

(1993) 10 DEL CK 0013

In the Delhi High Court

Case No : Company Petition No. 155 of 1992

Mayar Traders Ltd.

APPELLANT

Vs

Akhil Services Ltd.

RESPONDENT

Date of Decision : 27-10-1993

Acts Referred:

Citation : (1993) 10 DEL CK 0013

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : S.K. Kaul, for the Appellant; Jayant Nath, for the Respondent

Judgement

Smt. Usha Mehra, J.—Mayar Traders Ltd., by this application has sought the winding up of Akhil Service Ltd. on the ground that the said company is unable to pay its debts. Akhil Services Ltd., respondent herein, placed orders on the petitioner company for the printing of lottery tickets for its various draws, namely, Jeewan Shakti, Jeewan Mothi, Jeewan Shree, Jeewan Sagar, Jeewan Akshay, Jeewan Jyoti and Jeewan Dhara. The agreement was arrived at between the parties, the terms of which are contained in the petitioner's letter dated January 15, 1991. Pursuance to that agreement, the petitioner was to print the tickets of the first four lotteries from the third draw onwards and those of the last three lotteries from the fourth draw onwards. These tickets were to be dispatched by the petitioner to the respondent. The petitioner raised bills with regard to the lottery tickets printed by the petitioner for the respondent. Some payments were made by the respondent but an amount of Rs. 1,78,000 was still due and outstanding against the respondent. The respondent raised objections regarding the delivery of tickets schedule followed by the petitioner and hence lodged a protest regarding payments. However, after discussion a settlement was arrived at pursuant to which the respondent agreed to pay to the petitioner a sum of Rs. 1,02,721.03, i.e., after making certain adjustments. This was so communicated by the respondent to the petitioner, vide letter dated January 29, 1992. This admitted amount has not been paid in spite of repeated reminders

issued by the petitioner. Ultimately, the petitioner issued a statutory notice on April 20, 1992. In response to this notice, the respondent raised a counter-claim to the tune of Rs. 1,35,780 which according to the petitioner is an afterthought and not bona fide.

2. On an application being filed a show-cause notice was issued to the respondent in response to which a reply has been filed raising a dispute that neither any amount is payable nor due. On the contrary according to the respondent the petitioner committed breach by not supplying the lottery tickets as per the terms of the agreement dated January 15, 1991. According to this agreement, the delivery period was 21 days prior to the date of the draw of the lottery. This schedule was not adhered to, hence the respondent suffered loss and damages. Hence the respondent claimed a sum of Rs. 1,35,780 on account of damages as mentioned in its letter dated May 4, 1992. As regards letter dated January 29, 1992, it was procured by the petitioner. The said letter cannot amount to acknowledgment of liability. It was issued by a person without jurisdiction. The tickets were received from 1 to 5 days before the date of draw. Some of the tickets were received from 6 to 10 days before the date of draw, others were received from 11 to 13 days before the date of draw and then 14 to 21 days before the date of draw. This delay in delivery led to the loss in the business of the respondent.

3. In rejoinder the petitioner took the plea that time was not the essence of the contract nor was it agreed that in case the tickets were not supplied within 21 days, the respondent would claim damages or reserved the right to reject the supply of the lottery tickets. In fact after discussion a settlement was arrived at whereby the respondent admitted the liability to pay to the petitioner a sum of Rs. 1,02,721.03. After this settlement, there remains nothing for the respondent to raise any dispute.

4. I have heard Mr. S.K. Kaul, counsel for the petitioner, and Mr. Jayant Nath, counsel for the respondent and have perused the documents placed on record. Admittedly, as per the letter dated January 15, 1991, the delivery of the lottery tickets was to be made 21 days from the date of the fifth draw onwards and delivery of the third and fourth draws were as agreed. The reading of this letter does not indicate as to what would have happened if the delivery schedule was not adhered to. Be that as it may, the respondent vide annexure "R-1" letter dated March 15, 1991, annexure "R-2" letter dated March 25, 1991, and annexure "R-3" letter dated April 25, 1991, did intimate to the petitioner that there was delay in the supply of lottery tickets on account of which the respondent will suffer losses. It is also a fact that vide these letters, the respondent pointed out to the petitioner that lottery tickets should be dispatched in time and as per the delivery period mentioned in the agreement. All these letters are of the year 1991. Similarly, the letter written by the petitioner making a demand of Rs. 1,75,000 is dated June 4, 1991. Thereafter, it appears, discussion took place pursuant to which the manager (operations) of the

respondent company, vide letter dated January 29, 1992, intimated to the petitioner that the company has finally agreed to pay to the petitioner a sum of Rs. 1,02,721.03. The question that arises for consideration is : in view of this letter thereby settling the dispute between the parties does it lie now for the respondent to raise any dispute on the same account. Admittedly, the complaint of the respondent that the lottery tickets were not supplied in time or as per the schedule or the delivery period, were of the year 1991, whereas this settlement after discussion was arrived at in January, 1992. Therefore, this letter assumes importance for the determination of this petition.

5. Mr. Jayant Nath, appearing for the respondent contended that this letter can at best be treated as an acknowledgment of debt. But mere acknowledgment would not fasten any liability on the respondent nor does it operate as a new contract nor can it be made the basis for the filing of this winding up petition. In order to strengthen his arguments he placed reliance on the decision of the Rajasthan High Court in the case of Hasti Mal and Another Vs. Shanker Dan and Others, , where it was held that a mere acknowledgment of debt does not operate as a new contract and cannot be made the basis of the suit. It only keeps alive the original cause of action but the suit must be founded on the original cause of action. There is no quarrel with the proposition of law laid down in this case, but the facts of that case are distinguishable. In the case in hand the respondent has not only acknowledged the liability, but settled the bills finally after discussion and admitted the amount due and payable to the tune of Rs. 1,02,721.03. Therefore, as per section 433(e) of the Companies Act, the amount due and payable in this case comes to Rs. 1,02,721.03. This is the present liability of the respondent. It is not a mere acknowledgment of the debt. It is in fact the admission of the liability after discussion. The bills raised by the petitioner were to the tune of Rs. 1.75 lakhs whereas the respondent settled the dues to Rs. 1,22,160 out of which further deductions were made on account of cost of sheets of printing papers and flap papers lying with the petitioner, thereby reducing the amount to Rs. 1,02,721.03. For the petitioner to invoke the provision of section 433, it was to prove that a debt exists and secondly the company is unable to pay it. In this case the respondent by its own admission made in the letter dated January 29, 1992, has established the debt due and payable to the tune of Rs. 1,02,721.03 and the same has not been paid by the respondent in spite of statutory notice. When once the company admits that it owes an amount, it is for the company to establish that the liability has been discharged. In this regard reference can be had to the decision of the Kerala High Court in the case of M.V. Paulose v. City Hospital P. Ltd. [1992] 73 Com Cas 362.

6. The contention of counsel for the respondent that the letter dated January 29, 1992, was procured has not been prima facie proved on record nor any letter of resignation of Mr. R.N. Bhagat has been placed on record. On the contrary on behalf of the respondent annexures "R-1", "R-2" and "R-3" were all written by Mr. R.N. Bhagat, manager (operations). This shows that Mr. Bhagat was competent to settle the amount due to the petitioner on behalf of the respondent-company.

If he had resigned and left the company by or before January 29, 1992, then his resignation ought to have been placed on record. But no such resignation or any document proving that on January 29, 1992, Mr. Bhagat was not in the service of the respondent-company has been placed on record. Therefore, it cannot be said that the letter dated January 29, 1992, was issued by an unauthorised person. Mr. Nath placed reliance on the decision of the Bombay High Court in the case of *In Re: British India General Insurance Co. Ltd.*, where it has been held that if the company denies its liability on a substantial ground then it cannot be said that the company has neglected to pay its debts. But the question still remains as to whether any substantial ground or defense has been raised by the respondent company? In fact no bona fide dispute exists in view of its letter dated January 29, 1992, in which the respondent admitted the debt due. Regarding this letter, there is no Explanation except that the same was procured. This can neither be called substantial defense nor a bona fide dispute. Mere denial of liability is no defense what to talk of bona fide defense. Therefore, the ratio of the Bombay High Court decision has no applicability to the facts of this case. Counsel for the respondent then placed reliance on the decision of the Calcutta High Court in the case of *J.N. Roy Chowdhury (Traders) Pvt. Ltd. v. Jainti Enterprises* [1987] 61 Com Cas 504. In that case on the facts disclosed the court came to the conclusion that the dispute was bona fide and hence the winding up order was not passed. But in the case in hand in view of the acknowledgment of debt, vide letter dated January 29, 1992, it cannot be said that any substantial or bona fide dispute has been raised by the respondent-company by merely denying its liability now. Mr. Jayant Nath's contention that this letter dated January 29, 1992, has to be read with the respondent's letters, annexures "R-1" to "R-3", to my mind, is without force. As pointed out above, all these letters had been written by the respondent up to April, 1991, whereas the settlement of dues took place and was communicated on January 29, 1992, which clearly indicates that this amount was settled after discussions. In January, 1992, when the respondent wrote letter dated January 29, 1992, it must be having before it annexures "R-1" to "R-3" and must have also taken these into consideration, i.e., the losses or damages suffered by it and only thereafter accepted the liability to the tune of Rs. 1,02,721.03. As regards the statement of account of the respondent company mentioned in annexure "R-IV", the same was never forwarded to the petitioner at any stage.

7. Statutory notice was duly received by the respondent and in response the only defense taken was that the petitioner owed a sum of Rs. 1,35,780. With this reply dated May 4, 1992, annexure "R-IV" was not forwarded to the petitioner. Hence, the petitioner had no opportunity to know how the respondent had raised counter-claim. To my mind, in view of the settlement of debt after discussion it cannot be said that the respondent has raised a substantial or a bona fide dispute. The admitted liability presently due has not been discharged by the respondent. Therefore, the petitioner is within its right to file this petition.

8. In view of the above discussions, I am of the considered view that the petition

be admitted for hearing. Let the citation be published in the daily newspaper Statesman (English), Veer Arjun (Hindi) and Delhi Gazette for January 20, 1994.