

IN THE HIGH COURT OF DELHI AT NEW DELHI

CO.PET. No. 333 of 2012

Reserved on: March 7, 2013

Decision on: March 19, 2013

ZHUHAI HANSEN TECHNOLOGY CO LTD. Petitioner
Through: Mr. Amit Bansal with Ms. Manisha
Singh and Ms. Ritika Nagpal, Advocates.

versus

SHILPI CABLE TECHNOLOGIES LTD. Respondent
Through: Mr. Amit Sibal with Mr. Ajay Garg,
Mr. Rajeev K. Goel and Mr. Gaurav Dudeja,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

19.03.2013

1. The Petitioner, Zhuhai Hansen Technology Co. Ltd., a company incorporated in People's Republic of China having its office in Guangdong, China, has filed this petition under Sections 433(e) and 434 of the Companies Act, 1956 ('Act') seeking the winding up of the Respondent, Shilpi Cable Technologies Ltd.

Background facts

2. The Petitioner states that it is an acknowledged industry leader in providing antenna-system solutions and service to telecommunication network operators and providing cable operators the last mile connectivity. The Petitioner further states that it offers a complete range of RF and CATV cables to meet every application and budget requirement. It has a state-of-

art manufacturing facility in Zhuhai, China. In 2011 the Petitioner had a turnover of US \$ 500 million.

3. The Petitioner states that it had a long standing business relationship with the Respondent dating back to the year 2005 when the Respondent started to purchase cables and accessories from the Petitioner. In February 2009, the Respondent conveyed to the Petitioner its urgent requirement for about 1500 km of 7/8” superflex cables used in the telecom industry. A Memorandum of Understanding (‘MOU’) was entered into between the parties on 18th February 2009 whereby the Respondent agreed to purchase and the Petitioner agreed to supply 1300-1500 km of 7/8” superflex cables.

4. The terms and conditions of the MOU were that the shipment of the above goods was expected to take place between 1st March and 5th April 2009. Upon receipt of the original standby letter of credit (‘L/C’) or bank guarantee (‘BG’), the Petitioner would immediately arrange for production. The MOU noted that an L/C or BG for a cable length of 100 km had already been provided to the Petitioner. The Respondent was to establish a separate L/C or BG for an additional 150-200 km by 25th February 2009. The material was to be shipped from Zhuhai. The Petitioner was to email to the Respondent the scanned copies of the invoice and packing list. The Respondent was to establish a confirmed irrevocable L/C for 100% invoice value of the despatched materials within “10 working days of On-Board Date.” The establishment of the L/C was not to be linked to any possible disputes/claims. The Respondent was responsible for any demurrage, storage, warehousing and handling charges outside Zhuhai. Clause 9 of the

MOU stated that the Respondent had also agreed to supply “1.5 M 1/2’ S DIN M – DIN F e51 Jumpers, Connectors and Surge Arrestors.”

5. A purchase order (‘PO’) was placed by the Respondent on the Petitioner on 25th February 2009 for supply of 1500 km of 7/8” superflex RF feeder cable at the unit price of US \$ 2.14 per metre for a total value of US \$ 3,210,000. The payment terms indicated in the PO were that the L/C should be opened with usance credit at 180 days and interest to the account of the “applicant”. The delivery had to be completed before 31st March 2009. The goods had to be invoiced to the Respondent.

6. On 2nd March 2009 the Petitioner sent an email to the Respondent asking it to arrange the BG or standby L/C for at least 150 km and extend the validity of the last L/C for 200 km 7/8”. The Respondent was asked to speed up the process so that the delivery could be made within time. The Petitioner states that it had shipped a total quantity of 1301.015 km of 7/8” superflex cables to the Respondent between 25th March and 21st May 2009. However, the Respondent failed to establish the L/C. Some of the correspondence exchanged between the parties has been enclosed with the petition. One of them is an email dated 11th May 2009 from the Petitioner to the Respondent stating that around 950 km 7/8” of cables had been shipped without an L/C being furnished, by the Petitioner.

7. The Petitioner states that on 14th May 2009 a schedule was sent by the Respondent to the Petitioner for establishing the balance L/C for the goods despatched till 8th May 2009. According to the Petitioner, since the schedule was under the signature of Mr. Ghanshyam Pandey, Chief Executive Officer

(‘CEO’) of the Respondent it constituted “a clear and unconditional undertaking and commitment” on the part of the Respondent to open the L/C in respect of all supplies made or to be made by the Petitioner. It is further stated that on the basis of the above assurance the Petitioner shipped the remaining quantity of the product, with the last of the shipments being made on 24th May 2009. However, the Respondent failed to establish the L/C in terms of the said schedule and undertaking. It also did not get the goods released from the Indian Customs with whom the goods had been lying since March-May 2009.

8. In para 13 of the petition the Petitioner has given the details of the invoices for the period from 26th March 2009 till 21st May 2009 for a total sum of US \$ 1,891,556.70 towards several invoices which remained unpaid by the Respondent till 31st August 2009. According to the Petitioner, the Respondent wrote to it on 3rd September 2009 citing its weak financial condition as the sole reason for not being able to open the L/C for the goods despatched by the Petitioner and its inability to collect the goods from the customers. It is stated that the Respondent suggested an alternate mode of payment for paying the dues of the Petitioner and in order to support the Respondent “in its moment of financial crisis”, the Petitioner agreed to the said proposal. A reference is also made to an email dated 4th September 2009 from the Respondent asking the Petitioner to present the documents “under respective L/C only” and that the Respondent would start opening L/Cs from 7th September 2009 onwards. It is stated that on 8th September 2009 the Respondent opened an irrevocable L/C drawn on State Bank of India (‘SBI’) in favour of the Petitioner for an amount of US \$ 1,891,556.70 thus covering the outstanding balance amount owing by the Respondent to

the Petitioner. According to the Petitioner, the Respondent thus made a “clear, unequivocal and categorical admission” of its liability in respect of the aforementioned sum to the Petitioner. A reference is also made to email dated 10th September 2009 whereby the Respondent requested the Petitioner not to present all the documents at one go and to present document of one bill of lading (‘B/L’) on the third day as this would help the Respondent in honouring the payment on timely basis. This was followed by another email dated 1st October 2009 whereby the Respondent informed the Petitioner that its understanding with SBI could not be worked. It had accordingly decided to cancel the L/C and make upfront payment of the documents. The Petitioner was requested to present one document on ‘document against payment’ (‘DP’) basis to Karur Vysya Bank Limited (‘KVBL’) for payment. The Respondent requested that the documents on DP basis be presented ‘one by one’ and stated that “it may take some time, but once the process is through, we will come out of this mess.”

9. It is stated by the Petitioner that it agreed to the cancellation of the said L/C in lieu of payment on DP basis, in good faith and in order to help the Respondent, believing that the Respondent would make the balance payment against the goods already shipped to it. It is stated that subsequently, on the Respondent’s instructions, the Petitioner presented the documents for payment to the banker and received payment towards invoices for the supply of 98.23 km of the product on 23rd October 2009 and another invoice for supply of 98.31 km of cable on 15th November 2009 thereby reducing the outstanding amount from US \$ 1,891,556.70 to US \$ 1,470,941.84 in respect of 687.365 km. The Petitioner states that despite making payments in October/November 2009, the quantities were collected

only in May and July 2010 thus incurring, on daily basis, storage and detention charges by shipping line and demurrage charges by Inland Container Depot ('ICD') at Tughlakabad, New Delhi.

10. According to the Petitioner, after taking delivery of the last two shipments, the Respondent realized that the detention and demurrage charges in respect of the balance amount had escalated well over the value of the goods which therefore, became economically unviable for the Respondent. According to the Petitioner, in order to avoid making payment the Respondent started raising issues as regards the condition/quality of goods by email dated 24th May 2010 for the first time. This was replied to by the Petitioner on 26th May 2010 stating that long time storage of the goods and humidity at the port was responsible for the condition of the goods but the same would have no impact on the quality of the goods. It was further pointed out that the Respondent had never rejected any of the shipments on the ground of quality of the goods. The Respondent inquired from the Petitioner by email dated 23rd July 2010 as to how to clear the shipments with minimum loss and this was replied to on 23rd July 2010 itself.

11. On 4th November 2010 the Petitioner sent to the Respondent a notice calling upon the Respondent to make the following payments of the outstanding amounts set out in the form of a table, within 15 days from the date of the receipt of the notice:

S.No.	Particulars	Amount (US \$)
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1.	Cost of demurrage/detention or other charges incurred in selling 196.255 kms. of the product to Third Party	427,352.00
2.	Loss/Additional expenses incurred for erasing the mark of Shilpi	3,000.00
3.	Cost of 491.110 kms. of the product	1,050,975.40
4.	Additional expenses incurred for the various trips made for resolving the issue with Shilpi	20,000.00
	Total	1,501,327.40
	Interest @ 18% p.a. till the receipt of the full payment as demanded herein above.	

12. The Respondent had by a detailed reply dated 30th November 2010 denied its liability to pay the outstanding amount. Importantly it was stated that neither the MOU dated 18th February 2009 nor the PO dated 25th February 2009 had been acted upon and in any event the Petitioner had failed to adhere to the terms of the PO. Further since the Petitioner had failed to make delivery of the goods by 31st March 2009, the Respondent had extended time after 15th April 2009. Despite repeated reminders and requests the Petitioner had failed to offer the products by the extended deadline. The Respondent had air lifted certain deliveries in order to despatch the products to its customers. Consequently, the Respondent had suffered huge losses for which it had the right to recover such damages from the Petitioner. It was further noted that the Petitioner had supplied 7/8" superflex cables to the Respondent's competitor, Volex, at a price lesser than the price charged by the Petitioner from the Respondent. A para-wise

reply was given to the legal notice dated 4th November 2010 in which it was stated that the proper documentation was a pre-condition for releasing the L/C whereas during the discussions it transpired that the documents presented by the Petitioner were discrepant in various aspects as a result of which the L/C could not be negotiated.

13. In paras 12 and 13 of the letter dated 30th November 2010 the Respondent stated that two lots each comprising of 98.23 km length of cables were released on DP basis and found to be defective. It was decided by the Respondent that no further goods would be released. All the above contentions were vehemently denied by the Petitioner by its letter dated 21st December 2010. Further correspondence was exchanged between the parties.

Submissions of counsel for the Petitioner

14. It is submitted by Mr. Amit Bansal, learned counsel for the Petitioner, that the two reasons given by the Respondent for not making the payments, viz., (a) delayed delivery of goods by the Petitioner and (b) defective quality of goods supplied by the Petitioner, were untenable and an afterthought. These were raised by the Respondent only after the receipt of the legal notice. It is stated that at no point of time did the Respondent ask the Petitioner to stop the shipment on account of delay in delivery and reject any shipment on that basis. The contention that the goods supplied were also defective is also termed as 'baseless and false'. It is reiterated that the goods supplied by the Petitioner were of the highest standard and quality. The Respondent had never raised the issue about defective products for not making payment. The Respondent failed to clear the goods on account of its

financial problems. It was *inter alia* stated that the Petitioner cannot be held responsible for the Respondent's failure to get the goods released from the customs since March-May 2009. While the Petitioner had complied with its obligations as agreed between the parties, the Respondent had defaulted in making the payment to the Petitioner.

15. A legal notice dated 28th April 2012 sent by the Petitioner to the Respondent under Sections 433 and 434 of the Act calling upon the Respondent to pay a sum of US \$ 1,501,327.40 alongwith interest @ 18% p.a. from the date such amount became due till the date of payment was replied to by the Respondent by a reply dated 18th May 2012 which was received by the Petitioner on 21st May 2012. Subsequently, a further reply was given on 30th May 2012 reiterating the above grounds. It was pointed out *inter alia* that the MOU for purchase of goods was entered into between the Petitioner and M/s. Shilpi Manufacturing Company and not with the Respondent. Even in the counter claim proposed to be raised by the Respondent in the sum of approx. Rs. 6 crores there was no claim as regards the defective goods supplied by the Petitioner. It is further averred that the Respondent is not discharging its admitted liabilities and it has become "commercially insolvent". It is added that "the substratum of the Respondent company is lost and therefore, it is just, equitable and necessary in the interest of justice that the Respondent company be wound up under the provisions of Section 433 and 434 of the Companies Act, 1956."

Submissions of counsel for the Respondent

16. Mr. Amit Sibal, learned counsel for the Respondent, submitted that the Petitioner has deliberately suppressed material facts and has not placed on

record the complete documentation and emails exchanged between the parties. Importantly the fact that there were three separate POs placed by the Respondent on the Petitioner, the first being for the supply of 1500 km cables (7/8” RF cables) and the other two POs for accessories (Jumpers and Surge Arresters) was not mentioned by the Petitioner. When in one instance, the accessories were not delivered simultaneous with the delivery of the cables, the Respondent was constrained to air lift the accessories.

17. Mr. Sibal referred to an email dated 6th March 2009 in which the Respondent explained to the Petitioner that supplies of cables went along with Jumpers, Surge Arresters and Connectors. By an email dated 26th March 2009 the Respondent requested the Petitioner to revise the Bill of Lading ('B/L') of five containers of cables on account of heavy demurrage and detention charges that were mounting. Since the original B/L was with the Petitioner, only the Petitioner could carry out the necessary amendments. This was followed by another email dated 29th March 2009 sent by the Respondent asking the Petitioner to explain the reasons for the delay in deliveries. The Respondent also reminded the Petitioner that “accessories scheduled to be dispatched on 27th March by sea is pending.” It was also asserted that any further delay in delivery would have to be compensated by the Petitioner. According to Mr. Sibal, although the delivery period in all the three PO's was before 31st March 2009, not even a single shipment was delivered except two shipments of accessories lifted by air. By an email dated 1st April 2009 the Respondent made it clear that all demurrage and detention charges would be to the account of the Petitioner. Reference was made to an email dated 3rd April 2009 whereby the Respondent complained that even the first container of Jumpers, Surge

Arrestors and accessories had not left till then. It is submitted that without Surge Arrestors, Connectors and Jumpers the mere despatch of cables would not serve the purpose of the Respondent. In fact on 9th May 2009 the Respondent sent an email to the Petitioner asking it to stop further supply of cables.

18. On 6th July 2009 the Respondent informed the Petitioner that the documents were refused on the ground that they were issued in favour of Indian Overseas Bank ('IOB'). On 13th July 2009 the Respondent requested the Petitioner to issue an B/L only in favour of "To Order" without mentioning any banker's name on it. On 3rd September 2009 the Respondent suggested for DP mode of payment. It was agreed to by the Petitioner by its written email dated 4th September 2009. He also referred to the decision in *Phulchand Exports Limited v. O.O.O. Patriot (2011) 10 SCC 300* to explain the most of the documents involved in cost, insurance and freight ('CIF') contracts. Mr. Sibal also referred to Clause 11 of the Accounting Standards ('AS') issued by the Institute of Chartered Accountants of India ('ICAI') which laid down the conditions that had to be fulfilled in a transaction involving the sale of goods. He pointed out that of the nine consignments, the documents in respect of four were in order. The Respondent took delivery of two consignments and the Petitioner sold two other consignments. The delivery of five shipments could not be taken in the absence of proper documentation. Mr. Sibal referred to the minutes of the meeting held on 20th August 2009 to show that it was made clear to the Petitioner by the Respondent that the goods were defective. This was reiterated on 24th May 2010. Therefore, it was incorrect for the Petitioner to

suggest that complaint about quality was an afterthought. Thus delivery was never taken of the five shipments.

19. According to Mr. Sibal, therefore, the essential conditions of supply were not met by the Petitioner. The mere fact that the Respondent agreed to open an L/C did not amount to an admission of liability. It is submitted that these are disputed questions of fact which could not be examined in the present proceedings. The Respondent had filed a suit in this Court in which these questions would be examined. Relying on the decision in *NEPC India Ltd. v. Indian Airlines Limited 100 (2002) DLT 14*, Mr. Sibal submitted that exercise of jurisdiction by the Court under Sections 433 and 434 was discretionary and it is only where the Court comes to a conclusion that there is an admitted liability coupled with the inability of the Respondent to pay its debts that the Court would order winding up.

No admission of liability

20. Arising out of the above submissions, the first issue to be decided by the Court is whether there is any admission of liability by the Respondent and if there is no such admission, whether the denial by the Respondent of its liability constitutes a sham defence? As explained by this Court in *NEPC India Limited v. Indian Airlines Limited* the defence adopted should appear to the Court not to be dishonest and/or a moonshine. The Court in that case drew upon the analogy of a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 ('CPC').

21. For the purposes of Section 433(e) of the Act it has to be demonstrated by a Petitioner seeking the winding up of the Respondent company that

there is an undisputed debt and that the Respondent company is unable to pay the debt. Section 434 of the Act gives instances where the company is deemed to be unable to pay its debts. Even if it is “proved to the satisfaction” of the Court that the Respondent company is unable to pay its debts, the Petitioner would also have to show that the company “neglected to pay the sum or to secure or compound for it to the reasonable satisfaction” of the Petitioner. It has time and again been emphasized by the Supreme Court that the machinery of winding up should not be utilized for recovery of money. [See *Pradeshia Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd. (1994) 3 SCC 348.*]

22. The ‘satisfaction’ of the Court under Section 434 (1) (c) of the Act is after the Court takes into account the “contingent and prospective liabilities of the company.” The mere refusal to pay debts should not be understood as ‘inability’ of the Respondent to pay its debts. In other words, the unwillingness of the Respondent to pay its debts does not automatically lead to the inference of inability to pay its debts.

23. In the present case, there were undoubtedly three separate contracts entered into between the parties. One was for the supply of cables and the other two for supply of accessories, i.e., Jumpers, Connectors and Surge Arrestors. Both the parties have been dealing with each other for over seven years. The Petitioner itself being the manufacturer of cables and accessories knew that for the purpose of the business of the Respondent the mere supply of cables without the accessories could not be sufficient. The Respondent was in turn supplying cables and accessories to the telecom service providers including Tata Tele Services Limited (‘TTL’). The mere supply of

cables to TTL would not have constituted a complete delivery of goods. The peak period in the telecom industry for the supply of cables was the first three months of the year. Therefore, the failure on the part of the Petitioner to supply the accessories would adversely affect the corresponding obligations of the Respondent to its customers.

24. For some reason the Petitioner has in its narration of facts not referred to two emails, the first dated 26th March 2009 whereby the Respondent asked for reasons why it had not received Jumpers, Surge Arrestors and Connectors by that date. The second was the email dated 3rd April 2009 again advertent to the above issue. This explains the emails dated 9th May 2009 and 22nd May 2009 by which the Respondent asked the Petitioner to stop despatching further cables. It is apparent that there were disputes between the parties on whether the supplies by the Petitioner were complete and whether the Respondent was justified in not accepting delivery of the consignments. It is difficult, in the circumstances, and at this stage, to conclude that the defence of the Respondent is a sham one.

Incomplete documentation

25. The second issue concerns the documents that had to accompany the shipment. In terms of the MOU, L/C had to be opened by the Respondent. The L/C was opened in its favour by its banker, i.e., SBI. For some reason, despite IOB no longer being the banker of the Respondent, the B/L was made to the order of IOB. The Respondent requested the Petitioner to have the B/L amended so that the payments could be released. Even for DP mode the documents had to be amended by making it 'To Order' without

mentioning any banker's name on it. The Petitioner did not manage to do this.

26. Section 25 of the Sale of Goods Act, 1930 ('SGA') underlines the importance of the terms and conditions of delivery of goods having to be fulfilled but clearly states that property in the goods does not pass to the buyer "until the conditions imposed by the seller are fulfilled." In the present case the seller had itself imposed the conditions of opening of L/C. Further, the AS maintained by ICAI also requires the fulfillment of the following two conditions of property in goods to pass from the seller to the buyer:

"11. In a transaction involving the sale of goods, performance should be regarded as being achieved when the following conditions have been fulfilled:

(i) the seller of goods has transferred to the buyer the property in the goods for a price or all significant risks and rewards of ownership have been transferred to the buyer and the seller retains no effective control of the goods transferred to a degree usually associated with ownership; and

(ii) no significant uncertainty exists regarding the amount of the consideration that will be derived from the sale of the goods."

27. The B/L for the five shipments was made to the order of IOB which was no longer a banker of the Respondent. This was a CIF contract and as explained by the Supreme Court in *Phulchand Exports Limited v. O.O.O. Patriot* one of the requirements was that the shipping documents had to accompany the despatch of the consignments. These include the invoices, B/L and the policy of insurance. In other words, "the essential feature of a

CIF contract is that delivery is satisfied by delivery of documents and not by actual physical delivery of the goods. Shipping documents required under a CIF contract are bill of lading, policy of insurance and an invoice.” With the documents accompanying the consignments not in order, they had to necessarily be amended as requested by the Respondent to facilitate the payment even on DP basis. For some reason this was not facilitated by the Petitioner. The contention of the Respondent that the above facts do not reflect any deliberate failure to make payment cannot in the circumstances be rejected as a sham defence.

Defects in quality

28. Under Section 55 SGA one remedy available to the seller of goods is to sue the buyer for the price of the goods. However, under Section 55 (1) SGA the conditions that have to be fulfilled are: (i) the property in the goods has passed to the buyer and (ii) the buyer has wrongfully neglected or has wrongly refused to pay for the goods according to the terms of the contract. Under Section 56 SGA the seller may sue the buyer for damages for non-acceptance where the buyer has wrongfully neglected or refused to accept and pay for the goods. Under Section 42 SGA, the buyer is deemed to have accepted the goods (a) when he intimates to the seller that he has accepted them; or (b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or (c) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

29. Mr. Bansal sought to demonstrate that the conditionality of Section 42 stood attracted since the Respondent had never intimated to the Petitioner

that it had rejected the goods. The above submission is unacceptable for the reason that on the facts of the present case the five shipments were never in fact delivered to the Respondent. Mr. Bansal himself stated that the five shipments were sold off by way of auction by the port authorities to recover the detention and demurrage charges. The question of the Respondent in the present case having retained the five shipments without intimating the Petitioner of its rejection does not arise.

30. For the purposes of Sections 55 and 56 SGA, the Petitioner would have to show that the neglect or refusal by the Respondent to pay for the goods was wrongful. This would require the examination of evidence to find out whether the buyer was justified in refusing to pay for the goods. The minutes of meeting dated 20th August 2009 of the Petitioner and the Respondent read as under:

“We have discussed following points during Hansen visit to our factory and conclusions are mentioned:

- * Shown 7/8” damaged drums to Hansen team and they have agreed to change to wooden drums/water proof plywood drums with same barrel as using presently.
- * 1 ¼” cable drums with wet condition shown to Hansen team and they have verified even container in which we have received the drums today found badly wet condition.
- * 7/8” and 1 ¼” cable electrical rejection shown to Hansen team and they have agreed to check drums from both end and only cables with return loss more than 20 dB from 400MHz – 1000 MHz and 1700MHz – 2200MHz will be sent to Shilpi.
- * Hansen agreed to send test reports of all the drums in soft copy to Shilpi for every lot.

- * Informed intermodulation results are falling down in ½” Jumpers in every lot. Hansen will improve from next lot onwards and as per them they are checking 40% of lot quantity for intermodulation test at present and may increase in further lots.”

31. Subsequently on 24th May 2010 the Respondent raised the issue of defective quality of the cables and attached photographs of the damaged lengths of the cables with nail marks. Thus, it appears that it was not the first time that this objection was raised. Yet, the complete picture will become clear only when the evidence that may be adduced by both parties is examined in detail in the civil suit stated to be pending. It is not possible for this Court to conclude at this stage that the refusal by the Respondent to make payment for the goods was deliberate or wrong.

Decisions cited by the Petitioner

32. In *G.K.W. Ltd. v. Shriram Bearings Ltd.* AIR 1999 Delhi 27, referred to by Mr. Bansal, the delivery of the goods had already taken place. The dispute as to quality was raised long thereafter. In *Paharpur 3P (A division of Paharpur Cooling Towers Limited) v. Dalmia Consumer Care Private Limited* (2008) 3 Comp.LJ 554 (Del) the Respondent was unable to substantiate the alleged poor quality of products supplied by the Petitioner. There was also sufficient documentation to prove the inability of the Respondent to pay its debts. The decisions in *Tarai Foods Ltd. v. Wimpy International Pvt. Ltd.* 2005 (8) AD (Delhi) 131, *Guangdong Fuwa Engineering Manufacturing Co. Ltd. v. ANG Auto Limited* (2010) 4 Comp.LJ 681 (Del) and *Indo Alusys Industries Ltd. v. Assotech Contracts (India) Ltd.* 2009 (160) DLT 752 also turned on their own facts and do not assist the case of the Petitioner.

Conclusion

33. While the pendency of a suit will not *per se* preclude the exercise of the winding up jurisdiction of the Company Court, on the facts of the present case, the Court is not persuaded to hold that the Respondent is unable to pay its debts and is, therefore, required to be wound up under Sections 433(e) and 434 of the Act.

34. It is clarified that the present decision is limited to the context of the prayer for winding up of the Respondent and is not intended to prejudice the contentions of the parties on merits in the pending suit.

35. Consequently, the petition is dismissed with costs of Rs. 20,000 which will be paid by the Petitioner to the Respondent within four weeks from today.

S. MURALIDHAR, J.

MARCH 19, 2013

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