MANU/MH/1268/2006

Equivalent Citation: [2008]145CompCas823(Bom), (2009)20VST162(Bom)

IN THE HIGH COURT OF BOMBAY

Company Petition No. 570 of 2005

Decided On: 02.03.2006

Appellants: **Uma Kumar**
Vs.
Respondent: **Reunion Electrical Manufacturers P. Ltd.**

Hon'ble Judges/Coram:
S.J. Vazifdar, J.

Counsels:
For Appellant/Petitioner/Plaintiff: S.C. Naidu and B.H. Gada, Advs., i/b., C.R. Naidu and Co.

For Respondents/Defendant: Birendra Saraf, Adv., i/b., V. Deshpande and Co.

Case Note:
Company - Winding-up - Sections 433 and 434 of the Companies Act, 1956 - Petitioner company sought for winding-up of Respondent-company under Sections 433 and 434 of the Act - Hence, this Petition - Held, it was crucial to note that company did not really deny its liability totally but denied that it was liable in sum demanded by Petitioner - However, company expressly stated that account in respect of transactions during relevant period was required to be reconciled - Further, Petitioner was called upon to convene a meeting for reconciliation of accounts by independent expert - Moreover, still did it go stating that company reserved "their right to give detailed and suitable reply to notice after reconciliation of accounts - Acknowledgment was made before statutory period had run out - In letter there was no assertion that on an account being taken, balance would considerably be in favour of company - There was nothing to indicate that Petitioner failed to have account reconciled as suggested - Offer was also not given to have account settled by an independent person - Thus, Company had no intention of paying its debts and therefore chose to do nothing in this regard - Hence, company would pay a sum to Petitioner with interest before wind-up - Petition allowed.Ratio Decidendi"Company shall be wind-up only after all its liabilities are clear."

JUDGMENT

S.J. Vazifdar, J.

1. This is a petition under Sections 433 and 434 of the Companies Act, 1956, seeking winding-up of the respondent-company.

2. According to the petitioner, the company is indebted to her in the sum of Rs. 13,19,853.48 together with interest thereon. The petitioner carries on business as the sole proprietor in the firm name and style of M/s. Kandhan Electricals and Engineers. The petitioner's case is that pursuant to purchase orders placed by the company she

supplied goods on the terms and conditions contained in 58 invoices, the details whereof are tabulated in paragraph 8 of the petition. The invoices were issued during the period April 9, 2001 to November 3, 2001.

The only defence is that the claims are barred by limitation as the petition was filed on August 9, 2005.

3. By its letter dated November 5, 2001, the company acknowledged its liability in the sum of Rs. 6,61,540.27 by a letter dated November 22, 2001, the company assured the petitioner that it would make payment at the earliest and expressed its gratitude for the co-operation extended by the petitioner. By a letter dated April 19, 2002, the company assured the petitioner that it would initiate action shortly to clear all her dues and regretted the inconvenience caused to the petitioner.

These letters however do not save the bar of limitation for the petition was filed on August 9, 2005, i.e., more than three years after the last acknowledgment dated April 19, 2002.

4. The petitioner served a statutory notice by her advocate's letter dated April 29, 2005. In reply to the statutory notice, the company's advocate addressed a letter dated June 9, 2005.

5. The reply contained bare denials. The company has gone to the extent of denying that it had assured the petitioner that it would make payment of the outstanding amounts. In view of the letters of the company, referred to above, it is clear that the denials are ex-facie false. The affidavit in reply filed on behalf of the company is, with good reason, guarded. The denials in the affidavit have not gone to the same extent obviously for fear of being cited for perjury. However, paragraphs 3 and 5 of the letter are important as I have come to the conclusion that the contents thereof constitute an implied promise by the company to pay the amount which may be found due on taking accounts as demanded by the company. Paragraphs 3 and 5 of the letter dated June 9, 2005, read as under:

> **3.** Our clients state that the claim made in the notice under reply is absolutely false and frivolous and without any justification *and the same is required to be reconciled.* Our clients state that there is nothing due and payable by our clients to your clients as alleged.
>
> (emphasis supplied)
>
> **5.** Our clients state that without admitting the genuineness and correctness of the claim made in the letter under reply, *our clients say and submit that the accounts in respect of the transaction between the period April 1, 2001 and March 31, 2002, between our clients and your clients is required to be reconciled and thus we hereby call upon your clients to convene a joint meeting for reconciliation of the said accounts by* independent expert and thus reserve their right to give detailed and suitable reply to the said notice after reconciliation of the said accounts.
>
> (emphasis supplied)

The petitioner by her advocate's letter dated July 1, 2005, furnished the documents called for by the company's advocate's letter dated June 9, 2005, to enable reconciliation of the accounts. It is important to note that even after receipt of these documents the company did not dispute the quantum of the petitioner's claim.

6. Mr. Saraf, learned Counsel appearing on behalf of the company, submitted that the petitioner's dues were barred by limitation. Even the last invoice dated November 3, 2001, would be barred by limitation as the petition was filed only on August 9, 2005.

7. Mr. Naidu, learned Counsel appearing on behalf of the petitioner, submitted that the bar of limitation was saved on two counts. Firstly, he stated that the company has issued forms C under the provisions of the Central Sales Tax Act. Secondly, the bar of limitation is saved in view of what was stated on behalf of the company in paragraphs 3 and 5 of the letter dated June 9, 2005, extracted above. I have come to a conclusion against the petitioner on the first point but in her favour on the second.

8. Whether the issuance of forms C constitutes an acknowledgment of liability so as to save the bar of limitation in view of Section 18 of the Limitation Act, is the first question that falls for consideration. I have come to the conclusion that the execution or issuance of a form C by itself does not save the bar of limitation under Section 18.

9. Section 18 of the Limitation Act, 1963, reads as under:

> **18.** Effect of acknowledgment in writing.-(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.
>
> (2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed ; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.
>
> Explanation-For the purpose of this section,-
>
> > (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;
> >
> > (b) the word 'signed' means signed either personally or by an agent duly authorised in this behalf, and
> >
> > (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

10. Before dealing with the nature of a form C, it would be useful to consider the ambit of Section 18 of the Limitation Act. The principles, at least, while considering the nature of a form C qua the question of limitation, are clear from two judgments of the Supreme Court.

11. In Shapoor Fredoom Mazda v. Durga Prosad ChamariaMANU/SC/0254/1961 : [1962]1SCR140 , the Supreme Court held (page 1238):

(6) It is thus clear that acknowledgment as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. *The statement on which a plea of acknowledgment is based must relate to a present subsisting liability* though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. *The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement.* In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. *Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or farfetched process of reasoning.* Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter.

(emphasis supplied)

12. In Tilak Ram v. Nathu MANU/SC/0321/1966 : AIR1967SC935 , the Supreme Court held as under (page 939):

(9) It is not, however, necessary to go into the details of these decisions or to decide which of the two views is correct as this Court in Shapoor Fredoom Mazda v. Durga Prosad Chamaria MANU/SC/0254/1961 : [1962]1SCR140 , has examined the contents and the scope of Section 19. After first stating the ingredients of the section, this Court stated that an acknowledgment may be sufficient by reason of Explanation 1 even if it omits to specify the exact nature of the right. Nevertheless, the statement on which a plea of acknowledgment is based must relate to a subsisting liability. The words used in the acknowledgment must indicate the jural relationship between the parties and it must appear that such a statement is made with the intention of admitting that jural relationship. Such an intention, no doubt, can be inferred by implication from the nature of the admission and need not be in express words. It was then observed:

> If the statement is fairly clear then the intention to admit the jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement.

The court also observed that stated generally the courts leaned in favour of a liberal construction of such statements though that would not mean that where no admission was made one should be inferred or where a statement was made clearly without intending to admit the existence of jural relationship such as intention would be fastened on the maker of the statement by an involved or a far-fetched process of reasoning. Similarly, while dealing with an admission of a debt, Fry L.J., in Green v. Humphreys [1884] 26 Ch. D 474, observed that an acknowledgment would be an admission by the writer that there was a debt owing by him either to the receiver of the letter or to some other person on whose behalf the letter was received but that it was not enough that he referred to a debt as being due from somebody. In order to take the case out of the statute there must, upon a fair construction of the letter read by the light of the surrounding circumstances, be an admission that the writer owed the debt.

The right of redemption no doubt is of the essence of and inherent in a transaction of mortgage. *But the statement in question must relate to the subsisting liability or the right claimed. Where the statement is relied on as expressing jural relationship it must show that it was made with the intention of admitting such jural relationship subsisting at the time when it was made.* It follows that where a statement setting out jural relationship is made clearly without intending to admit its existence an intention to admit cannot be imposed on its maker by an involved or a far-fetched process of reasoning.

(emphasis supplied)

13. While considering the nature of a form C it is necessary first to note the provisions of Section 8 of the Central Sales Tax Act, 1956, which read as under:

8. Rates of tax on sales in the course in inter-State trade or commerce.-(1) Every dealer, who in the course of inter-State trade or commerce-

(a) sells to the Government any goods ; or

(b) sells to a registered dealer other than the Government goods of the description referred to in Sub-section (3) ;

shall be liable to pay tax under this Act, which shall be four per cent. of his turnover . . .

(4) The provisions of Sub-section (1) shall not apply to any sale in the course of inter-State trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner-

(a) a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority ; or

(b) if the goods are sold to the Government, not being a registered dealer, a certificate in the prescribed form duly filled and signed by a duly authorised officer of the Government:

Provided that the declaration referred to in Clause (a) is furnished within the prescribed time or within such further time as that

authority may, for sufficient cause, permit.

The form prescribed under Section 8(4)(a) is in form C which, in turn, is prescribed under Rule 12(1) of the Central Sales Tax (Registration and Turnover) Rules, 1957, which provides that the declaration and the certificate referred to in Sub-clause (4) of Section 8 shall be in forms C and D, respectively.

14. It is now necessary to see the contents of a form C. Form C is a declaration issued by the purchaser in order to enable the seller to avail of the reduced rate of Central Sales Tax. In the absence of a form C the seller would be required to pay the higher rate specified in Section 6 of the Central Sales Tax Act. A form C requires details such as the name of the issuing State, the office of issue, the date of issue, the name of the purchasing dealer, his registration certificate number and the date from which the registration was valid. It also requires an endorsement to the seller certifying that the goods ordered in the purchase order and supplied as per the bill/cash memo/challan No. are for resale/use in the manufacture/processing of goods for sale/use in mining/ use in generation/distribution of power/packing of goods for sale/resale, as the case may be, and that the same are covered under the purchase registration certificate, issued under the Central Sales Tax Act. The form also certifies that the purchaser is not registered under Section 7 of the Act in the State in which the goods are to be delivered. The form further requires the name and address of the purchasing dealer. The form is to be signed, declaring that the statements therein are to the best of the knowledge and belief of the person signing the same.

The primary purpose for the issuance of a form C is to enable the seller to avail of the reduced rate of the sales tax under Section 8(1). There is no other purpose for which the form is issued. A form C was admittedly issued by the respondent.

15. A form C, no doubt, is evidence of a contract of sale having been entered into. The form may, in conjunction with other facts and circumstances, evidence that the goods were, in fact, sold and delivered by the seller to the purchaser and the price at which the goods were sold and delivered. In substance, therefore, the form would evidence the fact/existence of an agreement to sell as well as the price at which the goods were agreed to be sold.

16. However, neither Section 8 nor Rule 12 or even form C for that matter, require the purchaser to declare expressly that he has paid the price of the goods in respect of which form C is issued. Thus, it is not possible to infer that the execution and issuance of form C by a purchaser impliedly reflects on the question of payment by the purchaser to the seller in respect of the transactions referred to therein.

17. Form C does not contain expressly or even by implication, the acknowledgment of liability in praesenti in respect of the transactions referred to therein. The execution and issuance of form C does not, to use the words in Shapoor Fredoom Mazda's case MANU/SC/0254/1961 : [1962]1SCR140 , relate to a present subsisting liability. Nor does the execution and issuance of form C indicate that the statements therein were made with an intention to admit a subsisting liability. In other words, though, a form C certainly indicates the existence of a jural relationship at some point of time, of seller and purchaser, it does not acknowledge the existence, in praesenti of a debtor-creditor relationship or the existence of a liability on the date of the making/execution of the form C.

18. The courts are entitled to look at the surrounding circumstances, as held by the

Supreme Court in Shapoor Fredoom Mazda's case MANU/SC/0254/1961 : [1962]1SCR140 . I am however unable to find any circumstances surrounding the issuance of form C which would indicate that the same was issued by the company with the intention expressly or impliedly to admit a subsisting liability present at the time of the issuance thereof.

19. Mr. Naidu relied upon a letter dated September 19, 2003, addressed by the company to the petitioners merely referring to the issuance of form C and the details of the bills in respect whereof it was issued. The bills referred to are of the aggregate value of Rs. 3,26,530.27. The company also requested the petitioners to issue E-1 forms.

20. The letter does not carry the petitioner's case further. It does not say anything more than what was stated in the form C. The letter does not any more than form C itself, indicate the existence of a liability present and subsisting as on the date of the letter.

21. In the circumstances, though much I was inclined initially to lean in favour of a liberal construction holding the execution of a form C to be an acknowledgment of liability, upon further reflection, I am not inclined to do so. If I were to lean any further despite what I have observed above, I would fall into the error warned against by the Supreme Court in the above cases.

22. There is yet another difficulty in the petitioner's way in so far as her case is based on the C forms. As Mr. Saraf rightly pointed out not only have the C forms not been annexed but even the dates of the C forms have not been mentioned.

23. This brings me to the second ground on which the bar of limitation is said to be saved. It is based on paragraphs 3 and 5 of the letter dated June 9, 2005, which I have extracted earlier. The letter cannot be of any assistance to the petitioner as a mere acknowledgment of liability under Section 18 of the Limitation Act for it was executed even after the extended period of limitation. Prior thereto, the last acknowledgment on record is the one contained in the letter dated April 19, 2002, by which the company informed the petitioner that it would initiate action shortly to clear her outstanding dues.

24. However, to my mind, the letter dated June 9, 2005, and in particular, paragraphs 3 and 5 thereof, constituted a promise albeit an implied promise by the company to pay the petitioner the amounts, if any, that may be found due upon the account being reconciled. It is crucial to note that the company did not really deny its liability totally. It denied that it was liable in the sum of Rs. 7,67,646.21 demanded by the petitioner. The company however did not stop there. The company then expressly stated that the account in respect of the transactions during the relevant period "is required to be reconciled". The letter goes a step further and calls upon the petitioner "to convene a meeting for reconciliation of the said accounts by independent expert." And further still did it go stating that the company reserved "their right to give detailed and suitable reply to the said notice after reconciliation of the said accounts."

25. The question that first comes to mind is-why did the company call upon the petitioner to reconcile the accounts? The obvious answer is-to arrive at the amount that the petitioner was actually entitled to. The question that then comes to mind is-why did the company want the correct amount to be arrived at ? The logical answer is that the company impliedly thereby agreed to pay only that amount which was found

to be due and payable on a reconciliation of the account.

26. I did not hear Mr. Saraf to suggest that there was any other reason for what the company stated in paragraphs 3 and 5 of the letter. Indeed, there cannot be any other reason on a fair reading of the letter itself. The letter does not deny the fact of the transactions having been entered into. The letter does not state that upon a reconciliation of the accounts, no amount will be found due and payable. If, according to the company, upon reconciliation, no amount would be due and payable, it would not have reserved to itself a right to give a suitable answer after an examination of the account.

27. The letter dated June 9, 2005, therefore on a fair and correct reading, contained an implied promise on the part of the company to pay the amount, if any, found due upon reconciliation of the account. If this conclusion is correct, the petitioner's claim even if barred by limitation is saved under Section 25(3) of the Indian Contract Act, 1872, which reads as under:

> **25.** Agreement void, if made without consideration.-An agreement made without consideration is void, unless- . . .
>
> (3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.
>
> In any of these cases, such an agreement is a contract.

I believe the approach adopted and the view taken by me finds support from authorities.

28. In Maniram v. Seth Rupchand [1906] 33 IA 165, the appellant was the adopted son of one Motiram. Motiram and the respondent/defendant were money dealers and had dealings with one another from July 21, 1891 to May 12, 1898 and at the close thereof, the respondent owed Motiram Rs. 5841.9.1 on account of principal and Rs. 2801.2.0 on account of interest. The only defence was that the suit which was brought on September 5, 1901, was barred by the lapse of time.

29. The defence of limitation was met on the basis of an affidavit filed by the respondent, Rupchand, in proceedings for the probate of Motiram's will. The respondent was one of the trustees named under the will who had applied for probate. The application was opposed by the other trustees, inter alia, on the ground that Rupchand was indebted to Motiram. In reply to this objection, Rupchand stated in a reply dated September 20, 1899, as follows:

> The applicant Rupchand Nanabhai is a big Mahajan of Burhanpur paying Rs. 106 as Income Tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate.

30. The Privy Council held that the above document saved the bar of limitation under Section 19 of the Indian Limitation Act, 1877 (Section 18 of 1963 Act) as it was executed during the period of limitation. The findings of the Privy Council during the course of the judgment support the conclusion I have arrived at. It was held as under:

There is, therefore, a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that whoever on the account should be shown to be the debtor to the other was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representatives if the balance should be ascertained to be against him.

The question is whether this is sufficient by the Indian law to take the case out of the statute.

It has been already pointed out that the acknowledgment was made before the statutory period had run out. Thus, one requisite of Section 19 is complied with. The necessity of signature by the party to be charged is also complied with. The acknowledgment is not addressed to the person entitled, but according to the 'Explanation' given in Section 19 this is not necessary. We have, therefore, the bare question of whether an acknowledgment of liability, if the balance on investigation should turn out to be against the person making the acknowledgment, is sufficient.

Their Lordships can see no reason for drawing any distinction in this respect between the English and the Indian law. The question is whether a given state of circumstances falls within the natural meaning of a word which is not a word of art, but an ordinary word of the English language, and this question is clear of any extraneous complications imposed by the statute law of either England or India.

In a case of very great weight, the authority of which has never been called in question, Mellish L.J., laid it down that an acknowledgment to take the case out of the statute of limitations must be either one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed. *River Steamer Co.: Mitchell's Claim In re* L. R. 6 Ch. App. 822. *An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do. There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that whoever is the creditor shall be paid when the condition is performed by the ascertainment of a balance in favour of the claimant. It is a case of the third proposition of Mellish L.J., a conditional promise to pay and the condition performed.*

There was, therefore, on September 28, 1899, a sufficient acknowledgment to give a new period of limitation from the date of the acknowledgment, viz., September 28, 1899, and the present suit having been commenced on September 5, 1901, is within any period of limitation that can be applicable.

The only reason given is that it would require a considerable stretch of the imagination to place upon it the meaning that there was a right to have the account taken, thereby implying a promise to pay. It has not, however, been

> argued that there was a promise to pay in any event, and the learned judge does not seem to have considered the meaning, which appears to their Lordships to be the natural one, that the words import an admission of liability if the balance should prove to be against the respondent coupled with the fulfilment of that condition a state of things which in all reason and sound sense places the acknowledgment upon the same footing as an acknowledgment unconditional in the first instance, from which, in English law, a promise to pay has always been inferred. The Indian Limitation Act, Section 19, however, says nothing about a promise to pay, and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition which if fulfilled stand upon precisely the same footing.
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> (emphasis supplied)

31. As the acknowledgment was in any event within the period of limitation, the Privy Council held that the bar of limitation was saved under Section 19 of the Indian Limitation Act, 1877 (Section 18 under the Limitation Act of 1963). In the present case the letter dated June 9, 2005, was not within the period of limitation and therefore the petitioner cannot avail the provisions of Section 18 of the Limitation Act, 1963.

32. The question however remains whether the letter dated June 9, 2005, contained an implied promise to pay. In that regard, the difference between the present case and Maniram's case [1906] 33 IA 165 is only this. The admission in Maniram's case [1906] 33 IA 165 was to the existence of an open and current account. The Privy Council held that the legal consequence would be that, at that date, the parties to the account had a right as against the other to an account. In the case before me, there may not be an open and current account between the petitioner and the company and the petitioner may not have been entitled, in the absence of the letter dated June 9, 2005, to an account. That however, to my mind, would make no difference. The company expressly insisted upon the account being taken and reconciled and to that end called upon the petitioner to furnish details and documents which the petitioner did. There really is therefore in subsistence, no difference between Maniram's case [1906] 33 IA 165 and the present case. In the former, the party was entitled to an account as a legal consequence of there being an open and current account. In the present case, the petitioner is entitled to an account in view of the respondent having not merely invited but having demanded expressly a reconciliation of the account. The inference therefore must follow in the present case, as it did in Maniram's case [1906] 33 IA 165 that by calling upon the petitioner to reconcile the accounts, the company impliedly promised to pay the amounts, if upon reconciliation, any were found due. The letter dated June 9, 2005, saves the bar of limitation, if any. If any, I say as, the letter constitutes a promise to pay a time-barred debt which under Section 25 of the Indian Contract Act, 1872, does not require to be supported by consideration and a fresh period of limitation would start from that date.

33. The ratio and not the conclusion in the case of River Steamer Co.: Mitchell's Claim In re L.R. 6 Ch. App. 822 is important for the letter relied upon as saving the bar of limitation was in material respects, different from the letter dated June 9, 2005. Though it was not contended otherwise before me, I may only mention that the letter there expressly stated that on an account being taken, the balance would considerably be in the defendant's favour and called upon the plaintiff to refer the

matter to arbitration. It was further stated in the letter there that the defendant had long since named their arbitrator but could not get the plaintiff to appoint their arbitrator and the reference was never therefore proceeded with. Lastly, the letter was also without prejudice.

34. In the letter dated June 9, 2005, there is no assertion that on an account being taken, the balance would considerably be in favour of the company. There is nothing to indicate that the petitioner failed to have the account reconciled as suggested. Indeed, the petitioner immediately forwarded all the documents called for by the company. The offer was to have the account settled by an independent person. No such person was suggested or appointed. The petitioner's recourse to have the issue decided in a court of law would in these circumstances, conform to the decision being made by an independent person.

This leaves me with the last aspect of the matter which really is a consequence of the letter dated June 9, 2005 and one on merits.

35. The accounts were not reconciled between the parties. By the letter dated June 9, 2005, the company called upon the petitioner to furnish all the invoices, lorry receipts/delivery challans and the acknowledgments made by the company confirming the petitioner's claim. The petitioner under cover of her advocate's letter dated July 1, 2005, forwarded the same. Thereafter, the company did not dispute or deny the quantum claimed by the petitioner. Even assuming that the inspection was incomplete and that the copies of the documents were illegible, nothing prevented the company from checking the same with its records. The fact of the matter is that the company had no intention of paying its debts and therefore chose to do nothing in this regard. Even in the affidavit in reply, the company did not give any details regarding any reconciliation carried out by it.

In view of the aforesaid correspondence and the admissions contained therein, I see no reason to hold that an amount less than that an amount of Rs. 6,61,540.27 confirmed by the company by the letter dated November 5, 2001, is due and payable to the petitioner.

36. At this stage, for the purpose of this order, I would add to that figure interest only at the rate of 9 per cent, per annum and not at the rate of 20 per cent, per annum, claimed by the petitioner. I would further instead of admitting the petition forthwith, first afford the company an opportunity of paying the amount.

37. In the circumstances, the following order is passed:

(i) In the event of the company paying to the petitioner a sum of Rs. 9,00,000 within twelve weeks from today, the petition to stand dismissed. This is without prejudice to the petitioner's right to claim a higher amount by way of interest or otherwise by adopting independent proceedings.

(ii) In case of failure on the part of the company to pay the aforesaid amount as aforesaid, the petition shall stand admitted and to be advertised in The Free Press Journal, Navshakti and Maharashtra Government Gazette. The petitioner to deposit an amount of Rs. 2,000 with Prothonotary and Senior Master of this Court within four weeks from the date of default.