

**Unitron Ltd. Vs. Unicorp Industries Ltd.**

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**Court :** Delhi

**Decided On :** Oct-27-1993

**Reported in :** [1997]89CompCas736(Delhi)

**Judge :** Usha Mehra. J.

**Acts :** [Companies Act, 1956](#) - Sections 433 and 434

**Appeal No. :** C.P. No. 135 of 1992

**Appellant :** Unitron Ltd.

**Respondent :** Unicorp Industries Ltd.

**Advocate for Def. :** U.K. Chaudhry, Adv.

**Advocate for Pet/Ap. :** Rakesh Sawhney and; Ms. Richa Mainee, Adv

**Judgement :**

**Smt. Usha Mehra, J.**

1. Unitron Limited, the petitioner, herein has sought winding up of Unicorp Industries Ltd. (hereinafter called 'the company') on the ground of its inability to pay the petitioner's debt. The respondent company placed a purchase order date May 3, 1988, with the petitioner for purchase of a quantity of 200 Radar Switch Mode Power Supply with power card for a total consideration of Rs. 3,70,000. As

per the purchase order, St/CST was to be paid by the respondent company against Form H. In accordance with the Sales Tax Rules, Form H is required to be furnished by the dealer when the goods are purchased for export. Since in the purchase order it was mentioned that ST/CST was to be against Form H, the petitioner understood that the goods purchased were intended for export. Pursuant to the said purchase order, the petitioner supplied to the respondent company goods, vide three different invoices dated May 14, 1988, August 16, 1988, and September 9, 1988, respectively. After completion of the transaction, the petitioner requested the respondent company to furnish Form H which was required to be submitted with the sales tax returns. The respondent company, somewhere in the middle of January, 1991, intimated to the petitioner that Form H could not be furnished as its registration certificate was pending for amendment and change of the respondent's name, change of address, addition in business line and submission of fresh surety, hence it was not possible to get any form from the department but assured that Form H would be furnished within a month.

2. On receipt of this letter, the petitioner intimated to the respondent that the last date for submission of Form H was January 22, 1991, and in the event, the respondent company failed to hand over Form H to the petitioner before the said date, then the respondent would have to pay sales tax on the goods purchased from the petitioner. On receipt of this letter, the respondent company, vide letter dated January 24, 1991, intimated to the petitioner that instead of Form H, the petitioner should collect Form C against the said purchase. The petitioner refuted the averments made in the said letter of the respondent and insisted that the respondent furnish Form H. Subsequently, on February 4, 1991, the respondent company informed the petitioner to accept Form ST-35. This offer of the respondent was also not accepted by the petitioner, because by then the sales tax assessment order had already been passed and the petitioner had to pay the said amount of sales tax. This fact was also brought to the notice of the respondent.

3. That when the sales tax dues were not paid by the respondent company, the petitioner served it with a statutory notice under section 434 of the Companies Act, thereby asking the respondent to pay a sum of Rs. 31,031.71 in lieu of the amount paid by way of sales tax by the petitioner. In reply to the said notice, the

respondent for the first time took up the plea that in the purchase order it was inadvertently mentioned that the sales tax Form H would be furnished. In fact the respondent had purchased the goods for being used as component for the manufacture of computers to be utilised in the local market and, therefore, the respondent was to issue Form C and not form H. When this plea was raised, the petitioner realised that the respondent was not going to discharge its debts, and, therefore, filed the present petition for winding up.

4. A show-cause notice was issued to the respondent. In response to the same, the respondent filed a reply and took up the plea that inadvertently it was mentioned in the purchase order that the sales tax Form H would be supplied by the respondent. In fact, the goods purchased were to be utilised for the local market, hence sales tax Form C was required to be furnished. The petitioner was aware that the goods purchased were not to be exported, but were to be utilised in the local market. At the time the purchase order was issued, there was genuine confusion in the respondent as to whether these components would be used for an export-oriented unit or part of it would be used on the domestic market. Since the components were not used for the purpose of export, the respondent company could not have issued Form H. In these circumstances, if Form H had been issued, it would have amounted to an illegal act on the part of the respondent company. The company would have been prosecuted by the sales tax department for this illegal act. It was in this background that the petitioner was informed to accept Form C. Had the petitioner accepted Form C, it would not have paid that much amount of sales tax. For the fault of the petitioner, the respondent cannot be made to suffer.

5. I have heard learned counsel for the parties and perused the documents placed on record.

6. In a winding up petition, the principles on which the court acts are, firstly, that the defense of the respondent company is raised in good faith; secondly, the defense is likely to succeed on point of law; and, thirdly, the company adduces prima facie proof of the fact on which the defense depends. Admittedly, the provisions of the Companies Act cannot be availed of for obtaining an adjudication

of the right to obtain payment, when it is contested and the finding involves such a detailed and lengthy investigation as is necessary for a decision in a suit. Nor is winding up petition a legitimate means to enforce payment of a debt which is bona fide disputed by the respondent company. When the defense is that the debt is disputed, all that the court first has to see is whether the dispute on the face of it is genuine or merely a cloak for the company's real inability to pay a just debt.

7. Mr. Chaudhary, appearing for the respondent company, asserted that the respondent has raised a genuine dispute regarding the existing debt, hence the petition for winding up is not maintainable. According to him, the respondent company utilised the goods supplied by the petitioner in the local market, therefore, under the Sales Tax Act, it could not issue Form H. The said form could only be issued if the goods had been utilised or used for an export-oriented unit. Hence, under the law, the petitioner cannot succeed in enforcing this debt which is not payable under the law because of the bar created by the Sales Tax Act. Since the goods were used for the domestic market, hence the respondent company had all along been ready to co-operate with the petitioner by furnishing Form C. The assessment ought to have been got done from the sales tax authorities on the basis of the information. This being a bona fide dispute, regarding the respondents' liability to furnish Form H, the remedy for the petitioner was to file a suit and not a winding up petition. The respondent company by leading evidence will prove that the claim of the petitioner is not covered under the Sales Tax Act nor the respondent liable to pay any amount.

8. On the other hand, Mr. Rakesh Sawhney, appearing for the petitioner, contended that the plea now raised is an afterthought, frivolous and a mere moon shine. On the face of the admitted documents placed on record, such a plea cannot be accepted nor can it be termed a bona fide dispute. For this purpose the court has to examine all the disclosed circumstances. The defense now set up is not only on afterthought, but a mere cloak to cover up its inability to pay the debts. As a matter of fact, the defense now raised by the respondent company is not supported by any document nor has this defense been raised in good faith. There is no prima facie substance in it. The respondent has miserably failed to shoulder the onus disproving the claim of the petitioner nor can the company succeed on

the point of law, because the claim of the petitioner is based on a contract entered into between the parties in pursuance of which the supply was made.

9. In order to appreciate the contentions raised at the Bar, some of the salient facts are necessary to be kept in mind. Those are : that the respondent company placed the order on the petitioner, vide the purchase order dated May 3, 1988. In this purchase order, against the column ST/CST, it was mentioned 'Nil-Form H'. Pursuant to this order, the petitioner supplied the goods against three invoices. In invoices dated May 14, 1988, June 18, 1988, etc., the ST/CST had been shown 'Nil', meaning thereby that the goods were for export purposes and the petitioner was to receive only Form H from the respondent. This condition indicated by the respondent was accepted by the petitioner and the goods were accordingly supplied as has been reflected in the invoices. The petitioner in its sales tax return reflected this fact and final assessment order was passed on January 25, 1991.

10. From a perusal of the documents placed on record, the picture which emerges clearly shows that the sales tax return was filed by the petitioner in time. This fact was communicated to the respondent company on the telephone as well as by the registered letter dated January 11, 1991, when the petitioner informed the respondent to furnish Form H. The respondent vide its letter dated January 15, 1991, undertook to furnish the same within a month. The petitioner, vide its letter dated January 18, 1991, informed the respondent company that the last date for submission of Form H was January 22, 1991. It was also intimated that if the petitioner failed to supply Form H before the last date, then the respondent company would be liable to pay the amount of sales tax. To this there was no response. However, on January 24, 1991, for the first time the respondent took the plea of a telephone discussion and further telling the petitioner to collect Form C instead of Form H against the invoices. The factum of discussion on telephone and acceptance of Form C was denied by the petitioner, vide its letter dated January 29, 1991. The petitioner denied that it had ever agreed to accept Form C. According to the petitioner, the sale under the above referred to purchase order was against Form H. This was so reflected by the petitioner in the invoices raised against the respondent as well as in the sales tax returns. Hence, it was not possible for the petitioner at that stage to change the returns, particularly when the

assessment order had already been passed on January 25, 1991. According to the petitioner, the respondent had never been consistent in its defense. On February 4, 1991, the respondent issued a telegram to the petitioner asking the petitioner to accept Form ST-35. This was a totally different and contradictory stand. Earlier the respondent vide its letter dated January 24, 1991, had asked the petitioner to collect Form C but by this telegram it offered ST-35. No Explanationn was given of this change in the offer.

11. It was for the first time in reply to the show-cause notice that the respondent took up the plea about inadvertently mentioning Form H or that the goods supplied by the petitioner were meant for domestic use. The fact that the letter dated January 15, 1991, was issued by an unauthorised person and inadvertently was also taken for the first time in reply filed in this court. Earlier this fact was not brought to the notice of the petitioner nor was this objection taken even in the reply to the statutory notice issued by the petitioner.

12. The enumeration of the above facts supported by the documentary evidence placed on record prima facie show that the defense set up by the respondent is an afterthought. The purchase order is dated May 3, 1988, whereas it was on May 11, 1985, for the first time in its reply that the respondent set up the case of inadvertent mistake in the purchase order regarding 'Form H'. The contention of the respondent that the company immediately brought to the notice of the petitioner about the mistake is belied from the documents placed on record. These documents clearly show that from 1988 till 1993 when the company filed a reply to the show-cause notice, it never brought to the notice of the petitioner that the goods were used in the domestic market or that those were not meant for export. Even in reply to the petitioner's statutory notice the factum of mistake or inadvertent mentioning of Form H in the purchase order was not pointed out. Mr. Chaudhary, counsel for the respondent was repeatedly asked at the Bar to produce any letter in the court showing that this mistake was brought to the notice of the petitioner during the currency of the contract or immediately thereafter. But he could not show or produce any document in this regard. On the contrary he relied on the letter issued by the company dated January 24, 1991. The reading of this letter does not even remotely suggest that the respondent company indicated

to the petitioner that the goods purchased were to be utilised for the local market and not for an export unit. The contention of counsel for the company that the offer of Form C was given after discussion had not been prima facie substantiated with any document. This argument, therefore, has no force in view of the letter dated January 29, 1991, written by the petitioner to the respondent. The allegation of discussion by the respondent with the petitioner had been categorically denied by the petitioner, vide its letter dated January 29, 1991. In fact the stand or plea of the respondent has not been consistent. As already discussed above till January 15, 1991, the respondent had been assuring the petitioner that Form H would be supplied. Then it changed its stand, vide letter dated January 24, 1991. By this letter, the respondent offered Form C instead of Form H. The respondent took a somersault when, vide telegram dated February 4, 1991, it offered to supply Form ST-35. This shows that the respondent company had not been consistent in its defense. Counsel for the respondent argued that there was genuine confusion in the respondent as to whether these components would be used for export-oriented units or for the domestic market. Since the respondent company had been manufacturing computers for export as well as for the domestic market, hence due to confusion Form H was written. But since the goods purchased were used for manufacturing computers for the domestic market, Form H could not be supplied. This argument may appear very convincing but nothing has been placed on record to substantiate that goods purchased from the petitioner were used for the domestic market. The petitioner supplied components for manufacturing computers. It was for the respondent to indicate whether those were used for the domestic market. This is a matter of fact which cannot be established by oral arguments. Till date not even prima facie evidence has been placed on record to establish this fact. The company under law was to adduce prima facie evidence in support of its defense. This unsubstantiated defense, to my mind, would amount to neglect of the payment of debt. There is no denying the fact that there is a presently payable debt which was assessed by the Sales Tax Officer and which as per the contract is payable by the respondent company. The court has only to look for a prima facie case. The plea of defense of the respondent company that there was an amendment to the purchase order has no relevance. This was with read to subsequent orders placed. The subsequent purchase orders by the respondent on

the petitioner would not amount to amendment in the purchase order dated May 3, 1988. The subsequent transaction and the contract signed therein cannot have a retrospective effect. I also find no force in the submission of counsel for the respondent that the dispute regarding which Form was to be supplied is a bona fide dispute. Admittedly, the purchase order dated May 3, 1988, indicated that Form H was to be supplied by the respondent company. In the absence of any evidence to the contrary, it will not amount to a bona fide dispute. The last date for filing the sales tax return was January 22, 1991. The assessment order was passed on January 25, 1991, whereas the officer to give Form C was made on January 24, 1991, and that too without any Explanation as to why the petitioner should accept Form C instead of Form H. This court, at this stage, is only concerned as to whether, prima facie, a defense has been made out or not. This court is not enquiring into the quality or quantity of the debt. From the documents placed on record and the discussion above, I am prima facie of the view that the company has omitted to pay the presently payable debt without any reasonable excuse.

13. If there was any confusion to the respondent about the form to be supplied, why did it not make it clear to the petitioner at the appropriate stage. Admittedly, no hard and fast rules can be laid down in enquiring into the question of bona fide dispute with regard to any debt. It all depends upon the peculiarities of each case. Counsel for the respondent company placed reliance on the decision of this court in the case of *Agrob Anlagewbau GmbH v. Orient Ceramics and Industries Ltd.* [1986] 60 Comp Case 691. There is no quarrel with the proposition of law laid down in that case when it laid down that the winding up jurisdiction should not be allowed to be used as an instrument of arm-twisting of a corporate body or to compel it to make payment, which it would not otherwise have to make for legitimate reasons. But in this case no legitimate reason or prima facie ground has been set up, nor can it be said that the petitioner by this petition is trying to twist the arm of the company. The correspondence exchanged between the parties and placed on record shows that the plea which the company now wants to take is an afterthought, therefore, cannot be termed as raising a bona fide dispute. Counsel for the respondent also placed reliance on the decision of the Punjab and Haryana High Court in the case of *State Trading Corporation of India Ltd. v. Punjab*

Tanneries Ltd. [1989] 66 Com Cas 634. The ratio of that case has no applicability to the facts and circumstances of this case. The court in that case was dealing with a case where the petitioner had filed a civil suit besides the company petition, but that is not the cases in the case in hand. Similarly, the decision of the Orissa High Court, relied on by the respondent in the case of Misrilal Dharamchand P. Ltd. v. B. Patnaik Mines P. Ltd. [1978] 48 Com Cas 494, has no applicability to the facts of this case.

14. In fact, I find that the respondent has not prima facie set up a bona fide dispute. The plea sought to be raised had not been raised at any earlier stage nor can it be called bona fide. In view of the circumstances discussed above, I admit the petition to hearing. Let the citation be published in the daily newspapers Statesman (English), Veer Arjun (Hindi) and the Delhi Gazette. However, it is made clear that the publication be not issued for a period of two months in order to enable the company to pay its debts to the petitioner. If the debts are not paid within this period of two months, then the petitioner will be at liberty to take out the citation for publication in accordance with law.

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