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

% Date of Decision: 20.09.2018

\+ CO.PET. 324/2015

RMC READYMIX (INDIA) (DIVISION OF PRISM CEMENT LIMITED) ..... Petitioner

Through Ms.Priya Darshini Arora, Adv.

versus

TRISTAR GLOBAL INFRASTRUCTURE PRIVATE LIMITED ..... Respondent

Through Mr.Rahul Malhotra, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under section 433(e), (f) and 434 of The Companies Act, 1956 seeking winding up of the respondent company. The case of the petitioner is that the respondents approached the petitioner for supply of cement and allied material through various purchase orders. The material was said to have been duly supplied to the respondents. Tax invoices were also raised which have been duly received and acknowledged by the respondent. Reliance is also placed on a document which is said to be balance confirmation dated 19.11.2013 whereby it is stated that the respondents have acknowledged their outstanding amount as Rs.27,97,982/-. A legal notice was sent to the respondents on 03.12.2014. However, there has been no response from the respondents.

2. I may note that on 21.8.2018 this court noted as follows:-

> "Learned counsel for the petitioner relies upon Balance Confirmation Annexure P-4 where she submits that the respondent has acknowledged the dues of Rs. 27,97,982/-.
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> Learned counsel appearing for the respondent has submitted that this balance confirmation is not signed by the respondent. He further submits that the petitioner has already filed a suit for recovery of the same amount before the Civil Judge Ludhiana.
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> Learned counsel for the petitioner seeks to place on record the original acknowledgment and a judgment to show that despite having filed the suit, the plaintiff would be entitled to pursue the winding up petition.
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> List on 23.08.2018."

3. Learned counsel for the petitioner is said to have filed on record the original acknowledgement but the same is not on record. She has shown a copy of the original in court.

4. Learned counsel for the respondent has vehemently opposed the present petition. However a reply has not been filed despite several opportunities. Since last one year the matter has been adjourned to await the reply of the respondent. Learned counsel for the respondent states that the reply has been filed but was returned under objections and the objections have been removed. In any case I have perused the reply filed by the respondent from the copy that was shown in court. I do not see any reason to adjourn the matter.

5. Learned counsel for the respondent has vehemently denied having executed the balance acknowledgement dated 19.11.2013. He has also submitted that the petitioners have already filed a suit prior to filing of the winding up petition before the appropriate Civil Court at Ludhiana, which is pending adjudication. He submits that the issue as to whether the respondent

has executed balance confirmation letter relied upon by the petitioner is also an issue which has been framed there. He also says that the fact of filing of suit has not been brought to the notice of the court while filing the present petition. He has of course denied that the balance confirmation letter was executed by the respondent. He also shows ignorance about Mr.Kishore Thakur who is said to have signed the said acknowledgement.

6. A perusal of the original acknowledgement shows that the stamp of the respondent, namely, Tristar Global Infrastructure Private Limited is clearly affixed on the acknowledgement. Mr.Thakur has signed the document confirming the outstanding balance of Rs.27,97,982/-.

7. Prima facie there appears to be no reason to doubt the veracity of the balance confirmation which has been placed on record.

8. The other aspect which becomes relevant is that two legal notices have been sent to the respondent, namely, on 3.12.2014 and statutory notice of 20.2.2015. It is not in dispute that the registered office of the respondent company is C-207, Sarvodaya Enclave, New Delhi. As far as the notice dated 20.2.2015 is concerned the tracking report of the postal department has also been filed showing that notice was duly delivered on the respondents. Despite the above, in the reply copy of which was shown to me by the learned counsel for the respondent, there is complete denial about receipt of these two notices. I cannot help feeling that the respondent is deliberately being evasive.

9. However, in my opinion, an opportunity ought to be given to the respondent to adjudicate these defences in the appropriate civil court where the proceedings have already been initiated by the petitioner.

10. Reference in this context may be had to the judgment of this court in

Brown Forman Mauritius Ltd. v. Jagatjit Brown-Forman India Ltd. & Ors., 109 (2004)DLT 198, where the court held as follows:

> "18. In Prime Century City Development Pvt. Ltd. Versus M/s Lloyds Finance Ltd., 1 (2003) DLT 445, I had held as under:
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> "The Restatement of the law pertaining to the winding-up jurisdiction is contained in Padeshiya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro-Chemical Ltd. and Another, MANU/SC/0679/1994 : (1994) 2 Comp LJ 50 (SC). A summary of the judgment yields the following propositions, as stated in NEPC India Ltd. Vs. Indian Airlines, MANU/DE/1191/2002 : 100(2002)DLT14 :
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>> 4. In winding-up proceedings it is necessary to keep the following conditions in perspective-
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>> (i) If there is a bona fide dispute and the defense is a substantial one, the Court will not wind-up the company.
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>> (ii) Where the debt is undisputed the Court will not act upon a defense that the company has the ability to pay the debt but the company chooses not to pay it.
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>> (iii) Where the defense of the company is in good faith and one of substance, and the defense is likely to succeed in point of law, and the company adduces prima facie proof of the facts on which the defense depends, the petition should be rejected.
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>> (iv) The Court may consider the wishes of creditors so long as these appear to be justified.
>>
>> (v) The machinery of winding-up should not be allowed to be utilised merely as a means of Realizing its debts. [For the above propositions see Pradeshiya Industrial and Investment Corporation of Uttar Pradesh vs. North India Petro-

> Chemical Ltd. and Another, MANU/SC/0679/1994 : (1994) 2 Comp LJ 50 (SC), in which the observation in Amalgamated Commercial Traders (P) Ltd. vs. Krishnaswami, [1965] 35 Comp Cas 456 and Madhusudan Gordhandas and Co. vs. Madhu Woollen Industries (P) Ltd., [1972] 42 Comp. Cas. 125 have been paraphrased].
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> (vi) If the stance of the adversaries hangs in balance it is always open to the Company Court to order the Respondent Company to deposit the disputed amount. This amount may be retained by the Court and be held to the credit of the suit, if any is p ending, or likely to be filed in the immediate future. [see Civil Appeal No.720 of 1999 arising out of SLP (C) No. 14096 of 1998 - M/s. Nishal Enterprises vs. Apte Amalgamations Ltd., decided by the Hon'ble Supreme Court on February 5, 1999]. It appears to me that the following point may be added to the foregoing considerations.
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> (vii) Generally speaking, an admission of debt should be available and/or the defense that has been adopted should appear to the Court not to be dishonest and/or a moonshine, for proceedings to continue. If there is insufficient material in favor of the petitioners, such disputes can be properly adjudicated in a regular civil suit. It is extremely helpful to draw upon the analogy of a summary suit under Order xxxvII of the Code of Civil Procedure. If the Company Court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction it would have granted unconditional leave to defend, it must dismiss the winding-up petition."

11. In my opinion, it would be in the interest of justice that the respondent company is permitted to defend itself in the suit that has been filed by the petitioner subject to certain conditions.

12. Subject to the respondent depositing a sum of Rs.10,00,000/- in court the present petition would stand disposed of. The amount would be kept by

the Registrar in a Fixed Deposit and would be subject to outcome of the civil proceedings pending before the Civil Court at Ludhiana. Necessary deposit will be made within four weeks from today. Learned counsel for the respondent confirms that they will deposit the amount within four weeks from today. If such amount is deposited, the civil court may deal with the contentions of the parties uninfluenced by any observations made herein.

13. The petition accordingly stands disposed on the above terms. In case there is default in making deposit of the amount, liberty is granted to the petitioner to revive the present petition.

JAYANT NATH, J

SEPTEMBER 20, 2018
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