IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO.234 OF 2015
WITH
NOTICE OF MOTION (L) NO.583 OF 2015

Actgen Pharma Private Limited Appellant
versus
Jiangxi Chibang Pharmaceutical Co. Limited Respondent

Mr.Mayur Khandeparkar with Mr.Sanjay Dubey with Omar Khaiyam Shaikh for Appellant.

Mr.Rohan Cama, Mr.Darshan R. Mehta and Mr.Hasmit Trivedi i/by M/s.Shruve Liladhar & Co. for Respondent.

CORAM : MOHIT S. SHAH, C.J. AND
B.P.COLABAWALLA, J.

DATE : 4 March 2015

PC :

This appeal is directed against the judgment and order dated 10 December 2014 of the learned Company Judge ordering winding-up of the appellant company Actgen Pharma Private Limited on the ground of its inability to pay the dues of the respondent (petitioning creditor) to the tune of US $ 2,08,600.

2. According to the respondent, the appellant is indebted to it for the above sum together with interest thereon @ 12% p.a. in respect of supply of one full container load of Ofloxacin Q Acid. The appellant entered into two sale contracts with the respondent viz contract dated 11 January 2012 (first contract) and contract dated 26 December 2011 (second contract) for three full container load and two full container load of the above material respectively. The respondent admittedly supplied two full container load material under the first contract for an amount of US $ 2,08,600 each and the the respondent further supplied one full container load of the material in question under the second contract for an identical amount. The appellant made payment in respect of two out of the aforesaid three supplies but failed to make payment in respect of invoice dated 27 March 2012, which formed the subject matter of winding-up petition.

3. The learned Company Judge has noted, and it has not been disputed before us, that in the e-mail dated 1 September 2012 i.e. prior to the issuance of statutory notice dated 28 September 2012 and thereafter in two subsequent documents dated 8 October 2012 and 28 November 2012 respectively, the appellant admitted its liability and promised to pay initially by end of October 2012 and thereafter by end of December 2012. In fact, by their letter dated 28 November

2012, the appellant agreed to pay the outstanding dues of US $ 2,08,600 by 21 December 2012. All these e-mails and letter clearly contain an admission of liability. It was only subsequently on 5 February 2013 that for the first time the appellant took up a stand alleging a counter claim against the respondent on account of alleged short supply of the material i.e. non supply of two full container loads under the above contracts. Admittedly, the appellant did not make payment for the supply of third full container load under invoice dated 27 March 2012 nor has it ever made any payment for other two full container loads in respect of which the appellant has now made a counter claim of damages on account of alleged short supply.

4. In view of the above conduct on the part of appellant prior to issuance of the statutory notice dated 28 September 2012 and even thereafter till 28 November 2012 promising to make payment by 21 December 2012, we do not find any substance in the contention of learned counsel for the appellant that appellant is entitled to withhold payment of US $ 2,08,600. We, therefore, do not find any substance in the appeal.

5. Even at the hearing of the appeal, we had called upon the learned counsel for the appellant to deposit the amount of US $ 2,08,600 and thereafter to file a suit or opt for arbitration for the claim of alleged short supply. In response to

the above, learned counsel for the appellant stated that the appellant is not in a position to deposit the amount.

6. In view of the above also, we do not find any merit in the appeal. It is summarily dismissed. In view of dismissal of the appeal, Notice of Motion (L) No.583 of 2015 does not survive and stands dismissed as such.

(CHIEF JUSTICE)

(B.P.COLABAWALLA, J.)

MST