(2016) 03 P&H CK 0112

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No. 25 of 2012 (O&M)

Hetero Drugs Limited APPELLANT

Vs

Nectar Lifesciences Limited RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

Citation : (2016) 03 P&H CK 0112

Hon'ble Judges : Amit Rawal, J.

Bench : Single Bench

Advocate : Anand Chhibbar, Senior Advocate, Lalit Thakur, Gaurav Mankotia and Vaibhav Sahni, Advocates, for the Appellant; Atul V. Sood, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Amit Rawal, J.—1. The Rules for maintaining a winding up petition are well settled as per the ratio decidendi culled out by the Hon''ble Supreme Court in Madhusudan Gordhandas and Co. Versus Madhu Woolen Industries Private Ltd., , AIR 1971 (SC) 2600. In the said judgment, it has been held that where a debt is bonafidely disputed and defence is substantial one, the Court will not wind up the company but where the defence is malafide, the Court will not act upon a defence that the company has the ability to pay the debt, but chooses not to pay that particular debt. In such circumstances, the winding up order is inevitable. The present case has to be examined on the touchstone of aforementioned two parameters, i.e., whether the dispute raised by the defence is bonafide or not, much less the liability is disputed or not.

2. In order to appreciate the aforementioned two questions posed, it would be apt to refer few facts.

3. The case set up in the present petition seeking winding up of the respondent company is that the petitioner company is a creditor of the respondent company on account of the business dealings as per their balance sheet. It has been

stated that the respondent company, vide Purchase Order bearing No. NLL/R.M./U02/086/2010-2011 dated 10.7.2010 (Annexure P-1) had placed an order with the petitioner company for supply of 3000 Kgs. @ Rs. 9500/- per unit (kg.) totalling to Rs. 2,85,00,000/- of Cefixime Trihydrate (for short "CT"). In pursuance to the order placed by the respondent company, the petitioner company supplied the requisite material against different invoices (Annexures P-2 to P-8), which are stated to have been received by the respondent company. The same are reflected in Para 6 of the petition. It has been further stated that the material supplied was sent to the respondent company through credit and the price of the material was worth Rs. 3,20,64,210/- and this fact is reflected in the provisional balance sheet of the petitioner company, which has been attached as Annexure P-10.

4. In Para 11 of the petition, it has been stated that the petitioner company had been in correspondence with the respondent company through e-mails and phone calls demanding the payment of the outstanding amount, copy of which has been annexed as Annexure P-11 collectively, but no payment had been received, which necessitated to send a legal notice dated 12.10.2011 (Annexure P-12). The said legal notice was replied by the respondent company vide letter dated 31.10.2011 (Annexure P-13), wherein the respondent company linked the issue of outstanding amount to the alleged non-supply of different product by the name "Cefpodoxime Proxetil" (for short "CP"). As per the reply, it has been stated that the respondent company suffered a loss to the tune of Rs. 3.30 crores due to non-supply of the aforementioned product and the company had to arrange the same material from a different source at a much higher rate and, therefore, the aforementioned amount has been set-off/adjusted/forfeited. It has further been stated that since the aforementioned liability has been admitted by seeking forfeiture/setting-off, the present case squarely falls within the parameters of Section 434 of the Companies Act, 1956 (for short "1956 Act"). There was no concluded contract between the petitioner company and the respondent company for supply of CP product. It has been stated that prior to sending of the legal notice, respondent company had sent a legal notice dated 28.9.2010 (Annexure P-14) stating therein that it has faced the loss to the tune of Rs. 10.00 crores on account of non-supply of CP product. The said legal notice was replied vide letter dated 22.10.2010 (Annexure P-17) denying the existence of any binding contract between the parties, much less the liability. It has been further stated that the petitioner company had duly informed the respondent company vide e-mail dated 11.8.2010 (Annexure P-15) of its inability to supply the required 6 MT of CP due to severe shortage of BF3 gas (Boron Triflouride Gas), in essence, the company was not able to supply more than 3 MT of CP limiting to 1 MT per month and despite that, respondent company had placed a Purchase Order for 6 MT of CP vide e-mail dated 18.8.2010 (Annexure P-16), thus, the petitioner company never assured regarding the supply of the said material. It is in these circumstances, the company petition, aforementioned, was filed.

5. Upon notice, the respondent company appeared and filed a detailed reply taking various preliminary objections, vis-?-vis maintainability of the petition under Sections 433(e), 434 and 439 of 1956 Act by stating therein that prior to filing of the winding up petition, the respondent company had duly notified the petitioner company way back on 28.9.2010 regarding the contractual breaches by the petitioner company and failure to honour the representations, warranties and commitments, resulting into causing of huge financial loss. It has also been stated that the petitioner company failed to comply with the legal notice (Annexure P-14) and in this regard, the respondent company filed a civil suit on 15.12.2011 (Annexure R-1) and the present petition is a counter blast to the legal notice and, thus, as per the settled law, winding up petition cannot be entertained where the alleged debt is disputed. It has also been stated that the petitioner company has withheld the factum of filing of the suit as the winding up petition was filed on 22.2.2012 and the suit had been filed on 19.12.2011. Notice of motion in the present petition was issued on 17.7.2013, whereas the written statement in the civil suit had been filed on 17.12.2013. Along with the legal notice, various correspondences, alleged to have been exchanged between the parties, have been annexed.

6. Mr. Anand Chhibbar, learned Senior Advocate assisted by Mr. Lalit Thakur, Advocate, appearing on behalf of the petitioner company, in support of the aforementioned submissions, submits that as per Para 16 of the legal notice dated 31.10.2011 (Annexure P-13), which is reply to the legal notice dated 12.10.2011 (Annexure P-11), the respondent company had admitted the liability of Rs. 3,20,64,210/- by alleging that it had suffered a loss of Rs. 3.30 crores and, therefore, the said amount has been adjusted/forfeited. For the sake of brevity, Para 16 of the legal notice (Annexure P-13) reads thus:--

"16. That in the circumstances, my clients have adjusted/forfeited the sum of Rs. 3,20,64,210/- and the same is not payable to you. On the contrary, my clients have suffered a direct loss of Rs. 3,30,00,000/- on account of the difference in price of material not supplied by your clients despite various reminders by my clients and assurances by your clients''. Therefore, my clients dispute and deny the claims raised in the notice under reply."

7. He further submits that in pursuance to the order dated 24.2.2012 of this Court, the petitioner company was directed to file a specific affidavit as to whether the Purchase Order dated 17.8.2010 for supply of CP @ Rs. 12,250/- per Kg. was ever received from the respondent company and if yes, what was the reply sent and in compliance of the aforementioned order, an affidavit dated 21.3.2012 (at page 172 of the paper book) has been filed, wherein it has been stated that various e-mails dated 26.7.2010, 27.7.2010, 29.7.2010, 2.8.2010 and 10.8.2010 were exchanged between the petitioner company and the respondent company for supply of CP, where it was specifically mentioned that the price of the drug was @ Rs. 12,500/- per kg. vide e-mail dated 11.8.2010, which was much subsequent to the Purchase Order dated 10.7.2010 for supply of

3000 Kgs. of CT, for which the supplies had been made by the petitioner company by 29.7.2010. Various e-mails have also been extracted. He, thus, submits that it is a clear cut case of admitted liability and since the respondent company has failed to discharge the obligation, the defence raised is a malafide one, much less an after-thought and, therefore, the second rule is applicable and the judgment cited supra would be applicable and the company petition be ordered to be admitted.

8. Mr. Atul V. Sood, learned counsel appearing on behalf of the respondent company submits that the defence raised in the present petition is a bonafide as it is a case of set-off, inasmuch as that the respondent company vide e-mail dated 17.8.2010 issued a Purchase Order dated 16.8.2010 of 6 MT of CP @ Rs. 12,250/- per Kg., which was in pursuance to various correspondences exchanged between the parties starting from Page 226 of the paper book, the details of which are given herein under:--

"1) On 27.7.2010, the petitioner sent an e-mail to the respondent company regarding the basic rate of CP at the rate of Rs. 12750/- per Kg.+ED 10.30% +CST 2% against form ''C'' and delivery as per schedule and the payment to be made in 60 days;

2) Vide e-mail dated 27.7.2010, the petitioner company stated that it would not be possible for them to offer less than given quote. For the sake of brevity, contents of the letter dated 27.7.2010 and again letter date 27.7.2010 are reproduced herein below:--

9. He further submits that the aforementioned correspondences leave no manner of doubt of concluded contract and since the petitioner company did not supply the agreed material, the respondent company suffered losses and for that, it had purchased the material from other source at a higher price and for that, a civil suit claiming recovery/damages of Rs. 3.30 crores has been filed by forfeiting the amount of Rs. 3.30 crores and, therefore, the liability is disputed and cannot be adjudicated in a summary manner.

10. He further submits that as per the reply dated 22.10.2010 submitted in response to the legal notice dated 28.9.2010, the petitioner company, for the first time, raised the dispute of not conveying its acceptance. In fact, they volte-faced from the previous stand as noticed above and in this regard, he has drawn the attention of this Court to the contents of the reply dated 22.10.2010 and urges this Court for dismissal of the petition.

11. In support of his contentions, he has relied upon the following judgments to contend that in a winding up petition, set-off is permissible, in essence, it is permissible under law and it would not invite the Company Court to pass an order of winding up of the company:--

"1) Martin & Harris Pvt. Ltd. Versus Organon (India) Pvt. Ltd., , [2014] 187 CompCas 272 (Cal);

2) Kuoni Travel (India) Private Limited Versus Tecumseh Products India Private Limited, , [2016] 194 CompCas 164 (AP);

3) J.N. Roy Chowdhury (Traders) P. Ltd. Versus Jainti Enterprises, , [1987] 61 CompCas 504 (Cal); and

4) Garware Capital Markets Ltd. Versus Jaiswal Granites Ltd., , [1998] 93 CompCas 215 (AP);"

12. For the sake of brevity, Para 21 of judgment No. 1, Paras 9 and 13 of judgment No. 2 and Paras 26 and 32 of judgment No. 3 are reproduced herein below:--

"Para No. 21 of Judgment No. 1

"It is undisputed that the transaction between the parties continued for several years. The agreement, provides the deposit of money in the bank account after deduction of the commission, taxes and other expenses. It is not an allegation of the petitioning-creditor that the Company has violated any of the terms and conditions embedded in the agreements. The termination came because of the change in the policy and it cannot be said at this stage that the remedy of the Company is not available in seeking the damages for illegal and wrongful termination. The Company has approached the Bombay High Court by filing the civil suit for recovery of money on account of damages though there has been some admission on the part of the Company for such an amount payable to the petitioner but the same has been adjusted against the claim made in the said suit. The adjustment of an amount when the claim made is much more, is not impermissible under the law. It does not invite the Company Court to pass an order for winding up of the Company as the liability is admitted. The Andhra Pradesh High Court in case of Smt. Vijayalakshmi v. Hari Hara Ginning & Pressing reported in , (1999) 96 Company Cases 723 held:

"Thus, even if a part of the liability is admitted, that itself will not constitute an admitted amount due which a company is unable to pay nor can it be inferred that the company''s liabilities are more than its assets and the Company is not able to discharge its liability or it requires the protection of the debtors by admitting the company petition for liquidation. Thus, we find no ground to interfere with the order of the learned single Judge in order to come to a conclusion that the summary proceedings under section 433 be initiated to admit the petition for winding up."

Paras 9 and 13 of Judgment No. 2:

"9. As noted hereinbefore, as far back as 22.4.2015, i.e., almost one year before the filing of this winding up petition, the respondent has raised a serious issue on the alleged failure of the petitioner to secure visa for its Managing Director. The petitioner has not even responded to the said letter for more than four months before it has denied any failure or liability on its part. Be that as it may, as the respondent has raised the dispute much before the contemplation of the

Company Petition, it cannot be said that the denial of debt by it is not bona fide and the same is intended to evade the legally payable debt.

13. Following the legal position which emerged from the above-mentioned judgments, I am of the opinion that the claim for set-off or adjustment is made by the respondent towards the alleged damages against the amount payable by it, for the limited purpose of adjudicating the winding up petition, this Court cannot treat such a claim for set-off or adjustment as lacking bonafides whether the respondent is really entitled to such set-off or adjustment needs to be adjudicated by the competent Court of law. For the present purpose, it will suffice, if this court is satisfied that the set-off or adjustment claimed by the respondent is not an after-thought and that it has been consistent in its stand in this regard much before the filing of the winding up petition."

Paras 26 and 32 of Judgment No. 3:

"26. In our opinion, these are disputes which cannot be resolved on affidavits but in a regular action. On a consideration of all the facts and circumstances of the case, it cannot be said that the defence sought to be raised by the appellant in the instant case is frivolous or mala fide. In substance, the defence of the company appears to be that the said amount of Rs. 24,000 was not crystallised into a debt giving rise to an indebtedness of the company and further by reason of the respondent''s stopping to place any further order or for closure of business without any notice in terms of the agreement, the appellant had suffered loss and damages. By reason of such breach, there was a prima facie case for the appellant''s counter-claim. Therefore, in our opinion, it cannot be said that a such a claim is frivolous or made with an intention to defeat the claim of the respondent or without any merit. The respective cases as made out by the parties require thorough investigation which is only possible in a regular action.

32. In our opinion, the questions sought to be raised in the instant case are questions which, if established, may constitute a valid case for the company. Whether the company will succeed in establishing its case or not will naturally depend on the result of the suit. We are fully convinced that the petitioning-creditor''s debt has been disputed bona fide and there is a prima facie case for the appellant''s counter-claim. In view of such claims and cross-claims by the parties, we are of the opinion that the learned judge was not right in admitting the petition for winding up and in giving directions for advertisement."

13. I have heard the learned counsel for the parties and appraised the paper book and am of the view that the present case does not fall within the parameters of admitted liability enabling the Court to pass the winding up order, much less admit the petition as the defence raised by the respondent company is bonafide and not malafide. The reproduction of the e-mails, ibid, leaves no manner of doubt that the respondent company had placed the Purchase Order vis-?-vis CP 6 MT at the rate of Rs. 12,250/-, Kg. whereas the petitioner company had offered the rate at the rate of Rs. 12,750/- and ultimately agreed

for Rs. 12,250/- Kg., but the schedule of payment was deferred month-wise owing to the shortage of BF3 gas, in essence, they have agreed to supply 1 MT spanning over six months. The affidavit filed in pursuance to the order of this Court in view of the correspondences is not correct and rather the aforementioned correspondences leave this Court to an irresistible conclusion that there was a concluded contract for supply of CP. There is no dispute that prior to the placing of the Purchase Order dated 18.8.2010, the respondent company had placed the Purchase Order with regard to CT and had been supplied the material worth Rs. 3,20,64,210/-, but owing to the non-supply of CP, the company had purchased the material from other source at a higher price, for which the civil suit is pending and the same shall be proved in those proceedings and the petitioner company shall have a right to rebut the same.

14. In my view, at this stage, the petitioner company cannot be permitted to continue, much less seek winding up order of admission. In view of the ratio decidendi culled out in the judgment (supra), there is no dispute that the respondent company can always set up a plea of set-off and adjustment. The present case is of a case of such kind where the respondent company at the initial stage, vide legal notice dated 31.10.2011 (Annexure P-13), as per Para 16, had adjusted/forfeited the amount to be paid to the petitioner company. The petitioner company did not disclose the factum of filing of the suit as the present company petition was filed on 22.2.2012 and notice was issued on 17.7.2013, whereas the suit had been filed on 19.12.2011. Copy of the suit has already been annexed as Annexure R-1.

15. There is another aspect of the matter. After supplying the schedule as per the letter dated 30.10.2010 (supra), the petitioner company deviated from the agreed rate and sought amendment in the rate of Rs. 13,000/- per kg. vide letter dated 30.10.2010. For the sake of brevity, the contents of letter, aforementioned, read thus:--

"Chetan Gulati

From: "sandeep"

To: "Chetan Gulati"

Cc: ; "Ms.Renuka"

Sent: Monday, August 30, 2010 3:33 PM

Subject: 6 MT Cefpodoxime Proxetil

Dear Mr. Chetan Gulati,

Re: Your order of 6 MT Cefpodoxime Proxetil at

Rs. 12,500/- per Kg

We are taking allocation of 1 MT quantity from the plant. Presently there is acute shortage of Boron Trifluoride Gas. We have discussed with M/S. Navin Fluorine, they have informed that situation of supply will not improve till April, 2011.

We have explored the possibility of importing gas but which is going on double the price at which we are getting existing supply by which cost of Proxetil will touch around Rs. 14,000/- per kg. For these supplies we have given higher price than the existing one & we have paid advance to them for the supplies so that the supply should come regularly.

We request you to give us amendment in the rate of Rs. 13,000/- per kg looking into A/c all these parameters. 1 MT we are despatching at Rs. 12,500/- only. For balance quantity only we are asking for the amendment. Regards

Sandeep Chawan".

16. Thus, there is no force in the plea of Mr. Chhibbar that there was a concluded contract for supply of 6000 MT of CP at the rate of Rs. 12,500/- per Kg. Had the aforementioned correspondences not been there, much less schedule of payment had not been submitted by the petitioner company, the defence of the respondent company would have been malafide and there would have been some force in the contention, but owing to the facts and circumstances narrated above, position is otherwise. Thus, the instant case falls within the parameters laid down in M/s. Madhusudan Gordhandas''s case (supra), a landmark judgment rendered by the Hon''ble Supreme Court, holding that where the defence raised is bonafide, remedy for the creditor is not to seek the vindication of his grievance through winding up petition, but elsewhere. Since, it is a matter of record that the suit is pending and the next date fixed in the suit was 10.3.2016 for the evidence of the respondent company-plaintiff before the trial Court, both the parties shall be at liberty to prove their case in accordance with law by leading direct and cogent evidence, vis-?-vis concluded contract or not, but the present case seeking winding up is not based upon the admitted liability and, therefore, is not maintainable and any observations regarding concluded contract are only for the purpose of adjudication of company petition. In other words, petitioner company-defendant shall independently take up defence of alleged contract and trial Court shall decide the controversy influenced with regard of aforementioned findings.

17. Keeping in view of the aforementioned facts and circumstances, there is no merit in the petition. The same is dismissed leaving the petitioner company to take remedy in accordance with law.