, he has pleaded that the respondent company has failed to fulfil its obligation.

6. I may have a look at the said acknowledgement dated 31.08.2015, which reads as under:

“Dear Flipkart Team,

We accepted that amount 66,24,136/- is payable to you. As per the previous talk with your team we will adjust this pending amount only against your future purchase. We can only adjust this amount with supply of books against your future purchase orders.”

7. It is quite clear from the perusal of the above so called

acknowledgement that respondent was acknowledging the amount of Rs.66,24,136/- stating that the said pending amount would be adjusted only against future purchases.

8. To the same effects are some of the emails which were sent later in time which show the stand of the respondent company that they would adjust the payment against future orders that may be received.

9. In fact, I had pointed out to the learned counsel for the petitioner that the respondent would be obliged to take back unsold books and refund the prices only in case there is a specific provision in the agreement between the parties. The learned counsel for the petitioner has failed to show any provision in the vendor agreement dated 29.10.2011 which obliges the respondent to take back the surplus stocks lying with the petitioner and refund the consideration paid.

10. The learned counsel for the petitioner however states that this condition was mutually agreed between the parties and the respondent is bound by the terms and conditions of the said agreement that was agreed upon between the parties.

11. Under section 19 of Sales of Goods Act, 1930, the property in the goods is transferred to the buyers at such time as the parties to the contract intended it to be transferred. In the present facts, there is nothing to show that when the goods were purchased by the petitioner, the title to the goods did not pass to the petitioner. Hence, it cannot be said that the respondent company is liable for the stated dues.

12. It is settled legal position that it is not the function of the company court to enter into an adjudication of disputed facts which should have been the subject matter of the Civil Suit.

13. Reference in this context may be had to the judgement of the Supreme Court in *IBA Health (I) Pvt. Ltd. vs. Info-Drive Systems Sdn.Bhd., (2010) (4) CompLJ 481 (SC)* where the Supreme Court held as follows:-

“17. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.”

14. The respondent has raised disputes that are *bona fide*. Clearly, the contentions which are now being raised by the petitioner are the issues which ought to have raised before the Civil Court. There is no merit in the present petition. Needless to add that any observations made herein will not in any manner prejudice the rights of the parties.

15. The petition is accordingly dismissed.

JAYANT NATH, J.

JULY 06, 2018/v corrected & released on 18.07.2017

HIGH COURT OF DELHI



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