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

% ***Date of decision:* 28.03.2019**

+ **CO.PET. 238/2015 & CA 1132/2015**

ALPHABET DESIGNS PTY LTD. Petitioner
Through Mr.R.K.Sanghi, Mr.Satyendra Kumar
and Mr.Ishan Sanghi, Advs.

versus

SARASH IMPEX PVT. LTD. Respondent
Through Mr.M.P.Sahay, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. The Petition is filed under Section 433(e) and 434 and 439 of the Companies Act, 1956 (*hereinafter referred to as 'the Act'*) seeking winding up of the respondent company.
2. The case of the Petitioner is that it placed an order for 5981 units Woven Linen Dresses and Tops from the respondent. The petitioner paid 30% as advance payment to the respondent. As there were several defects, it was agreed between the petitioner and the respondent to get the fabric tested by CSIRO(Independent Government Testing Laboratory). This agency confirmed that the quality of the fabric was not as per the approved sample. Thereafter, it was agreed by the parties that the respondent will refund a sum of US\$ 48000 to the petitioner.
3. It is stated that vide email dated 22.10.2014 the petitioner requested the respondent to give the remittance for refund of the agreed amount of

US\$ 48000. The respondent admitted its liability to pay but informed that the bank is not allowing the respondent to do so. By legal notice dated 03.02.2015 the respondent was called upon to refund the amount of US\$ 48000 with interest @ 15% p.a. Despite receiving of legal notice, the respondent was failed to refund the amount. Hence, the present winding up petition.

4. I have heard learned counsel for the parties.

5. Learned counsel for the respondent has pointed out that as a goodwill gesture, the respondent had accepted to refund US\$ 48000. However, it was agreed by the parties as reflected in email dated 28.11.2014 that the said sum of US\$ 48000 would be deducted/adjusted from the subsequent order that was placed by the petitioner on the respondent. Reliance is placed on the email sent by the petitioner to the respondent on 28.11.2014 where the sum of US\$ 48000 was sought to be adjusted against the claim of the respondent for US\$ 76,600.47. Accordingly, the petitioner was liable to pay a sum of US\$ 27,600.47 to the respondent. It is pleaded by the respondent that the goods were duly dispatched in terms of this communication. The petitioner refused to accept the goods and to pay the balance due to the respondent of US\$ 72,419.21. Hence the goods were recalled by the respondent. It is pleaded that nothing is payable to the petitioner by the respondent.

6. Learned counsel for the petitioner insists that no goods were dispatched to the petitioner and the petitioner has not received any goods which are subject matter of the subsequent consignment. It is pleaded that the respondent has obtained forged receipt from M.C. Transport, the authorized transporter.

7. The learned counsel for the respondent has reiterated his submission that he has filed the receipt from M.C.Transport which is dated 03.02.2015/28.11.2014.

8. I may note that the respondent in its counter affidavit has laid emphasis on the aforesaid noted documents, namely, dispatch of goods and email dated 28.11.2014. The averment to this effect has been made in para 17 of its counter affidavit. Para 17 of the rejoinder filed by the petitioner gives the details of the narration of the facts that unfolded. It has been pleaded in para 17 that on 22.10.2014 after it was agreed that the respondent would refund a sum US\$ 48000, an email was received from the respondent stating that the bankers are not willing to remit such a huge amount and the respondent will adjust the amount in the current shipment order. It is also pointed out that the respondent on 25/26.11.2014 stated that they are attaching the invoice along with packaging list against the goods to be supplied to the petitioner. It is pleaded that invoice along with packaging list was not attached to the said email. By email dated 27.11.2014, the petitioner requested the respondent to ship/deliver the goods to M/s Musk Freight Services Pvt. Ltd., the nominated Freight Forwarder of the petitioner without including the rejected styles. It was further stated that the petitioner would give bank confirmation and the payment would be received by the respondent within 2-3 days. On 27.11.2014 the petitioner informed that the goods has not been received by M/s Musk Freight Services Pvt. Ltd., the nominated Freight Forwarder of the petitioner. It is stated that in order to cover their lapses, the respondent obtained a receipt from a transporter M.C.Transport being Receipt No.1456 dated 28.11.2014 in which the respondent has allegedly booked the consignment and given it to the

transporter. Further it appears that, as per the respondent, the respondent was compelled to recall the consignment on 05.02.2015. It is pleaded that this was a false story raised by the respondent. It is hence pleaded that representative of transporter should be called upon along with their relevant records and they be called upon to file an affidavit stating/declaring that the goods under the alleged invoice along with packaging list as mentioned in email dated 25.11.2014 has been taken by such transporter and has been returned on 05.02.2015.

9. The respondent does not deny the above narration of facts. Hence, it is stated by the respondent that the petitioner had to pay the balance amount of US\$ 24,419.21 for the fresh consignment less USD 48,000/-. The petitioner failed to do needful. The respondent had no option but to recall the goods by legal notice dated 05.02.2015. The petitioner however claims that payment was not released as M.C.Transport did not receive the goods. A demand is also made that M.C.Transport be summoned and directed to file an affidavit to explain as to what is actually transpired. Clearly there are several disputed issues that require evidence before a conclusion about the liability of the respondent can be arrived at.

10. 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.

11. Reference in this context may be had to the judgment of the Supreme Court in the case of *IBA Health (I) Pvt. Ltd. vs. Info-Drive Systems Sdn.Bhd., (2010) (4) CompLJ 481 (SC)*. 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.”

12. At this stage the learned counsel for the petitioner has vehemently argued that there was no reply to the statutory legal notice. Hence, this court has to admit the present winding up petition. Reliance is placed on an extract of the judgment of this court in the case of **Mr.Sandeep Sabharwal v. M/s M-Tech Developers Ltd., MANU/DE/1099/2014**. In that case, the facts of the case would show that on the basis of advertisement, the petitioner had applied for a duplex flat and made initial payment of Rs.3.50 lacs. The balance payment was to be made in installments and the petitioner made another payment of Rs.3.37 lacs. Based on these facts, the company court

had come to the conclusion that the contentions of the respondent are a sham and not tenable. It was in those circumstances, the court had noted that the statutory notice issued under sections 433(1)(a) of the Act had elicited no response from the respondent. Therefore, by virtue of section 433(1)(a) of the Act, the respondent is deemed to be unable to pay its debts. The said observation has been made in the totality of the facts and circumstances of the case as a finding was recorded that the defence raised by the respondent is sham. The said judgment does not help the learned counsel for the petitioner.

13. There is no merit in the present petition. The same is dismissed. Liberty is granted to the petitioner to approach the appropriate civil court for recovery of his dues by initiating appropriate proceedings. In case, such proceedings are commenced, the concerned civil courts/forum may deal with the contentions of the petitioner uninfluenced by any observations made by this court.

MARCH 28, 2019/v

JAYANT NATH, J.