

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ Co. App. 3/2007
GERMAN HOMOEPATHIC DISTRIBUTORS
PRIVATE LIMITED Appellant
Through: Mr. Rajiv Sawhney, Sr.
Adv. with Mr. Sanjeev
Sachdeva & Mr. Preet
Pal Singh, Advs.

versus

\$ DEUTSCHE HOMEOPATHIC-UNION DHU
^ ARZNEIMITTEL GmbH & Co. KG Respondent
Through: Mr. Sanjay Jain, Sr.
Adv. with Mr. Kamal
Sharma & Mr. Amol
Dixit, Advs.

Date of Hearing : May 11, 2009

% Date of Decision : July 31, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE RAJIV SHAKDHER
1. Whether reporters of local papers may be
allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported
in the Digest? Yes

VIKRAMAJIT SEN, J.

1. The present Company Appeal is directed against the impugned Judgment and Order of the learned Company Judge dated 20.11.2006 admitting the winding up petition of Deutsche Homeopathic Union DHU Arzneimittel GmbH & Co. Kg, the Respondent in the present Appeal. Publication of citations and

appointment of provisional liquidator had been deferred for a period of two months so as to enable the said Respondent company to pay € 9,87,044.97 along with interest at the rate of five per cent per annum from the date of filing of the Petition till payment. The amount of said € 9,87,044.97 has been reached by the learned Company Judge by setting-off € 4,41,438.67, the counterclaim that was held to be genuine, from € 14,28,003.44 which is the total outstanding amount due on the German Homeopathic Distributors Private Limited (hereinafter referred as Appellants) on account of eight different orders for purchase of homeopathic medicines, which were undisputedly duly supplied.

2. The Appellant is an Indian Company which was the sole selling agent for Dr. Willmar Schwabe Gmbh & Co. KG in India of which the Respondent is an affiliate. The last Contract dated 24.6.1998 was agreed between the Appellant and Dr. Willmar Schwabe Gmbh & Co. KG to be current till 31.03.2003, automatically extendable from year to year. Either party had the right to terminate it by six months advance notice of initial or any extended period of the Agreement. The said Agreement stood prolonged for one year, that is, upto 31.03.2004. It was from May 19, 2003 to October 6, 2003 that the Appellant placed eight orders for purchase of Homoeopathic medicines

in respect of which the Respondent has raised Invoices bearing numbers 10560, 11970, 09530, 17110, 17140, 17210, 19650 and 19860.

3. The Appellant has not disputed that supplies were made against the Invoices raised and amount due and payable under the Invoices raised by the Respondent herein. However, they have sought to raise counterclaims against the Respondents, which are pending adjudication in Civil Cases filed by them. It is contended that these are substantial, *bona fide* and are in excess of the claims of the Respondent.

4. The Appellant has raised its counterclaims against the Respondent on several grounds. Firstly, the Appellant claims an amount of € 2,19,243.45 against the commission payable under the Agreement dated 24.06.1998. The learned Company Judge has, in respect to this claim held that *prima facie* evidence in support has been filed by the Appellant. Secondly, an amount of € 9,32,500.00 has been claimed against the loss/damages and the expenses incurred in removing the adverse impression of quality of CMS Eye Drops and obtaining approval including arranging, airfreight, demurrage, storage charges, custom duty, testing charges etc. for the new CMS Eye Drops from the Authorities. The learned Company Judge has, on a *prima facie* view, held the claim to be inflated and

excessive as no documents have been filed, justifying or supporting the quantum claimed. He has, however, treated an amount of € 1,82,500 as a defence to the debt claimed.

5. Thirdly, an amount of € 2,60,037 has been claimed against alleged defective packaging and cost of additional labeling incurred by the Appellant. It is the case of the Appellant that the packaging of the medicines supplied by the Respondent neither conformed to the requirements of INCOTEMS nor the mandatory requirements of the Standards of Weights & Measures (Packaged Commodities) Rules and Foreign Trade (Development & Regulation) Act. To conform with the requirements of the law, the Appellant was required to affix additional labels on the bottles and the outer packaging, for which the Appellant had to incur heavy costs. The learned Company Judge, while adjudicating on this claim, had perforce to refer to the correspondence made between the parties and not the Agreement because the learned Judge held the same to be inconsequential for this claim as the Agreement dated 24th June, 1998 stood expired by the efflux of time. It was further held that the parties had settled the claim at an amount of € 75,000 for the year 2002 and € 65,000/- for the year 2003. The claim for the year 2000 has been held to be time barred and that of the year 2004 to be an afterthought

and not *bona fide*. The learned Judge only held claim of € 75,000/- for the year 2001 to be a genuine counterclaim. Fourthly, an amount of € 3,50,717.55 has been claimed towards the stock which, according to them, was bound to be purchased back by the Respondent as per Clause IX of the Agreement dated 24.06.1998 limited to three months requirement. The learned Company Judge has held that the first letter written by the Respondent company for repurchase was on 24th November, 2004, that is, after lapse of nearly eight months. Further, he held that neither in the letters nor in the pleadings the Respondent company has pointed out or stated “the three-months requirement” nor was any letter written within the three months period. Thus, the claim was *ex facie* not held to be valid and substantial. Fifthly, counterclaim of € 9,75,000 has been raised as a reimbursement of loss suffered by the Appellant on account of misdescription on the medicines supplied between the years 2003 and 2004 which wrongly indicated its manufacturing to be “made in Germany” though the same were, in fact, manufactured in Czechoslovakia. The learned Company Judge has declined to consider the claim applying the doctrine of *caveat emptor* (buyer beware) and being a belated claim. Sixthly, € 5,00,000 have been counterclaimed on account of breach of the

Confidentiality Clause by the Appellant for supplies of medicines in the year 2003 to its own associate, Dr. Willmar Schwabe India (P) Ltd. at a discounted price. Seventhly, € 4,50,000/- has been claimed towards breach of Confidential Clause. Eighthly, claim has been made towards Bad Faith on account of starting a new company. These three claims were dealt cumulatively by the learned Company Judge and brushed aside simultaneously. It has been held by the learned Judge that these counterclaims are exorbitant and extortionate and that the Respondent before him failed to satisfy the Court that there is some material and basis for making these claims and the quantum claimed is based on sound and intelligible grounds. Also on incorporation of competitive company by the Respondent, the learned Judge remarked that the Appellant before him was itself shareholder of the said company which was, in fact, a joint venture. Thus, the Appellant had given its tacit consent in its incorporation and cannot now after indirectly participating in its incorporation cry and shed tears. Besides, the claims made towards the investments made by the Appellant towards the Joint Venture were held to be mutually exclusive of the present dispute and not maintainable under the guise of counterclaim in that petition. Ninthly, claim of € 30,464.61 with regard to Debit Note dated 7.2.2003 has

been raised and Tenthly € 52,815.37 have been claimed towards frozen commission. Both these counterclaims were refused to be looked into by the learned Company Judge on the ground that no documents or materials in support were filed by the Appellant. Evaluating all the counterclaims, the learned Judge held a total of € 4,76,243.45 to be a substantial counterclaim and rest of the counterclaim to be a phony claim.

6. The Appellant has also raised Objections to the Affidavit filed in support of the Petition on the premise that the same was not signed by the person mentioned under Rule 21 of the Companies (Court) Rules, 1959. The learned Company Judge has disregarded the same, holding it to be an irregularity which can be cured.

7. It has been vehemently argued by Mr. Sawhney, learned Senior Counsel for the Appellant that the learned Company Judge has exceeded the jurisdiction vested on him in a winding up petition under Sections 433(e), (f), Sections 434 read with Section 439 of the Companies Act, 1956 (hereinafter referred to as the 'Act') and misapplied jural discretion by ascertaining the amount of the counterclaim of the Appellant and holding that evidence has not been placed on record for certain counterclaims. In a Company Petition the scope of enquiry is limited to *prima facie* determining whether the counterclaim

raised is in good faith and is one of substance and not *mala fide*. It has been the pivotal contention of the Appellant's counsel that the winding up petition is not a legitimate or legally permissible method of seeking to enforce payment of a debt or an alternative to the ordinary mode of debt realization. It is argued that the allegations of both the adversaries require appreciation of evidence and cannot be decided in a company petition for winding up.

8. Before running the marathon of analyzing each and every counterclaim like the learned Company Judge has diligently done, we would analyze the scope of enquiry required to be made by a Company Court in case of a winding up Petition filed under Section 433 (e) & 434 on the ground that the Company is unable to pay its debts; and where a counterclaim or cross-claim is set forth as a defence by the Respondent. The Supreme Court, in the celebrated case of *Madhusudan Gordhandas and Co. -vs- Madhu Woollen Industries P. Ltd.*, [1972] 42 Comp Cases 125: AIR 1971 SC 2600: (1971) 3 SCC 632, has laid down the following principle:-

20. Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the

company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See *London and Paris Banking Corporation, (1874)* 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been properly was not allowed. (See *Re. Brighton Club and Norfolk Hotel Co. Ltd., (1865)* 35 Beav. 204).

21. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See *Re. A Company* 94 SJ 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely See *Re Tweeds Garages Ltd., 1962* Ch. 406). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.

9. In *Amalgamated Commercial Traders (P) Ltd. -vs- A.C.K. Krishnaswami, 1965 (XXXV) Comp Cas 456* the Supreme Court has enunciated the law in these words:-

13. It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the

debt which is bona fide disputed by the Company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances **may be stigmatized as a scandalous abuse of the process of the Court**. At one time petition founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial grounds, the Court may decide it on the petition and make the order.

In the instant case, I find that the facts are disputed and there is case and counter case and in that view of the matter, in my opinion, in view of the ratio laid down by the Supreme Court in *Amalgamated Commercial Traders (supra)* this petition for winding up is not sustainable and it must be dismissed.

10. The law of winding up has been succinctly and elaborately discussed by the Division Bench of the Gujarat High Court in *Tata Iron and Steel Co. -vs- Micro Forge (India) Ltd.*, [2001] 104 Comp Cas 533 (Guj): (2000)2GLR1594 where our learned Brothers have articulately covered all contours and aspects of this subject. It was opined that a claim to an order of winding up is not a matter of right, but it is the discretion of the court to grant or to reject. Secondly, if a disputed debt has been

disclosed, it should be adjudicated by a competent civil court. Thirdly, a Petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the court and should be dismissed with costs. After applying *Bayoil S.A.*, [1999] 1 All ER 374, the Division Bench, noting the existence of a *bona fide* dispute of debt, as also the existence of a plausible Counterclaim, dismissed the winding up petition.

11. We are also reminded of *In re L.H.F. Wools Ltd.*, [1969] 3 W.L.R. 100 : [1969] 39 Comp. Cas. 934 where the Three-Judge Bench of the Court of Appeals was confronted with a situation similar to what obtains before us. A Petition for winding up had been admitted since the Petitioner had obtained a Decree against the Debtor Company which had filed a Counterclaim in Belgium. This Counterclaim would not have been entertained in England but was certainly sustainable in Belgium. The Court of Appeals opined that “the proper order to make is that the petition should stand over generally with liberty to either side to restore, until we can see what progress is made with the action in Belgium : and I would so hold”.

12. In winding up proceedings it is necessary to keep the following principles in perspective --(i) If there is a *bona fide* dispute and the defence is a substantial one, the court will not wind-up the company; (ii) Where the debt is undisputed the

Court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay it;

(iii) Where the defence of the company is in good faith and one of substance, and the defence is likely to succeed in point of law, and the company adduces *prima facie* proof of the facts on which the defence depends, the petition should be rejected;

(iv) The Court may consider the wishes of creditors so long as these appear to be justified; (v) The machinery of winding up should not be allowed to be utilised merely as a means of realising its debts. [For the above propositions see *Pradeshia Industrial and Investment Corporation of Uttar Pradesh -vs- North India Petro-Chemical Ltd.*, (1994) 2 Comp LJ 50 (SC) in which the observation in *Amalgamated Commercial Traders (P)Ltd. -vs- Krishnaswami*, [1965] 35 Comp. Cas 456(SC) and *Madhusudan Gordhandas -vs- Madhu Woollen Industries (P) Ltd.*, [1972] 42 Comp. Cas.125 (SC) have been paraphrased];

(vi) If the stance of the adversaries hangs in balance it is always open to the Company Court to order the Respondent Company to deposit the disputed amount. This amount may be retained by the Court and be held to the credit of the suit, if any. [see *Ambala Bus Syndicate Pvt. Ltd. -vs- Bala Finance Pvt. Ltd.*, 1983 (2) SCC 322 and Civil Appeal No. 720 of 1999 arising out of SLP (C) No. 14096 of 1998 - *M/s.Nishal Enterprises -vs- Apte*

Amalgamations Ltd., decided on February 5, 1999]; (vii) Generally speaking, an admission of debt should be available and/or the defence that has been adopted should appear to the Court not to be dishonest and/or a moonshine, for proceedings to continue. If there is insufficient material in favour of the petitioners, such disputes can be properly adjudicated in a regular civil suit. It is extremely helpful to draw upon the analogy of a summary suit under Order XXXVII of the Code of Civil Procedure. If the Company Court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction it would have granted unconditional leave to defend, it must dismiss the winding up petition.

13. As regards the *prima facie* proof of a *bona fide* character of a counterclaim, the burden lies on the party who sets-up the counterclaim, which burden can be discharged by producing sufficient material in support. The adequacy of the material cannot be objectively defined but it should convince the learned Company Judge that the counterclaim requires to be adjudicated in detail by a Civil Court.

14. Applying these findings of law to the facts of the present case, we cannot but reach to the conclusion that the learned Company Judge has travelled beyond the frontiers of jurisdiction in winding up petitions by going into the counterclaim in minute

detail. The learned Company Judge has allowed the first counterclaim of the Appellant for the commission payable *in toto*. As regards the second counterclaim regarding the supply of defective CMS eye-drops which had to be destroyed, the Appellant had filed the correspondence made between the parties in December, 2002, much before the filing of winding up petition as Annexure R-9 along with the photographs of medicines being rundown by a bulldozer and a Certificate granted by the Government of India signed by Deputy Drugs Controller, certifying that the medicines were, in fact, destroyed. The documents are adequate to *prima facie* raise a valid and substantial counterclaim. The learned Company Judge could not, in the summary manner, which intrinsically governs and modulates winding up proceedings, have come to the conclusion that the claims were baseless and excessive. Assuming that the counterclaim was “excessive”, it was not expected of the Company Judge to quantify the amount due since that is the province of the civil court. Similarly, as regards the third claim regarding repackaging of the medicines, the learned Company Judge erred in admitting the claim of € 75,000 and declining the rest despite the Letters of Demand filed by Appellant as Annexure R-12. As regards the fourth counterclaim regarding re-purchase of medicines after the termination of

contract, the learned Single Judge ought not to have concluded that the Appellant failed to request the Respondent to repurchase the medicines within the stipulated three months period. Since the rival claims required adjudication, the Company Judge ought to have stayed, if not rejected the proceedings pending before him. Another counterclaim regarding the medicines, which were not manufactured by Doctor William Schwabe in Germany but by another company in Czech Republic, was raised which was declined by the learned Company Judge. The merits of this counterclaim are also subject matter of civil adjudication and could not have been dismissed by the learned Company Judge in a winding up petition.

15. The contract between the parties was concluded by Schwabe by letter dated October 27, 2004. The Appellant in the Reply to the Petition has filed a letter dated November 05, 2004, Annexure R-18, wherein, along with other claims against the Respondent, the Appellant had requested the Respondent to repurchase the medicines in transit and also those in stock with the Appellant. The Agreement required the Respondent to have bought back these medicines within a stipulated time period which the Respondent allegedly has not done. The arguments in favour and against this claim would appropriately be considered by a civil court for complete adjudication. It seems to us that

this stand of Appellant should be seen as a valid counterclaim. As regards the claim towards medicines alleged to have been made outside Germany but sold as being made in Germany, Appellant had filed letters of correspondence filed as Annexures 21 and 30 where the Respondent was called upon to settle the pending dispute. The learned Company Judge has held the claim of the Appellant to be *prima facie* exorbitant, but its rejection outrightly ought to have been avoided since that tantamounts to a complete adjudication of disputed questions of fact. Similarly, the aspect of wrongly frozen commission, for which the claims were raised through letter/correspondence by the Appellant, also requires adjudication in a civil court. In respect of the remaining five counterclaims, since necessary documentation had been filed only in the appellate proceedings, we will avoid making any observations. However, these will obviously be substantiated in the civil suit pending on the original side of this Court.

16. The sum total of the amounts held to be valid counterclaims raised in his Reply by the Appellant would add up to € 2,79,0275 which, if proved, would be over and above the debt claimed to be due to the Respondent before us. In this conspectus, we are of the view that the Appellant had successfully disclosed before the learned Company Judge that

there was a defence to the claim ventilated in the winding up Petition. The legal consequence ought to have been that the learned Company Judge should have directed the Petitioner to prove its claim in a civil suit. In the light of the facts and circumstances of the present case, the winding up order shall stand recalled. The Appeal is accordingly allowed. Parties to bear their own costs.

(VIKRAMAJIT SEN)
JUDGE

July 31, 2009

(RAJIV SHAKDHER)
JUDGE