
(2013) 01 DEL CK 0177
In the Delhi High Court
Case No : Co. Petition 612 of 2012

PLD International Pvt. Ltd.

APPELLANT

Vs

Reebok India Company

RESPONDENT

Date of Decision : 04-01-2013

Acts Referred:

Citation : (2013) 01 DEL CK 0177

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Arun Kathpalia, Mr. Yoginder Handoo, Mr. Angad Mehta and Mr. Samaksh S. Goyal, for the Appellant; C. Mukund, Ravi Kumar and Ms. Firdouse Qutb Wani, for the Respondent

Judgement

Justice S. Muralidhar

1. By this petition u/s 433 of the Companies Act 1956 ("Act"), the Petitioner, PLD International Pvt. Ltd., seeks the winding up of the Respondent M/s. Reebok India Company. The case of the Petitioner is that in terms of an agreement dated 26th April, 2010 entered into between the parties, a copy of which agreement is enclosed with this petition as Annexure P-2, the Petitioner gave on rent to the Respondent the ground floor of the property at 422-425, Ghitorni Market, Opposite Metro Pillar No. 132, MG Road, New Delhi-110 030 (hereafter "rented premises") on a monthly rent of Rs. 4,25,000/- subject to deduction of tax at source on applicable rate and payment of service tax, with effect from 1st May, 2010. It is asserted by the Petitioner, which assertion is disputed by the Respondent, that possession of the rented premises was handed over by the Petitioner to the Respondent on 1st May, 2010. It is further stated that the Respondent defaulted in payment of the rent from 1st May 2010 and finally some cheques were received in January, 2011 which did not clear the arrears. Even thereafter the Respondent continued to be irregular in the payment of rent. It is stated that till September 2011 as against the total outstanding rent of Rs. 72,25,000/- (exclusive of service tax), the Respondent had paid only Rs.

49,72,500/- (exclusive of TDS).

2. It is stated that since in the meanwhile this Court had, in a batch of petitions to which the Respondent was a party, upheld the levy of the service tax on rented property. Consequently service tax also was liable to be paid by the Respondent. The Petitioner sent an e-mail to the Respondent on 26th September, 2011 demanding the outstanding rent and arrears of service tax enclosing an account statement for the period from May 2010 till September 2011 with break ups for TDS, service tax, rent due, rent paid etc. The service tax amount i.e. outstanding for this period was Rs. 7,44,175/- (without interest) calculated at Rs. 43,775/- per month, while the outstanding rent was Rs. 15,30,000/-. It is stated that in December 2011 the Respondent paid the service tax amount, without interest up to date. However, the arrears of rent were not cleared.

3. On 1st March, 2012, the Petitioner received a letter from the Respondent terminating the tenancy and stating that the vacant possession of the premises would be handed over to the Petitioner on 31st May, 2012. The Petitioner in response thereto sent a legal notice to the Respondent on 27th March, 2012 calling upon the Respondent to pay a sum of Rs. 31,84,534/-. It sent separately another notice on the same date regarding unpaid electricity bills in the sum of Rs. 60,580/-. With the Respondent continuing to not pay the sums and another notice was sent by the Petitioner on 2nd May 2012 which quantified the outstanding amount as on 31st May 2012 at Rs. 42,90,904/-.

4. It is stated that apart from not making payment of arrears the Respondent also did not hand over vacant possession of the rented premises to the Petitioner on 31st May, 2012. A reply dated 9th July, 2012 was received to the Petitioner's legal notice in which the Respondent claimed that possession of the rented premises was handed over to it only in December 2010 and that it had been wrongly made to pay rent from 1st May 2010 onwards. It accordingly claimed the said sum from the Petitioner. According to the Petitioner this was a false defence since in its e-mail dated 26th June, 2012 the Respondent had paid service tax for the period from May 2010 onwards.

5. In the petition it is averred that when the Petitioner's representative met the representative of the Respondent and the Respondent "orally" acknowledged its liability to pay the admitted dues. However, since the dues were not paid and the statutory notice dated 14th May, 2012 sent to the Petitioner u/s 434 of the Act was also not replied to, the Petitioner filed the present petition seeking the winding up of the Respondent.

6. This Court has heard the submissions of Mr. Arun Kathpalia, learned counsel for the Petitioner and Mr. C. Mukund, learned counsel for the Respondent.

7. In response to the query from the Court as to the availability of the alternative remedy to the Petitioner in view of the arbitration clause in the agreement, Mr. Kathpalia relied upon the decisions in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., and Prime Century City Developments Pvt. Ltd. Vs. Ansal

Buildwell Limited, to contend that where the defence by the Respondent is "palpably false" and "dishonest", the petition for winding up should be admitted.

8. The Court drew the attention of Mr. Kathpalia to the fact that although the lease was for a period of three years the agreement was not registered. Mr. Kathpalia responded by stating that the tenancy was not denied and even otherwise it could be proved irrespective of the agreement. In response to query whether there is any document to show that in fact possession of the vacant premises was handed over on 1st May, 2010 and not December, 2010 as contended by the Respondent in its reply dated 9th July, 2012 to the Petitioner's legal notice dated 14th May, 2012, Mr. Kathpalia submitted that correspondence exchanged between the parties and the payments made by the Respondent of service tax in December 2011 itself acknowledged that rent became payable from May 2010. His submission was that if in fact possession had not been handed over in May 2010 itself the Respondent ought to have raised such an objection when called upon to pay the service tax. He submitted that service tax for the period from May 2010 was paid without demur by the Respondent and this itself demonstrated the defence now taken was sham.

9. In the absence of any document showing that in fact possession of the premises were handed over to the Respondent in May, 2010 and in light of the stand taken by the Respondent that possession was handed over to it only in December 2010, the said issue raises a disputed question of fact which cannot be decided without evidence led by the parties. In the circumstances this Court is unable to come to the conclusion at this stage that the defence of the Respondent is sham, false or mala fide. If indeed there is an arbitration agreement between the parties there is no reason as to why it cannot avail of that remedy and must necessarily seek the remedy of winding up.

10. In Prime Century City Developments Pvt. Ltd. the Court passed a common judgment in two petitions. In the first petition the Court was satisfied that a substantial defence had been raised which was not possible to be viewed "as moonshine or as lacking bona fides." It was observed that the said defence "can be properly adjudicated upon in regular and not summary proceedings". In the circumstances it was held that "it would be inappropriate to entertain this petition; the parties must seek their remedies in arbitration to which they have expressly agreed". It was categorically held "once a bona fide defence is shown to exist, arbitration can be efficacious and proper remedy; where the defence is mala fide and moonshine, arbitrable disputes would not exist in actuality". However, in the facts of the second case which was also decided by the same judgment the Court was satisfied that the defence of the Respondent was dishonest and accordingly admitted the petition for winding up.

11. In the present case this Court is not satisfied at this stage, on the basis of the documents placed on record by the Petitioner that the defence of the Respondent is moonshine or false. The Court recalls the observation in NEPC India Ltd. Vs. Indian Airlines Limited, to the effect that "the machinery of winding

up should not be allowed to be utilised merely as a means of realizing its debts." Accordingly, this Court declines to entertain the present petition and dismisses it as such. It would be, however, open to the Petitioner to seek other appropriate remedies that may be available to it in accordance with law.