IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CAPP-35-2015 (O&M)
Date of decision:- 03.12.2015

Punjab Chemicals and Crop Protection Ltd.
...Appellant

Versus

Repar Corporation
...Respondent

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA

1. Whether reporters of local papers may be allowed to see the judgement?
2. Whether to be referred to the reporters or not?
3. Whether the judgement should be reported in the digest?

Present: Ms. Munisha Gandhi, Senior Advocate,
with Ms. Salina Chalana, Advocate,
for the appellant.

Mr. Akshay Bhan, Senior Advocate,
with Ms. Raina Sabharwal Thakur, Advocate,
for the respondent.

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S.J. VAZIFDAR, A.C.J.

The respondent filed the petition for winding up the appellant, inter alia, on the ground that it is unable to pay its debts. This is an appeal against the order and judgement of the learned Company Judge rejecting the appellant's company application under Rule 9 of the Company Court Rules, 1959 challenging the maintainability of the petition on the ground that this Court does not have jurisdiction to try the petition in view of the agreement entered into between the parties.

2. The parties had admittedly entered into an agreement on the basis whereof the respondent/petitioning creditor contends that an amount of over ₹ 10 crores is due and payable to it by the appellant. The appellant filed the

above application challenging the maintainability of the petition on the basis of clause 7 of the agreement the relevant part whereof reads as under:-

> *"7. Governing Law, Venue and Appointment of Agent:*
>
> *This agreement shall be construed and interpreted in accordance with and governed by the law of the State of Maryland in the United States without regard to any conflict of laws provisions that might otherwise be applicable. Venue may be had solely in any Court of competent jurisdiction of the State of Maryland…………………."*

Ms. Gandhi contended that in view of clause 7 of the agreement, this Court lacks inherent jurisdiction to try the petition for two reasons.

3. Firstly, relying upon the second sentence in clause 7, Ms. Gandhi contended that only the Courts of competent jurisdiction in the State of Maryland can hear and try the disputes between the parties.

4. Had this been a suit, the argument may have been well founded. Where Courts in two or more places have jurisdiction to entertain and try a proceeding, the parties can agree that the Courts in any one of them would have exclusive jurisdiction to entertain the proceedings. Where Courts in more than one place have jurisdiction, the parties may agree that proceedings may be filed only in the Courts in one of such places. However, such clauses cannot operate in respect of the proceedings filed for winding up of a company under the Companies Act, 1956. This is for the obvious reason that a petition for winding up can be filed only in a Court within whose jurisdiction the registered office of the company sought to be wound up is situated. Section 10(1) of the Companies Act, 1956 reads as under:-

> *"10. Jurisdiction of Courts – (1) The Court having jurisdiction under this Act shall be –*
>
> *(a) The High Court having jurisdiction in relation to the place at which the registered*

> *office of the company concerned is situated, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section(2); and*
>
> *(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district."*

The appellant's registered office is admittedly situated in the State of Punjab which is within the jurisdiction of this Court. No other Court even in India would have the jurisdiction to entertain a petition for winding against the appellant-company. A creditor has a statutory right to file a winding up petition. A creditor may maintain a suit and a winding up petition simultaneously. The contention on behalf of the appellant if upheld would deny the creditor this statutory right.

5. The learned Company Judge rightly followed the judgement of a learned Single Judge of the Bombay High Court in *Intesa Sanpaolo S.P.A. Vs Videocon Industries Limited* (2014) 120 CLA 389 (Bom). In that case, a guarantee, described as a "Patronage letter", was issued by the respondent-company in favour of the petitioner therein guaranteeing the repayment of the financial assistance extended by the petitioner to the company. The petitioner filed the petition on the basis thereof. One of the defences raised was that exclusive jurisdiction to construe the terms of the patronage letter was conferred upon the Court in Turin in accordance with Italian law and that, therefore, the petitioning creditor must await the decision in the suit filed by it in Turin. Rejecting the contention, Justice N.M. Jamdar held:-

> *"50. It was then contended on behalf of the respondent company that under the terms of the patronage letter, the exclusive jurisdiction to construe or consider the patronage letter is with the Turin Court and the intention of the*

> *parties to oust the jurisdiction of the Court was clear from the language employed in the patronage letter. It was contended that the words used in the patronage letter were that any dispute arising out of or in connection with the patronage letter "shall be" referred to the exclusive jurisdiction of the Court of Turin. It was submitted that the petitioner has in fact accepted this position and has filed proceedings before the Turin Court which passed a decree in favour of the petitioner. Reliance is placed on the decision of the Apex Court in the case of M/s Swastik Gases Pvt. Ltd. Vs Indian oil Corporation Ltd., 2013(8) Scale SC 433 which lays down that the intention of the parties is determinant in reading exclusion clauses regarding jurisdiction of the Courts.*
>
> *51. Though the patronage letter does make a reference to jurisdiction of the Turin Court, reliance on the decision in Swastik Gases is misplaced. The decision in Swastik Gases was not rendered in the context of a winding up petition. <u>The petition for winding can be filed by the petitioner only in this Court. For the purpose of entertaining a petition for winding up only this Court will have jurisdiction. It will be absurd to suggest that the petition for winding up can be filed in the Turin Court</u>. From the correspondence which is referred to above, the existence of the patronage letter is not disputed. The fact that there has been default on the part of the VDC, which is aground for invocation of the guarantee, is also not disputed. <u>The petitioner is a creditor of the respondent company and if it seeks to file a petition for winding up, it can only file the same in this Court. The argument based on exclusion clause has no merit.</u>"*
>
> *(emphasis supplied)*

We are in respectful agreement with the judgement of the Bombay High Court.

6. Ms. Gandhi then, relying upon the first sentence in clause 7, submitted that as the agreement is to be construed and interpreted in accordance with and governed by the law of the State of Maryland in the

United States, only the Courts in the State of Maryland can entertain and try any dispute relating to the agreement.

7. We have no hesitation in rejecting this submission as well. This is not an uncommon term especially in international contracts. The parties often provide that the agreement and their rights thereunder shall be construed by and interpreted in accordance with the laws of a particular country. All that the term means is that the Court or Tribunal where the action is brought must decide the dispute in accordance with the laws of that country. It does not bar the jurisdiction of Courts in other countries or places from deciding the disputes between the parties if such Courts or Tribunals otherwise have jurisdiction to do so.

8. Ms. Gandhi relied upon a judgement of the learned Single Judge of the Karnataka High Court in *The Bank of New York Mellon, Represented by its Constituted Attorney Vs Cranes Software International Limited*, MANU/KA/0271/2014. In that case, the petitioner had filed a similar petition for winding up the respondent-company contending that the company had failed to pay the amounts due under the bonds issued by it. The clauses relating to governing law and jurisdiction were as follows:-

> *"20.1 Governing law*
>
> *This Trust Deed and the Notes and all matters arising from or connected with them are governed by, and shall be construed in accordance with, English law.*
>
> *20.2 English Courts*
>
> *The Courts of England have exclusive jurisdiction to settle any dispute (a "Dispute"), arising from or connected with this Trust Deed or the Bonds (including a dispute regarding the existence, validity or termination of this Trust deed or the Bonds) or the consequences of their nullity.*

20.3 Appropriate forum

The parties agree that the Courts of England are the most appropriate and convenient Courts to settle any dispute and, accordingly, that they will not argue to the contrary."

Ms. Gandhi relied upon the following observations of the learned Single Judge:-

"It was the English Courts alone which were conferred with the jurisdiction to decide on issues arising from or concerned with the contract. It is also seen that the English Courts can entertain a winding up petition against the respondent company, though it may be a company registered in India.

Even though the petitioner has reserved to itself the privilege of initiating proceedings relating to a dispute, in relation to the contract, in any other Court or Courts with jurisdiction the declared forum of choice was the English Court. This Court would certainly have jurisdiction over the respondent company as it is a company registered within the jurisdiction of this Court, if this be the reason for the petitioner to have instituted the petition before this Court as stated at paragraph No. 16 of the petition, it was incumbent on the petitioner to have incidentally stated as to the reason for not having instituted the proceedings in the forum of choice, exclusively and expressly reserved. More importantly this Court is called upon to try the case and determine the insolvency of the respondent and its inability to pay its debts – in relation to the payments due under the contract and with reference to the terms of the contract. The third point framed for consideration, as above, would in fact require this Court to firstly decide whether an "event of default" had occurred and whether the petitioner had satisfied the conditions after such default by the respondent, in order to present the petition and thereafter to adjudicate on the dispute whether there was an irrefutable liability which the respondent is unable to satisfy etc., this would be inconsistent with the intention and the admitted position that the contract is declared to be governed by the English law. It would be appropriate if the petitioner should approach the competent English Court in this regard. If

> *once there are findings of fact arrived at with reference to the contract on the application of the English law, as to the liability and inability on the part of the respondent to pay its debts – such findings could possibly be the basis of a winding up petition before this Court subject to this Court also being satisfied that it would be just and equitable for the respondent to be wound up.*
>
> *In so far as the purported reservation of an option available to the petitioner, to approach Courts other than the English Courts can only be with reference to situations which would not require the said Courts, with jurisdiction, to address a cause that does not require any adjudication on facts that require the application of the English law, unless the independent application of that law is also within that Court's purview. It is certainly not within the purview of this Court to ascertain and apply the English law in interpreting the working of the contract between the parties. On the other hand, the said reservation of an option to approach Courts with jurisdiction, in relation to the contract, can for instance, be under criminal or quasi criminal proceedings against the respondent and its men."*

9 (A) We are with great respect unable to agree with the judgement. Firstly, we do not agree that it was incumbent upon the petitioner to have stated the reasons for not having instituted recovery proceedings in the forum of choice. A party is entitled to file a winding up petition without filing any other recovery proceeding. There is nothing that compels a petitioning creditor to also file a suit or any other proceeding to recover its dues which it contends have remained unpaid by the company and on the basis of which a winding up petition is filed.

(B) We are also unable to agree with the observation that if a Court were to decide whether an event of default had occurred and whether the petitioner had satisfied the conditions after such default by the respondent and thereafter adjudicate on the dispute whether there was a liability that the respondent was unable to satisfy, it would be inconsistent with the intention of the parties who had agreed to be governed by the English law. As we mentioned earlier, merely because the parties have agreed to be governed by the law of a particular country, it would not prevent the Courts or Tribunals of another country to decide the disputes and differences between the parties to the agreement. All that such clauses entail is that irrespective of where the Court or Tribunal is situated, the rights and liabilities of the parties must be determined in accordance with the provisions of the laws of the country which the parties have agreed would govern their contractual relationship. A stipulation that the rights and liabilities of the parties would be governed by the laws of a particular country is a contractual term unrelated to the jurisdiction of Courts.

Parties can agree that the contract between them should be governed by the laws of a country where no part of the cause of action has arisen and with which the parties are also unconnected. Foreign law is a question of fact which must be proved like any other issue of fact. The Court or Tribunal before which the dispute is brought must, therefore, decide the rights and liabilities of the parties in accordance with the laws of that country which the parties have agreed to be governed by. There would be no question of any inconsistency merely because a Court in one country decides a proceeding in accordance with and applying the laws of another country.

(C) (i) We are, therefore, unable to agree that it would have been appropriate if the petitioner had approached the English Court merely because the parties had agreed to be bound by the English law or that it was not within the purview of the Karnataka High Court to ascertain and apply the English law in interpreting the working of the contract between the parties.

(ii) We would not agree with this view even if this was a suit. At the cost of repetition, foreign law is a question of fact which can be determined like any other issue of fact by a Court of competent jurisdiction.

10. A clause to this effect does not affect an arbitration agreement between the parties. Anyone familiar with such contracts would know that they contain such clauses as well as arbitration clauses. In that event, the arbitrators must decide the disputes between the parties in connection with the agreement on the basis of the law of the country mentioned in the agreement. The seat of the Arbitral Tribunal is often in an entirely different jurisdiction. It has never been and indeed can never be suggested that such clauses negate an arbitration agreement. Nor can it affect the jurisdiction of any Court or for that matter even a Tribunal.

11. Even assuming that this submission has any substance, it would not apply to a winding up petition. As we mentioned earlier, a winding up petition can be filed only in the Court within whose jurisdiction the registered office of the company sought to be wound up is situated. This petition could not have been filed in the State of Maryland, USA or in any Court other than this Court. If the appellant's submission is accepted, it would deprive a party the statutory right of filing a winding up petition conferred by the Companies Act, 1956.

12. In the circumstances, the appeal is dismissed.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

(TEJINDER SINGH DHINDSA)
JUDGE

03.12.2015
Amodh

Whether to be referred to the reporter?	Yes √	No