(2012) 05 DEL CK 0216

In the Delhi High Court

Case No : CO. Petition 232 of 2012

Wacker Metroark Chemicals Pvt Ltd. APPELLANT

Vs

Mccoy Silicons Ltd. RESPONDENT

Date of Decision : 17-05-2012

Acts Referred:
Companies Act, 1956 — Section 433, 434, 439

Citation : (2012) 172 CompCas 254

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Partha Sil, for the Appellant;

Final Decision : Dismissed

Judgement

Manmohan, J.—Present winding up petition has been filed u/s 433(e) read with Sections 434 and 439 of the Companies Act, 1956 stating that respondent company is unable to pay its debts allegedly amounting to Rs. 38,48,466.67/-. The facts as stated in the petition are that the petitioner supplied silicon products to the respondent from September, 2010 to May, 2011. Learned counsel for petitioner has drawn attention of this Court to the respondent''s E-mail dated 03January, 2012 wherein the respondent in its books of accounts has admitted that a sum of Rs. 31,52,563.42/-is due and payable to the petitioner.

2. However, a perusal of the reply to the statutory winding up notice reveals that the defence of the respondent is that the petitioner''s holding company namely, M/s. Wacker Chemie, Germany is liable to pay monies in excess of Rs. 8 crores to the respondent. The relevant paragraphs of the reply are reproduced herein below:

5. Without prejudice to all other arguments available to our clients, we are instructed to stated that at no time have our clients ever admitted payments of any amounts to your client. In fact, to the contrary, it is your client and its holding company Wacker Chemie, Germany (along with, M/s. Wacker Metroark

Chemicals Pvt. Ltd., collectively referred to as "Wacker") that are liable to pay huge sums of monies to our clients

6. You may be aware that our clients have on various occasions by written communications and verbal discussions sought the release of their claims currently in excess of Rs. 8 Crores (approximately US$1.65 million). In this connection, representatives of our clients have held various discussions in Germany and also at New Delhi, Mumbai and Kolkata. Your client''s alleged claims against our clients are manifestly illegal, malicious and non-est in law. Your clients has obviously not presented you with correct facts.

xxx xxx xxx

8. We are instructed to state that in addition to payments of aforementioned amounts due to our clients, our clients are prejudiced by various other illegal and unethical actions of Wacker, including but not limiting to:

a) Breach of the exclusively commitment given to our client;

b) Termination of the entire distribution arrangement, without any cause and prior notice to our client;

c) Deliberate sale of goods as loss leaders or at a discounted and predatory price by Wacker in India, to ensure losses to our client and destroy its market and business;

d) Misuse by Wacker of confidential and proprietary data that was provided by our client to Wacker in good faith to destroy our client''s business and to create its own independent customer network;

e) Various defamatory and slanderous statements by Wacker to cause loss and damage to our client''s goodwill and reputation resulting in serious business losses to our client;

f) Default of payment by customer, strictly on account of Wicker''s conduct resulting in further losses to our client;

g) Losses suffered by our client in undertaking significant marketing and distribution expenses based on the promises made by Wacker.

10. In view of the above, we do not wish to address a parawise reply to your notices. Please be advised that our clients specifically deny that any sum, let alone the sums of Rs. 33,58,150/-or Rs. 31,52,563.42p. is either due or payable to your client. As stated above, it is in fact Wacker Metroark that is liable to pay a sum of Rs. 8 crores to our clients. Therefore, all threats in your notice under reply and your notices dated November 4, 2012 are baseless and illegal and are rejected by our clients.

(emphasis supplied)

3. Further, this Court takes note of the legal notice dated 04 November, 2011

wherein it has been stated as under:

When the non-payment of the amounts due to our client was discussed, you have never denied the amount due to WMC but raised various extraneous and irrelevant issues including receipt of feedback from Wacker Chemie A.G., Germany, in respect of your alleged pending claim with them as will appear form your email dated 9September, 2011 addressed to our client. You have been informed by our client''s email dated 14September, 2011, that payments due to our client cannot be conditional upon response from Wacker Chemie A.G., Germany.

(emphasis supplied)

4. Though learned counsel for petitioner admits that the respondent has had business transactions with the petitioner''s holding company, but he states that the petitioner''s holding company is an independent corporate entity and consequently the aforesaid defence should not be looked into by this Court.

5. However, this Court in its judgment dated 23March, 2011 in Co. Pet. 131/2008 Pankaj Aluminium Industries Pvt. Ltd. vs. M/s. Bharat Aluminium Company Ltd. has held that the doctrine of single economic entity is not only well established, but also well recognized by the Courts. In DHN Food Distributors Ltd. and Others v. London Borough of Tower Hamlets [1976] 3 ALL ER 462 at Page 467, the Court held as under:

.....We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says : ''there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group''. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Hold worth & Co. (Wakefield) Ltd. v. Caddies. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

6. Accordingly, this Court is of the view that the defence of the respondent would have to be examined. However, this Court cannot do so as its jurisdiction is summary in nature.

7. Moreover, the Supreme Court in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., has held that "the Company Court is expected to ascertain that the company''s refusal is supported by a reasonable cause or a bona fide dispute in which the dispute can only be adjudicated by a trial in a civil court."

(Refer ''para 31'').

8. Consequently, the present petition is dismissed with liberty to the petitioner to file a recovery proceeding in accordance with law. It is made clear that the civil Court would decide the matter on its merits without being influenced by any observations made by this Court.