

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CO.APP.No.17/2014 & CM No.5739/2014

% Reserved on : 4th September, 2015
Date of decision : 10th September, 2015

M/S FORE SQUARE RETAIL PVT. LTD. Appellant
Through : Mr. Sachin Dutta , Sr. Adv.
with Mr. Manik Dogra, Adv.

versus

REVELL GMBH & CO. KG. Respondents
Through : Ms. Rekha Palli, Sr. Adv.
with Ms. Ankita Patnaik, Ms.
Priyam Mehta and
Ms. Shruti Munjal, Adv.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE I.S.MEHTA

GITA MITTAL, J.

1. Three short grounds of challenge to the order dated 21st February, 2014 passed by the learned Company Judge directing admission of the petition under Sections 433(e) and 434 of the Companies Act, 1956 inter alia praying for winding up of the company have been placed before us. The respondent herein (hereinafter referred to as the 'supplier') had prayed for winding up

of the appellant (hereinafter referred to as the ‘Company’) on the ground that it had failed and neglected to pay admitted liability of US\$ 534,696.20 due and payable to it for the supply of toys for children in the nature of model kits; paints accessories; airbrushes, metal and slot cars.

2. The three fold defence to the winding up petition before the learned Company Judge (on which the challenge is laid before us as well) of the payment to defend the petition can be summed up thus :

- (i) The title of the goods supplied to the company remained that of the appellant under clause (h) of the agreement dated 1st April, 2007;
- (ii) The company has a valid defence for the reason that defective goods (of bad quality) were supplied to it by the respondent and hence the company had raised a bonafide defence to the winding up action;
- (iii) There was no admission of liability by the company as is manifested from the figures demanded by the company in different communications.

3. We have heard learned senior counsels on both sides at length who have carefully taken us through the record.

4. We propose to take up these issues in the seriatum in which submissions have been made before us while referring to the findings of the learned Single Judge.

5. Before proceeding on an examination of the issue, we may note that the learned Single Judge has restricted the scope of enquiry in the proceedings and has very gently summed up the examination of “*whether the dispute raised by the respondent is bonafide or has been raised only for the purposes of defeating the legitimate claims of the petitioner.*” It has been rightly observed that in the winding up proceedings, the merits of the dispute raised are not as relevant as the sincerity on the part of the Company in raising such disputes.

Ownership of the good

6. As undertaken by the learned Single Judge, we may also begin our examination of the submission by adverting to the terms of the letter of agreement dated 1st April, 2007 relied upon by both sides. While Mr. Sachin Dutta, learned senior counsel for the

company has placed reliance on the payment terms contained in clause (h), Ms. Rekha Palli, learned senior counsel for the supplier has drawn our attention to clauses (b), (h) and (j) of the agreement to contend that the agreement postulated a clear transaction of sale of goods by the supplier to the company. These clauses as extracted in para 3 of the impugned order are set out hereunder as well :-

“b. **Distributor Relationship.**

XXXX XXXX XXXX XXXX XXXX

The Supplier will sell to The Distributor and The Distributor will purchase from The Supplier the Products to be resold by The Distributor.

XXXX XXXX XXXX XXXX XXXX

The Distributor undertakes diligently to canvass for purchasers of the Products and in all reasonable and proper ways vigorously to promote the sale of the Product in The Territory.

The Distributor will maintain adequate sales, service and warehouse facilities, a sales staff and adequate inventory of the Products in The Territory. It is imperative that the deliveries to the smaller shops may not be interrupted or even disrupted. Therefore The Distributor may have to appoint a sub distributor (in consent with the Supplier) to deal with the smaller accounts.

The Supplier, in its turn, undertakes not to sell the Products to any other retail- as well as wholesale merchandiser in The Territory the Products to be resold in The Territory except of the cases mentioned in the Clause a-Exclusions.

XXXX XXXX XXXX XXXX XXXX

h. **Payment Terms**

Payment for a consignment delivered is to effect:

90 days from bill of lading

XXXX XXXX XXXX XXXX XXXX

Until the distributor has paid in full the purchase price and any interest and other charges in respect of the goods (each order being treated as a whole) and any other sums which may be due to the Company from the buyer:

- 1) Legal & beneficial ownership of the goods shall remain with the Company; and**
- 2) The Company shall be entitled to repossess the goods at any time.**

XXXX XXXX XXXX XXXX XXXX

j. Product Warranty and Liability

The Supplier warrants that the Products are free from defects and safe for their intended use, and indemnifies.

The Distributor against any and all claims, damages and injuries

resulting from or connected with the Products. The Product liability is covered by The Supplier's German insurance.....

XXXX XXXX XXXX XXXX XXXX”

7. Pursuant to the said agreement, the company placed two orders dated 19th June, 2007 and 12th July, 2007 with the supplier herein for supply of the aforementioned goods.

8. The goods were supplied between 31st August, 2007 to 19th October, 2007 against invoices in respect of the goods duly received by the company as well as the invoices towards freight charges all of which are detailed in para 3.2 and 3.3 of the impugned decision. The total value for the 24 invoices mentioned

therein is the amount of US\$ 537,226.52. No dispute is made on behalf of the company with regard to either the issuance of the invoices or the details therein including the quantification of the amounts. No dispute is raised at all to the quality of the goods supplied.

9. Clause (b) of the agreement makes it clear that the supplier sold to the company (distributor) who would 'purchase' ordered goods which were to be 'resold' by it. Clause (g) also states that the distributor shall purchase the goods from the supplier on terms specified therein.

10. Clearly, the transactions between the supplier and the company were that of sale and purchase of goods. The products were specified in the agreement dated 1st April, 2007. The payment terms also stood agreed and the company was required to pay the price of goods supplied within 90 days of the bill of lading. The submission on behalf of the company to the effect that the supplier continued to be the owner of the goods and the title never passed and that consequently no liability could be fastened upon

the company for the reason that it is still willing to return the goods to the respondent has no basis in fact on law and is hereby rejected.

Goods supplied were defective

11. In order to adjudicate this ground of challenge, let us examine the conduct of the appellant company upon receipt of the goods against the invoices dated 31st August, 2007, we are informed that the first payment effected by the company was on 2nd January, 2008 when it paid the amount of US\$ 15748. The company failed to make any payment thereafter.

12. Conscious of its defaults, on 1st October, 2007 the company wrote to the supplier not to cancel the order placed by it. The company further requested the supplier to manufacture the goods but to hold the material at their end. The company also requested the supplier to postpone delivery and shipment dates which it would inform in the future. This was followed up with yet another request from the company by an email dated 10th January, 2008 regretting to the supplier that *“right now, we are unable to take the goods of the last order as we are facing lot of problems in selling these goods in the market due to high prices and local level*

competitors those are selling the similar range at lower cost". The company also requested the supplier to cancel the order for this reason. No complaint of quality or defect was pointed out.

13. The supplier responded promptly with an email of 10th January, 2008 itself informing the company that the order could not be cancelled as all components had already been brought in November 2007 itself. The company was reminded that it was a "*special production*" being run especially for the company and therefore, the components could not be used for any other customer.

14. The company's response was to request the supplier to "*postpone the delivery by March end*". It is noteworthy that the supplies had been postponed after 19th October, 2007 by the respondent/supplier purely on the request of the appellant company, not for any reason concerning quality of the supplies. Unwilling to wait any further for the payments due to it, the supplier addressed an email dated 13th August, 2008 to the representative of the appellant company requesting it to provide the payment plan immediately and the date and amount of the first

appellant. The company was informed that the supplier would start charging it interest rate of 8.5% on the outstanding amount if the information sought was not provided.

15. There was no immediate response. However, a series of three emails exchanged on 10th November, 2008 have been placed by learned senior counsel on both sides before us urging conflicting constructions. We briefly touch upon these three emails. The first email emanated at 08.07 am from the side of the company to the representative of the respondent stating that “goods are not moving from retail basis because of high prices”. The company refers to an offer to ship the goods to any other distributor; sought a 50% discount to still “*sell the products and pay off the money*”. A clear reference was made to the company being in “financial problems and our banks have asked us to pay 40% of the limits in next four months. There is no way we can pay them”. The company sought an amicable settlement. This email was forwarded at 10:56 to the supplier by its representative which promptly responded on the same day. We find that the supplier had referred to its repeated requests to the company to inform the “*alleged problem items and*

to quote the quantities”. The supplier categorically stated that it would not grant any discount but charge further interest within the next few days. It was also stated clearly that the “*collection procedure has been started and would be carried through*”.

16. The above narration would show that till this date, the company had not made any grievance at all about the quality of the goods. No complaint was made that the goods supplied were either defective in terms of either the constitution, composition or manufacturing.

17. On record is an offer from the side of the company made on 17th December, 2008 “*for a mutual resolution*” of the pending issues. The company offered to pay the amount of US\$ 54,959.79 by 31st December, 2008 latest. Reference is made to quantities/products that have “*already been sold until November 20, 2008*”. The amount included quantities/products already been sold until November 20, 2008 and quantities/products that the supplier had been advised to keep in stock. The payment schedule was also indicated. So far as the reason for the delay in payment was concerned, it was stated on behalf of the company that

“payments realised are normally received 60-90 days or on consignment sale basis only”. Time was sought to sell the existing stock over the next 3-6 months subject to *“receipt of new ordered goods”*. In fact, the tenor of the letter clearly establishes that the appellant company had no grievance at all so far as the quality or constituents/composition of the goods was concerned. In fact, this communication contains an inherent threat that payment of even the supplies already made, would not be made unless the supplier agreed to make further supplies. Had the supplier supplied defective goods, there would be no occasion for the company to order further goods.

18. The supplier responded with a letter date 13th May, 2009 stating that the proposal made by the company was unacceptable. A last offer to resolve the issues was made, setting out the monetary amount which the supplier was willing to receive coupled with its acceptance of return of some goods which had not been sold by the appellant.

19. Instead of abiding by the terms of its contract or making payments to the supplier, the company for the first time took up a

completely belligerent stand and caused a legal notice dated 31st July, 2009 to be issued to the supplier contending that *“on receipt the goods were found to be not suitable for the said markets of India, Sri Lanka, Bangladesh & Nepal; the goods were found to be hazardous to health and sub-standard with the result that the goods were not accepted in the markets and they could not be sold out; that since the products were defective and sub-standard and hazardous to health, you had also withdrawn the said products from various international markets; that ban has also been imposed on the import and sale of these products by various governments, which also clearly shows that the products were not suitable, defective and could not be sold in the markets and, the company for the first time alleged that “the said products were fraudulently supplied to my clients knowing very well that they were hazardous and concealing this fact, the supplier sent the said products to my clients. My clients are, therefore, not responsible for any payment towards the said defective, hazardous and sub-standard products”*.

Finally, the notice sought payment of US\$ 273252.46 from the supplier towards amount it claimed it had incurred towards custom duty; warehouse storing charges; insurance and other costs.

20. The supplier responded with the issuance of a legal notice dated 20th July, 2010 under Sections 434 (1)(a) of the Companies Act, 1956 to the appellant company. This notice was not repudiated by the company. The winding up thus could have been ordered on deemed admissions alone.

21. The learned Single Judge has relied on the admission of the receipt of the goods and the values mentioned in the invoices as well as the demands thereof contained in the emails more specifically the email dated 10th November, 2008.

22. In view of the above, the finding of the learned Single Judge that the Company's contention that the goods were "*defective or sub-standard*" was baseless and an afterthought and had been made only in order to avoid payment of the outstanding dues of the appellant, was the only possible conclusion and cannot be faulted. We reject this submission by the appellant as well.

The amounts were determined

23. The learned Single Judge has extracted complete details of the several invoices and their value. No dispute has been raised on any point of time to the receipt of the goods; the invoices or the values of the goods or the contents thereof. The above narration would show the several demands made by the supplier to the appellant company of the total amounts due from it. The above narration also contains the efforts made by the supplier company to resolve the disputes amicably. We have also noted above the efforts made by the respondent company to persuade the supplier to accept part payment and return some of the goods. These efforts did not culminate in any agreement inasmuch as the appellant company refused to accept the counter proposal by the supplier. For this reason, the efforts made to amicably resolve the issues and parts amounts suggested therein are of no legal consequence and effect. Looked at from any angle, such offers are inconsequential and do not impact the quantification of the liability of the appellant company as made out from the admitted invoices as well as the email dated 10th November, 2008 of the appellant.

This objection of the appellant company is also devoid of any legal merit and is hereby rejected.

24. We are also unable to agree with the appellant that the respondent supplier had dumped products with it against its instructions. The last supply was effected on 19th October, 2007 and thereafter, on the request of the appellant company, the supply of the goods were held back by the appellant.

Legal principles

25. Reference can usefully be made to the judicial precedents relied upon by the learned Single Judge in the case reported at ***(2010) 10 SCC 553 IBA Health (I) (P) Ltd. v. Info-Drive Systems Sdn. Bhd.***, the Supreme Court has observed thus:-

“20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle.

It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.”

Normally there has to be a substantial dispute with regard to compliance with the terms of a settlement so as to oust a prayer for winding up of a company.

26. In **161 (2009) DLT 703 (DB) German Homoepathic Distributors Pvt. Ltd. v. Deutsche Homeopathic-Union DHU Arzneimittel GmbH & Co.**, a Division Bench of this court has held as follows :-

“12. In winding up proceedings it is necessary to keep the following principles in perspective --(i) If there is *abona 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 v. North India Petro-Chemical Ltd.*, (1994) 2 Comp LJ 50 (SC) in which the observation in *Amalgamated Commercial Traders (P) Ltd. v. Krishnaswami*, [1965] 35 Comp. Cas 456(SC) and *Madhusudan Gordhandas v. 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. v. 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 v. 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.”

These principles have to guide the present consideration.

Conclusions

27. The learned Single Judge has, therefore, held in para 15 that while a winding up petition is not a means of enforcing a debt which may be otherwise disputed by company and that such proceedings cannot be used to exert pressure on the company to settle disputed claims. This is a correct statement of the applicable principles. It has also been rightly observed that if a debt is disputed, the refusal to pay the debt would lead to an inference that the company was unable to pay its debts. Thereafter, it has been rightly observed that a sham and spurious defence would not be permitted to deprive a creditor from maintaining a petition for winding up of the company.

28. In the present case, neither has the company been able to bonafide dispute the claim of the supplier nor is its defence of substance. As noted above, the debt is also undisputed. Additionally, the documents of the company reflect that it is facing financial difficulty as well. The defence of the goods having been of bad quality is clearly in bad faith and a malafide afterthought in retaliation to the supplier notifying the company that it has

proceeded towards collection of the debt. On application of the principles laid down in *German Homoeopathic Distributors Pvt. Ltd.* as well, we find that the learned Company Judge has acted in accordance with the requirements of law in passing the orders.

29. We are appalled with the manner in which the appellant has conducted itself in the present case. Payment for supplies received by it between 31st August, 2007 to 19th October, 2007, have not been made till date. The correspondence noted by us above shows that the appellant company has effected sales of large volume of the goods received by it and despite receiving payment thereof, has not paid the dues of the supplier company. The receipt of the notices from the supplier and the filing of the winding up petition has also not motivated it from making any payment to the respondent. Instead the appellant has attempted to raise a completely dishonest and malafide ground for non-payment and has entangled the respondent supplier in this frivolous and misconceived litigation. Valuable judicial time has been caused to be expended on completely untenable and baseless contentions. We are of the view that in addition to dismissal of the present

appeal, the appellant company deserves to be burdened with heavy costs.

Result

30. In view of the above, the appeal and the application are dismissed with costs which are quantified at Rs.50,000/-.

GITA MITTAL, J

I.S.MEHTA, J

SEPTEMBER 10, 2015

kr