

(2018) 09 DEL CK 0266

In the Delhi High Court

Case No : Civil Original Petition No. 297 Of 2016

Everdigm Corp. & Anr

APPELLANT

Vs

SG Enterprises & Equipment Private Limited

RESPONDENT

Date of Decision : 10-09-2018

Acts Referred:

Companies Act, 1956 — Section 433(e), 434, 434(1), 439

Citation : (2018) 09 DEL CK 0266

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Judgement

JAYANT NATH, J. (ORAL)

1. This petition is filed under section 433(e), 434(1) (a) and 439 of the Companies Act, 1956 seeking winding up of the respondent company. It is the case of the petitioner that petitioner No.1 entered into a Distributorship Agreement with respondent company on 27.10.2011. It is claimed that

between February 2013 to October 2013 the petitioner No.1 supplied goods to the respondent company which were duly received and various

commercial invoices were raised by petitioner No.1. Reliance is placed on communications issued by the respondent to petitioner No.1 from 8.1.2014

to 20.5.2014 admitting its liability. As there has been defaults on the part of the respondent on 9.3.2015 petitioner No.1 assigned the debt against the

company to petitioner No.2. On 9.9.2015 a statutory notice under section 434 of the Companies Act, 1956 was sent. Respondents have disputed their

liability in the reply dated 3.10.2015.Â

2. I have heard learned counsel for the parties. Learned counsel for the petitioner has taken me through the communications dated 8.1.2014, 12.8.2014

and 6.10.2014 to state that the respondent has admitted its liability. He has pointed out that the dues payable as on today are USD 411,108.40. He submits that goods were regularly supplied to the respondent. There are in all 94 invoices from 18.05.2009 to 20.6.2013 which have been placed on record.

3. Learned counsel appearing for the respondent has made the following submissions:-

(i) He submits relying upon clause 9 of the Distributorship Agreement dated 4.1.2010 and other similar agreements that the petitioner could not assign its debt to a third party without the prior consent of the other party. He submits that petitioner No.1 has received its dues from petitioner No.2.

Hence, the present winding up petition would not lie.

(ii) Reliance is placed on arbitration agreement between the parties as contained in the agreement to state that the remedy available to the petitioner was to commence arbitration proceedings. Hence, the present winding up proceedings would not lie.

(iii) He states that the present winding up petition was filed in 2016 and issue of limitation would arise.

4. I may first look at the first submission of learned counsel for the respondent. Clause 9 of the Distributorship Agreement reads as follows:-

Article 9 RIGHTS OF THE PARTIES TO THIS AGREEMENT

This Agreement and all terms and conditions hereof shall be personal to the parties and shall be binding upon any successor in title to the parties and neither party may assign, charge, subcontract or otherwise deal with any right or obligation under this Agreement without the prior written consent of the other party.

5. As per the above clause the parties cannot assign, charge, sub-contract or otherwise deal with any right or obligation under the Agreement without

the prior written consent of the other party. The clause relates to performance of terms and conditions of the contract. In the present case the facts

are that on account of default in payment by the respondent the petitioner No.2 the insurance company with whom petitioner No.1 had taken out the

insurance has reimbursed petitioner No.1. Now the present winding up petition has been filed by petitioner No.1 and 2. Firstly, the act of assigning

the debt has taken place on account of the default of the respondent. The

respondents cannot take advantage of its own default and now claim that it is not liable to pay on account of breach of Article 9 of the Agreement. Secondly, in any case petitioner No.1 is a party to the present proceedings.Â

Petitioner No. 1 is seeking its dues from the respondent. On receipt of the dues, petitioner No. 1 may pay petitioner No.2. Respondent cannot have objection to the same. There is no merit in the said plea of assignment of the contract.

6. As far as the plea of arbitration clause is concerned it is settled law that a plea for winding up of a company cannot be subject matter of an arbitration agreement. Any order of winding up operates in rem and an Arbitrator would not have any power to pass such an order. Hence, the arbitration clause does not debar filing of the present petition.Â

Reference in this context may be had to the judgment of Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Ors., (2011)5 SCC 532

where the Supreme Court held as follows:-

â??35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and

tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual,

which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals

is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively

for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and

tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the

court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon

arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal

offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv)

insolvency and windingup matters; (v) testamentary matters (grant of probate,

letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.â??

7. Regarding the plea of limitation, I may look at the acknowledgement which has been relied upon by learned counsel for the petitioner. On 8.1.2014 the respondent has written to the petitioner accepting outstanding liability of USD 423,749. Relevant communication reads as follows:-

â??Dear Sir,

This is in reference to the total outstanding payment to Everdigm, we hereby inform you that the total amount due is USD 423749.30.

We were not able to release the above payment on time since our payments got stuck up with the customers (Flood Disaster) and still we are expecting to get the fund released in due course.

Also due to abnormal increment of dollar prices reduced our margin to nil level, which was one of the major factors for our financial hardship.

During same period the only good news for us that we are selling SANY excavators in good quantity leads in making good margins.

Hence, we expect in future to overcome the financial crisis with the help of SANY excavators & TORSA Crusher (New Distributorship)

However, we would make the payment for outstanding amount as follows:

- 1) USD 243808 40 on or before 28.02.2014
- 2) USD 12640.90 on or before 31.3.2014

We would like to release the balance amount in four instalments as approved by you, hereby making our account regularise for forthcoming shipments.

Sir I have more than 30 yrs. Plus of experience of construction industry and have worked in Ltd. company. Out of my experience the present situation is overwhelming & on positive track which will lead us to overcome from this situation in coming months.

In future there will be no question of delay in payment as the breakers would be lie in your warehouse in New Delhi only and we will get it cleared as and when required.

Looking forward for your kind support on the same.

For SG Enterprises & Equipments Pvt. Ltd.

-sd-

Navin Taxali,

Head-Accounts & Finance

8. To the similar effect is the communication dated 12.8.2014 where the outstanding debt is gain acknowledged. Similar communication is issued on

6.10.2014 where again a debt is admitted.

9. Hence, on 6.10.2014 respondents have acknowledged their debt. The winding up petition is filed in 2016 which would be within the period of

limitation.

10. I may, at this stage, only note that learned counsel for the respondent has pointed out that the communication dated 6.10.2014 was written on the

instructions of the petitioner. Reliance is placed on communication dated 28.8.2014 written by the petitioner to the respondent. Even if what has been

pleaded is correct it does not take away the fact that on the instructions from the petitioner the respondent has admitted the dues. It is also an admitted

fact that despite these communications no worthwhile payment has been made to the petitioner.

11. In my opinion, the defence raised is not bona fide. There are no reasons given as to why the debt is not payable.

12. Reference in this context may be had to the judgement of the Supreme Court in IBA Health (I) Pvt. Ltd. vs. Info-Drive Systems Sdn.Bhd., (2010)

(4) CompLJ 481 (SC) where the Supreme Court held as follows:-

17. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for

winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine

dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The

Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The

grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be

a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave

the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.â??

13. I, accordingly, admit the present petition. The Official Liquidator attached to this Court is appointed as the Provisional Liquidator. He is directed to take over all the assets, books of accounts and records of the respondent-company forthwith. The citations be published in the Delhi editions of the newspapers â??Statesman? (English) and â??Veer Arjun? (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing.

14. Petitioner shall deposit a sum Rs.75,000/- towards cost of the publication with the Official Liquidator within 2 weeks, subject to any further amounts that may be called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavour to prepare a complete inventory of all the assets of the respondent-company when the same are taken over; and the premises in which they are kept shall be sealed by him.

At the same time, he may also seek the assistance of a Valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets of the respondent-company including the bank accounts of the respondent company.

15. List on 28.01.2019.