(2015) 05 P&H CK 0337

In the Punjab And Haryana At Chandigarh

Case No : CP No. 93 of 2013 and CA Nos. 285 to 288 of 2013

Venus Petrochemicals (Bombay) Pvt. Ltd. APPELLANT

Vs

Vannix Industries Pvt. Ltd. RESPONDENT

Date of Decision : 18-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Companies Act, 1956 — Section 433(e), 434, 439

Citation : (2015) 131 SCL 591

Hon'ble Judges : Amit Rawal, J

Bench : Single Bench

Advocate : Gopal Sharma and Tarurag Gaur, for the Appellant; Pardeep Sharma, Advocates for the Respondent

Final Decision : Allowed

Judgement

Amit Rawal, J.—Present petition has been filed under Sections 433(e), 434 and 439 of the Companies Act, 1956, (hereinafter called as the ''Act'') for winding up of the respondent-company.

2. Mr. Gopal Sharma, learned counsel appearing on behalf of the petitioner submits that the petitioner company was approached by the respondent-company for purchase of chemical materials known as Mosstanol-L and Mosstanol-120 and accordingly, the respondent-company placed the purchase order. He further submits that respondent-company had been purchasing the materials from the petitioner-company since 2007. The copy of the purchase order dated 09.07.2012 to 13.09.2012 have been placed on record as Annexure P-4 (Colly.). Alongwith Rejoinder, the petitioner-company has placed on record the purchase order pertaining to the year 2007 to 2011. He further referred that the entire material was duly received and accepted by the respondent-company without any objection and the total price of the material amounting to Rs. 77,83,191/- was duly supplied but the respondent-company has only paid a sum of Rs. 5,00,000/- through cheque and therefore amount of Rs. 72,83,191/- is

still outstanding.

3. He further referred to the telephonic reminders and as well as E-mail dated 29.10.2012 sent by the petitioner-company to the respondent-company and the said E-mail has been duly replied by the respondent-company, whereby they have acknowledge to pay outstanding amount and, therefore, respondent-company has admitted to pay the outstanding liability.

4. He further submitted that the legal notice (Annexure P-7) dated 11.03.2013 was sent to the respondent-company through registered post, which was replied by the respondent-company, wherein, for the first time they raised dispute that the material supplied by the petitioner-company when sold by them to the clients for use, submitted the complaints and thus, the respondent-company lost potential business, much less, goodwill and reputation. Copy of the same has been annexed as Annexure P-8. A rejoinder to the said legal notice was sent by the petitioner-company where it was specifically denied that respondent-company had lost the potential business and further as that the respondent-company did not raise the dispute with regard to the quality of the product, at any point of time, till the receipt of the legal notice.

5. Mr. Pardeep Sharma, learned counsel appearing on behalf of respondent-company submits that the petition is not maintainable in the eyes of law as no cause of action has accrued in favour of the petitioner-company, much less, the relief sought in the present petition is not supported by any documentary evidence, therefore, the petition deserves to be dismissed.

6. He further submits that petitioner-company misrepresented the respondent-company inasmuch as that the respondent-company had placed an order for Mosstanol-L (Substitute of IP A) and for Mosstanol-120 (substitute of Butanol) and in fact the respondent-company had placed an order for Butanol and IPA but the petitioner-company assured that Mosstanol-L and Mosstanol-120 were the substitute of Butanol and IPA.

7. He further submitted that on representation of petitioner-company, the respondent-company has used aforementioned material in the painting industry in a span of 3-4 months, but the respondent-company started getting the complaint from the market/dealers regarding the quality or material and the petitioner-company through various E-mails informed about the defective material and in this regard has drawn the attention of this Court to Annexure R-2 dated 19.11.2012, 21.11.2012, 21.12.2012 and Annexure R-3 dated 27.11.2012 and thus, prays that since the respondent-company has raised bona fide dispute, therefore, petitioner-company does not have any cause of action to invoke the jurisdiction of the Companies Court for seeking winding up and in case any dispute exists the petitioner-company has file efficacious remedy to civil suit by invoking provision of Section 9 of the Code of Civil Procedure and the Civil Court would have a jurisdiction to try the disputed question of the fact.

8. In support of his contention, he has referred to the judgment of High Court of

Gujarat in Asim Pharmachem Industries Versus Nilsin Ultrachem Ltd. decided on 06.08.2012 to contend that Company Court should not pass a winding up/ admission order in a routine, where it has prima-facie been proved that the petition has been filed with a view to harass the respondent-company. Another judgment of this Court has been cited i.e. Tata Davy Ltd. Vs. Steel Strips Ltd., AIR 1995 P&H 1 : (1994) 107 PLR 429 to contend that where the respondent-company has raised a bona fide dispute, winding up proceedings are not to be used without a normal alternative remedy of realizing the debt as available.

9. Mr. Gopal Sharma, learned counsel appearing on behalf of petitioner in rebuttal submitted that in rejoinder, the petitioner-company has specifically stated that dealing with the respondent-company was since 2007 and this fact has not been denied and that purchase order of 2007 support such submission, thus, prays that present petition be admitted.

10. He has relied upon following case law to contend that where the respondent company is unable to pay admitted liability, the petition should be admitted and wound up:-

"i) Chhabra Steels Strips (P.) Ltd. Vs. Haspa Wheels Pvt. Ltd., (1996) 86 CompCas 703 .

ii) 1991 (1) R.C.R. (Civil) 146, G.K.W. Ltd. Vs. Shriram Bearings Ltd.

iii) Rama Peer Trader Vs. Scot Innovation Wires and Cables Pvt. Ltd., (2014) 2 AD 362 : (2014) 182 CompCas 276 : (2014) 2 CompLJ 607 : (2014) 207 DLT 57 .

iv) Deutsche Homoopathie-Union DHU-Arzneimittel GmbH and Co. KG Vs. R.K. Import Private Limited and German Homoeopathic Distributors Pvt. Ltd., (2008) 145 CompCas 377 : (2007) 141 DLT 378 ."

11. I have heard learned counsel for the parties and appraised the paper book and as well as case law cited at Bar.

12. The foremost question to be answered by this Court is whether the dispute raised by the respondent-company would be bona fide or mala fide and in case it is found that the dispute is bona fide, then obviously this Court shall refrain from admitting the petition, much less, pass an order for winding up of the respondent-company. The proposition of law on this question has been laid down by Hon''ble Supreme Court of India Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., AIR 1971 SC 2600 : (1972) 42 CompCas 125 : (1972) 1 CTR 193 : (1971) 3 SCC 632 : (1972) 2 SCR 201 .

13. In order to answer such question, it would be apt to refer to various documents. The foremost documents scanned is purchase order. One of the copy of the purchase order is extracted hereinbelow:-

14. On perusal of the aforementioned purchase order placed by the respondent-company to the petitioner, it is evident that the material Mosstanol-L and Mosstanol-120 was ordered, though on the subject it has been mentioned as

"supply of IPA/Butanol". In every purchase order, the respondent-company placed the order with regard to supply of Mosstanol-L or Mosstanol-120 or sometimes together with the same subject as extracted above.

15. It is hard to believe that the respondent-company was misrepresented and was compelled to purchase the substitute instead of IPA and Butanol, inasmuch as that purchase order filed in the year 2007 onwards is in same fashion and similar to the one extracted above. In every purchase order, the respondent-company has ordered for Mosstanol-L and Mosstanol-120. It is basically the nomenclature being used in the "subject IPA/Butanol" being Mosstanol-L and Mosstanol-120 substitute and respondent-company had been using such material since time immemorial. Had respondent-company being misrepresented, there would not be occasion for the respondent-company to perpetually placed an order of the aforementioned materials i.e. Mosstanol-L and Mosstanol-120.

16. The respondent-company in order to establish as to whether the material supplied by the petitioner-company was defective or not, enjoined upon obligation to place on record the copy of the complaints received by their clients, which had used the material by manufacturing, i.e. the end product, much less, the debit notes. E-mail Annexures R-2 and R-3, which are extracted hereinbelow, would also leave no manner of doubt that plea of alleged complaint was taken halfheartedly.

17. For the sake of brevity, E-mail dated 19.11.2012, 21.11.2012, 27.11.2012 and 21.12.2012 is extracted hereinbelow:-

Dear Mr. Harish

As par telephonic discussion with our MD. Sir with you.

We have found your material lying with us from our all India branches are as given below:-

So your are requested to collect your material from our ends.

Regards

Shreeniwas Singh

With reference to our below mail regarding Mosstanol L and Mosstanol 120 Stocks lying with u, it is not due to any fault on our part, we had supplied the material on our confirmed purchase order and as per our request. So any wrong decision on our part is to be handled by u and it is our responsibility and look out. But still as considering our position, we are ready to support and accommodate by agreeing to accept the payment in parts. So kindly arrange to release of our total o/s of Rs. 77,83,191 in small lots of 5-10 lacs every week so that our finance is not blocked totally and at the same time u r also not burdened with such big amount release in one go.

Further also take note that our new Mosstanol price is on higher side with difference of 7-8 Rs. Which will beneficial to u. We hope this proposal will be helpful as we have tried our level best to support accordingly. Request to respond.

Regards

Harish Nayak Venus Petrochemicals (B) P. Ltd. 401-403, Zafryn Chambers, Opp. Sewri Railway Station, Sewri Koliwada Road, Sewri (East) Mumbai-400015, Maharashtra, India Tel: +91-22-61463100/61473100 DID: +91-22-61473113/61463160 FAX: +91-22-61463162/24163193 Email: harish@venuspetrochem.com web: www.venuspetrochem.com

------- original message ------

Dear Mr. Harish

As par telephonic discussion with our MD. Sir with you.

We have found your material lying with us from our all India branches are as given below:-

So your are requested to collect your material from our ends.

Regards

Shreeniwas Singh

Dear Harish Bhai,

Its unfortunate and embarrassing for us too about the outstanding and its much of worry to have the huge stocks of your product lying at our warehouse. Thanks for your suggestion to remit on weekly basis but the situation is that customer is not accepting the product open heartedly. As been discussed, if we can manage at least half the stock with your help and the balance could be paid in certain time frame.

I am again disappointed for the circumstances and sorry for the outcome, but am sure that both of us can sort this out.

Best Regards

Navin Navin Chandra Jha Managing Director Vaanix Industries Pvt. Ltd. 401, Bestech Chambers, Hotel Raddisson Suites, B-Block, Sushant Lok-I, Gurgaon-122002 Cell- +91 9871339996 admin@vaanix.com www.vaanix.com

Dear Atul Jee,

Sorry for the delay in replying as I was busy with our foreign partners, since our meeting and did not get the chance to see the mail.

I appreciate your co operation in this regard and your visit definitely helped us to understand the product and thereby expanding our business. The goods which was lying for so ling due to complain incurred from our existing customers mainly from printing has been detailed to other industries like ink and paint, the result of which the liquidation has started and hope we get these liquidated by January.

As being discussed we have some technical issues and we are working to resolve this by 10th of January and hereafter we start executing your payment, we hope to execute approx. Rs. 25 lac in January and balance in February.

I understand the gravity of the situation and sincerely thank you for your co operation.

Best Regards,

Navin

On 12-Dec-2012, at 2:17 PM, harish wrote:

We refer to meeting with our Director Mr. Atul Thakkar at your Guragaon office and as per discussion following things was agreed and confirmed viz.

1. That upto 10th January 2013 every week u will try to release payment of Rs. 5 lacs each.

2. From 10th January 2013 onwards maximum will be released and our total outstanding will be cleared accordingly. And this arrangement has been agreed due to your financial problem in machinery business and u needed some time for clearing total outstanding.

Kindly arrange to do the needful accordingly.

Regards

Harish Nayak Venus Petrochemical (B) P. Ltd. 401-403, Zafryn Chambers, Opp. Sewri Railway Station, Sewri Koliwada Road, Sewri (East) Mumbai-400015, Maharashtra, India Tel: +91-22-61463100/61473100 DID: +91-22-61473113/614631 60 FAX: +91-22-61463162/24163193 Email: harish@venuspetrochem.com web: www.venuspetrochem.com

Desclaimer: The information contained in this message is Venus Petrochemicals(B) Pvt. Ltd.''s Confidential and Proprietary."

18. Thus, it appears that the respondent-company had taken the plea of alleged defective material only to defray the payment of outstanding dues and the said E-mails were accompanied by any copy of the alleged complaints, much less, any type of plea taken by the respondent-company that the material as defective and in fact it is only a ploy not to make the payment.

19. The case law relied upon by the respondent-company is based upon the facts on each case. Judgments cited do not support the stand of the respondent-company. However, in the instant case in view of categoric admission of the respondent-company suffered in the year 2013, this Court is made to believe that the respondent-company has admitted the liability to pay the debt.

20. In order to lend support of the aforementioned observations, now I proceed

to refer to the E-mails written by the respondent-company to the petitioner-company, wherein the respondent-company in the year 2013 i.e. after of writing the E-mails extracted above acknowledge to pay the outstanding dues by generating money by taking loan from the bank and even in the one of the E-mails, the respondent-company had admitted, that 40 tonnes material lying with them, they intend to sell it and generate capital. Copies of E-mails pertaining to the period 04.02.2013, 05.02.2013, 09.02.2013 and 23.02.2013 are extracted hereinbelow:-

Dear Mr. Harish/Mr. Atul

Really understand your follow-up but we didn''t have any explanation who can satisfy you. After Mr. Atul Gurgaon visit on dated 08.12.2012 we tried to sell your 40T product which was lying at our stock science August, 2012. We are waiting for payment from our buyer, meanwhile we are also working with our Banker to enhance the existing limit, once it is done and whenever money comes from the market we will execute in your favour.

We are not the company which will run away or may be diluted where there to stay but we need your support for clearance of these dues. We hope you understand and cooperate.

Best regards

Suman

For Vaanix Industries Pvt. Ltd. Mobile: +91 9350245889

Taken note but as already informed that we have supported and accommodated u to our maximum extent but now we are in dire financial need as we are getting default in our commitment and we are facing lot of financial crunch. So u have to arrange for clearance of our longdue o/s on priority basis as we are in dire need. So kindly confirm the payment schedule so that we can plan accordingly.

Regards

Harish Nayak Venus Petrochemicals (B) P. Ltd. 401-403, Zafryn Chambers, Opp. Sewri Railway Station, Sewri Koliwada Road, Sewri (East) Mumbai-400015, Maharashtra, India Tel: +91-22-61463100/61473100 DID: +91-22-61473113/61463160 FAX: +91-22-61463162/24163193 Email: harish@venuspetrochem.com web: www.venuspetrochem.com

I am totally dependent on the corporation bank and they said today by 7-8 working days, once sanction is there I will sends you the schedule.

Regards

Navin Sent

From Black Berry(R) on Airtel

Request u to confirm the payment schedule as we are awaiting for the same. Kindly arrange to release the payment as we are in dire need of funds. Hoping for an immediate response and action in the matter

Regards

Harish Nayak Venus Petrochemicals (B) P. Ltd. 401-403, Zafryn Chambers, Opp. Sewri Railway Station, Sewri Koliwada Road, Sewri (East) Mumbai-400015, Maharashtra, India Tel: +91-22-61463100/61473100 DID: +91-22-61473113/61463160 FAX: +91-22-61463162/24163193 Email: harish@venuspetrochem.com web: www.venuspetrochem.com"

21. On perusal of the aforementioned E-mails, it is irresistibly concluded that the respondent-company had failed to pay the admitted liability. In view of the categoric admission of the respondent-company, this Court is made to believe that the respondent-company is unable to discharge the admitted liability and thus, the present petition is liable to be admitted.

22. Accordingly, the present petition is admitted. Let the factum of admission of the petition be published in the following newspapers:-

"i) Indian Express - (English) (Delhi/NCR Edition)

ii) Jansatta - (Hindi) (Delhi/NCR Edition)

iii) Official Gazette of Government of Haryana."

23. List on 28.09.2015.

