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

ARBITRATION PETITION NO.754 OF 2015

Bilcare Limited ...Petitioner
V/s.
Novogene Life Sciences Pvt. Ltd. ...Respondent

Mr.Astad Randeria with Mr.Harshal Dedhia i/b M/s.Kanga & Co. for the Petitioner.

Mr.D. Ramdas i/b Mr.Avinash Singh Gautama for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 29TH MARCH, 2017.

P.C. :-

1. By this petition filed under sections 433, 434 and 439 of the Companies Act, 1956, the petitioner seeks winding up of the respondent on the ground that the respondent is unable to pay its debts. Some of the relevant facts for the purpose of deciding this petition are as under :

2. It is the case of the petitioner that in the month of February, 2014, the petitioner contacted the respondent for supplying 2000 Caelyx Vials which were to be delivered at Belgium / Germany in Europe, in four equal batches of 500 Vials each within two months of the date of purchase order. According to the petitioner, the

respondent had confirmed the said position by its email dated 6th February, 2014. On 7th February, 2014, the petitioner issued a purchase order for supply of 1000 Vials on the terms and conditions mentioned therein at the price of Euros 625 for each Vials, which worked out to Rs.52,975/- per Vial. The purchase order specified the delivery period as “ASAP within EU”. It was further provided that if there was any delay of more than two days than the confirmed pick up date, the petitioner will charge penalty at the rate of 10% of the value of the product.

3. On 11th February, 2014, the petitioner paid to the respondent an advance for 400 Vials out of the total of 1000 Vials to be supplied under the said purchase order at the rate of Euros 625 per Vial totalling to Rs.2,11,90,000/-. It is the case of the petitioner that the respondent had sent the photographs of Vials of single lot to the petitioner. The said lot did not have any marketing authorization number. The petitioner sent an email on 21st February, 2014 enquiring as to why the first lot did not have a marketing authorization number. The petitioner asked the respondent to supply the Vials from another lot which conformed to the specifications required to sell and use the Vials in the European Union markets. The respondent accordingly by its email dated 26th February, 2014 sent the photograph of another lot with an Israel country code sticker and a

leaflet pasted on it. On 1st March, 2014, the respondent confirmed that all 400 Vials to be supplied would be from the same lot only. It is the case of the petitioner that the petitioner accepted the said proposal of the respondent to supply 400 Vials to Germany from a single lot from Israel.

4. On 4th March, 2014, the respondent informed the petitioner that out of 400 Vials to be delivered, only 210 Vials could be supplied from the second lot and the balance 190 Vials would be supplied from a different lot having an expiry of May, 2015. On 4th March, 2014, the petitioner vide an email accepted the proposal of the respondent to accept 210 Vials from the second lot at the rate of Euros 600 per Vial. It is the case of the petitioner that on 14th March, 2014, the respondent shipped only 163 Vials as against the delivery of initial agreement of delivery of 400 Vials. The petitioner asked for delivery of various documents vide an email dated 14th March, 2014. The petitioner vide its email dated 17th March, 2014 enquired about the status of the pending 237 Vials and mentioned that all the remaining Vials should be from one lot bearing No.DJBS000 and requested for delivery before 19th March, 2014. The respondent vide its email dated 18th March,2014 informed the petitioner that the remaining Vials would be the mixture of two lots having expiry date of March, 2015 and May, 2015.

5. It is the case of the petitioner that on 21st March, 2014, the respondent sent an email to the petitioner stating that the pending 223 Vials would be supplied from a combination of three lots having expiry of March, 2015, May, 2015 and June, 2015. It is the case of the petitioner that the petitioner agreed to accept the Vials from only two lots which had expiry dates of March, 2015 and May, 2015 amounting to a total 199 Vials and could not accept the Vials having expiry date of June, 2015 since the respondent was unable to produce a Certificate of Analysis (COA) for that lot which was a mandatory requirement under the purchase order.

6. It is the case of the petitioner that after confirming 199 Vials from two batches, the respondent by its email dated 21st March, 2014 informed the petitioner that only 160 Vials could be supplied. It is the case of the petitioner that on 29th March, 2014, after accepting the delivery of 160 Vials, the petitioner found that 3 Vials from the said shipment were damaged which fact was brought to the attention of the respondent by the petitioner vide its email dated 29th March, 2014. The respondent agreed to replace the said damaged Vials by its email dated 29th March, 2014.

7. It is the case of the petitioner that since the respondent did not supply the Vials in accordance with the purchase order, the petitioner vide its email dated 27th March, 2014 called upon the

respondent to refund the advance amount paid in respect of the remaining Vials as well as the payment of 25 Euro per Vial for 323 Vials which were supplied by the respondent to the petitioner. It is the case of the petitioner that the petitioner terminated the said purchase order by the said email dated 27th March, 2014.

8. The respondent vide its email dated 28th March, 2014 informed the petitioner that the respondent had remitted full amount for 1000 quantity of Vials to its suppliers in Swiss, Turkey, Israel etc. out of which the respondent had received payment for only 400 Vials. The respondent contended that in the purchase order, it was mentioned that the stock required was of later than 03/15 expiry which had been adhered to. The respondent informed the petitioner that since the remaining stocks were lying with German party, the supplier of the respondent would not agree for refund because it was already paid. The respondent may have to try to sell the remaining stocks to some other buyers to liquidate and once that happened, it will get in touch with the petitioner. The respondent made it clear that the respondent may not be able to bear further losses due to the rejection of the petitioner of the remaining stocks. The respondent informed the petitioner that if the petitioner would agree to pick up the remaining stocks which are of 03/15, 05/15 and 06/15, (COA may be possible), the respondent would give the petitioner a date and close

this transaction once and for all.

9. The respondent informed the petitioner vide its email dated 11th April, 2014 that as per the request of the petitioner, the respondent had suggested its supplier to try and sell the stocks lying in Germany warehouse to another client and the respondent would be able to refund to the petitioner for the balance 77 Vials only once they were sold. The respondent called upon the petitioner to pick up 39 Vials of the same earlier batch which were delivered to the petitioner and the respondent could try to refund the amount for the balance of 38 Vials and close the matter.

10. The respondent vide its email dated 21st April, 2014 informed the petitioner that the stocks were lying with German custom since last so many days and if the same were not picked up by the petitioner, the respondent may not be liable for damages claimed by the petitioner.

11. The respondent vide its email dated 23rd April, 2014, informed the petitioner that it was able to arrange all balance 77 Vials of the same batch as required by the petitioner and was ready to shift them whichever location the petitioner would wish to be sent. The respondent called upon the petitioner to convey latest by 24th April, 2014 and called upon the petitioner to release the old bill payments pending since two months.

12. The respondent vide its email dated 30th April, 2014 to the petitioner informed that since the petitioner wanted the same old batch, with great difficulty the respondent could manage to arrange the balance Vials by paying almost 100 Euros extra which would be shipped to Germany in next two weeks. The respondent asked the petitioner to pick up the balance 77 Vials during the end of next week.

13. The respondent by its email dated 5th May, 2014 informed the petitioner that with a lot of efforts, the respondent had managed to get COA for 06/15 batch also which was attached for reference of the petitioner and placed on record that the respondent had put lot of resources to complete 400 Vials lot delivery. The respondent requested the petitioner to pick up remaining 77 Vials and to close the transaction.

14. The petitioner vide its email dated 5th May, 2014 informed the respondent that the petitioner could not accept the offer of the respondent for 77 Vials which would be available at higher costs and that too by the end of next week. Though the respondent offered delivery of balance 77 Vials, the petitioner refused to accept. The petitioner through its advocate's notice dated 2nd June, 2014 to the respondent called upon the respondent to refund a sum of Rs.47,63,512/- with interest at the rate of 18% p.a. from due date till payment. The respondent replied to the said legal notice through its

advocate's letter dated 12th June, 2014 and denied the contents thereof. The petitioner vide its advocate's letter dated 7th July, 2014 replied to the said letter dated 12th June, 2014 and denied the allegations made therein and once again called upon to the respondent to pay the dues of the petitioner.

15. The petitioner thereafter through its advocate issued a statutory notice on 3rd December, 2014. There was further correspondence exchanged between the parties, which are annexed to the affidavits filed by the respondent.

16. Learned counsel for the petitioner invited my attention to the correspondence referred to aforesaid and also the purchase order and would submit that the respondent committed breaches of its obligation under the said purchase order and though had agreed to supply the Vials of the same batch, the respondent offered the delivery of Vials of different batch. He submits that the respondent was not able to deliver 77 number of Vials of the same batch as required by the petitioner under the said purchase order. The respondent had also demanded 100 Euros extra from the petitioner which was not in accordance with the terms and conditions of the purchase order. The respondent was not able to supply the COA to the petitioner while delivering 223 number of Vials. He submits that though the respondent had belatedly informed the petitioner that the

petitioner shall take delivery of the remaining 77 Vials from the German custom, the respondent could not produce any proof of purchase of those Vials by the respondent from its suppliers or to demonstrate that those Vials were actually available with German custom. He submits that the respondent not having supplied the balance quantify of Vials and had taken payment for 400 number of Vials, the respondent was liable to refund for 77 number of Vials not supplied as well as at the rate of Euro 25 per Vial which the respondent had agreed to refund in respect of the Vials supplied by the respondent to the petitioner. He submits that the respondent has not disputed that the petitioner had paid in advance for the entire 400 number of Vials to the respondent as against which the respondent had delivered only 323 Vials.

17. Learned counsel appearing for the respondent on the other hand invited my attention to the various correspondence referred to aforesaid and would submit that in the purchase order placed by the petitioner upon the respondent, the petitioner had placed the order for 1000 quantity of Vials with the expiry date of February, 2015 or more. He submits that the delivery of those Vials were to be made as per clause 2 of the said purchase order which provided that “ASAP within EU”. He submits that if there was any delay of more than two days than the confirmed pick up date, the

petitioner was entitled to charge penalty at the rate of 10% of the value of the product. He submits that in this case the petitioner did not charge any penalty and accepted the delivery of 323 Vials from the respondent and waived its right to charge penalty, if any. He also placed reliance on clause 3 of the terms and conditions of the purchase order and would submit that there was no mandatory condition that all the Vials should be from single batch though it was preferable. He submits that the petitioner had agreed to place 1000 Vials advance against the proforma invoices. It is submitted that the respondent had in turn placed order of 1000 quantity of Vials to the various suppliers and had made advance payment. Since the petitioner did not issue further invoices for the balance 600 Vials, the respondent suffered heavy losses.

18. It is submitted by the learned counsel that though the respondent had repeatedly called upon the petitioner to pick up the delivery from German custom in respect of the balance quantity of Vials but instead of taking delivery of those Vials by the petitioner, the petitioner purported to terminate the said purchase order. He submits that as a result thereof, the respondent has suffered losses. The respondent has not committed any breaches of any terms and conditions.

19. It is submitted that there are various disputed questions of

fact which cannot be gone into by this Court in this company petition. He submits that the petitioner has filed this petition *inter-alia* for the purpose of pressurizing the respondent to succumb to the unreasonable and untenable demand of the petitioner.

20. Learned counsel for the petitioner in rejoinder submits that the respondent has not disclosed the proof of purchase of 77 Vials and as to whether the same was available for delivery with German custom. He submits that the respondent could not have withheld the balance amount recovered from the petitioner as and by way of advance though the said balance quantity of 77 Vials was not delivered to the petitioner by the respondent admittedly.

21. A perusal of the correspondence exchanged between the parties clearly indicates that there were few changes in the terms and conditions by the conduct of the parties. The petitioner accepted the delivery from different lots admittedly and had also demanded reduction in the price. A perusal of the purchase order clearly indicates that the expiry date of the item described in the purchase order was February, 2015 or more. In clause 3 of the terms and conditions, it was specified that the expiry date should be February, 2015 or more (preferable from single batch), the fact remains that the petitioner accepted the delivery of 223 quantify of Vials from different batches.

22. A perusal of the correspondence exchanged between the parties further indicates that the respondent had repeatedly called upon the petitioner to take delivery of the balance 77 quantify of Vials as demanded by the petitioner from German custom but instead of taking delivery of the said 77 quantity of Vials, the petitioner terminated the said purchase order and demanded refund of the balance amount. The respondent had also agreed to provide COA along with the consignment in respect of the balance quantify of Vials. The petitioner did not make any grievance in respect of the 223 quantify of Vials received from the respondent.

23. On the contrary, it is the case of the respondent that though the petitioner had issued purchase order for 1000 quantify of Vials, the petitioner placed order only for 400 quantify of Vials, whereas the respondent had already made payment to its suppliers for the entire 1000 quantify of Vials. In that context, the respondent had made it clear in the correspondence that the question of refund of any amount did not arise. The respondent was trying to find another buyer for the balance quantify of 77 Vials. The respondent ultimately called upon the petitioner categorically to take the delivery of the said balance quantify of 77 Vials which the petitioner failed to take delivery.

24. In view of the aforesaid correspondence exchanged

between the parties and on the interpretation of the purchase order, in my view, there are various disputed questions of fact. The respondent has raised *bonafide* defence which are not moon-shine. This Court thus is not inclined to exercise its discretionary powers in favour of the petitioner and against the respondent in this matter. In my view, the remedy of the petitioner would not be for seeking winding up of the respondent company in the facts and circumstances of this case.

25. I therefore, pass the following order :-

a). The Company Petition No.754 of 2015 is dismissed. It is made clear that the observations made by this Court in this order are only for the limited purpose for deciding this company petition. If the petitioner proposes to file any recovery proceedings, such proceedings may be decided on its own merits without being influenced by the observations made by this Court in this order.

b). There shall be no order as to costs.

(R.D. DHANUKA, J.)