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

COMPANY PETITION NO.744 OF 2014

Jiangsu Guo Tai Int'l Group Hua Tai)
Imp and Exp Co.)....Petitioner
V/s.
Surbhit Impex Pvt. Ltd.)....Respondent

WITH
COMPANY APPLICATION NO.20 OF 2016
COMPANY PETITION NO.501 OF 2015

Mr.Shyam Kapadia a/w Mr.Darshan R.Mehta and Ms.Krithika Anand i/by M/s.Dhruve Liladhar and Co. for petitioner.
Mr.Vishal Kanade i/by Neha Mehta for respondent.

CORAM : K.R.SHRIRAM,J
DATE : 21.12.2017

P.C.:-

1 By this petition, petitioner seeks winding up of respondent company-Surbhit Impex Pvt. Ltd. (the company) under Sections 433(e), 434 and 439 of the Companies Act, 1956.

2 According to petitioner, they are, inter alia, in the business of manufacturing of chemicals like levofloxacin Q Acid and Ofloxacin Q Acid. According to petitioner, the company vide purchase order dated 19.6.2012, placed orders for 7000 KGS for levofloxacin Q Acid 25 KG/Drum and 7000 KGS for Ofloxacin Q Acid 98% min 25 KG/Drum at USD 32.00 per KG each. Petitioner placed confirmation

dated 19.6.2012 upon the company. Admittedly, the supply was made by petitioner. Petitioner has received payment for Ofloxacin Q Acid but has not received payment for Levofloxacin Q Acid amounting to USD 2,24,000/-.

3 It is alleged in the petition that the company was introduced to petitioner by one Mr.Vijay Hiran who was director of Actgen Pharma Pvt. Ltd. and Vigor Pharma Pvt. Ltd. According to petitioner Mr.Hiran informed them that the company was a renowned company and is credit worthy and based on that introduction, petitioner made search with the Chinese Insurance Group, SINOSURE and accordingly, supplied goods to the company. It is stated in the petition that the company failed and neglected to make payments and therefore, petitioner inquired with Mr.Hiran, who by two e-mails dated 18.2.2013 and 25.6.2013 assured that respondent will make payments. Since no payments came forward, petitioner issued through their advocate a statutory notice dated 27.1.2014 to which there is no reply. Hence this petition.

4 Mr.Kapadia appearing for petitioner submitted that in view of respondent not even replying to the statutory notice, the court should assume that company is unable to pay its debts, commercially

insolvent and on this ground alone, wind up the company.

5 It is true that company did not reply to the statutory notice. The company has, however, filed an affidavit in reply of one Mahendra Jain affirmed on 29.1.2015 in which 4 defences are taken. Those are :-

(i) Company is in sound financial condition and therefore, the question of being commercially insolvent does not arise ;

(ii) There is an arbitration agreement between petitioner and the company ;

(iii) The company was not the actual purchaser of the goods but was, if one puts loosely, a front for Actgen or Vigor Pharmaceuticals which are both companies of Mr.Hiran.

(iv) According to company said Mr.Vijay Hiran of the company has been a regular customer of petitioner for purchase of various pharmaceutical products. Mr.Hiran was also known to the company's directors since they are also in pharmaceutical business.

It is stated that sometime in June-2012 the said Mr.Vijay Hiran approached respondent-company and informed them that since his credit limit with petitioner was exhausted, he would like to place orders with petitioner through respondent for a predetermined management fee. The company agreed to help Mr.Hiran and Actgen

Pharma Pvt. Ltd. in doing 3 transactions with petitioner. The arrangement was, petitioner would move the goods by sea in the name of the company and the company would, in turn, vide a Highseas Sales Agreement, transfer the goods to Actgen Pharma who would then after using the said bulk drugs in their factory make payment to petitioner through the company at the end of the credit period. It is stated by the company that payments for 2 such consignments have been made by Actgen Pharma through the company and so far as subject matter of present petition is concerned, for payment of USD 2,24,000/-, the company is yet to receive payment from Actgen Pharma and therefore, making any payments to petitioner does not arise.

6 It was also submitted that petitioner was always aware of this arrangement that the company was a front for Actgen Pharma and was to make payment only upon receiving payment from Actgen Pharma. Mr.Vishal Kanade, counsel for respondent also submitted that otherwise the 2 e-mails on which petitioner relied upon which was sent by Actgen Pharma would not state what is stated therein. It will be useful to reproduce the 2 e-mails dated 18.2.2013 and 25.6.2013 :

" From : Vijay Hiran
To : cvx
Sent : Monday, February 18, 2013 12:55 PM

Subject : Re : 2nd payment

Dear Shirley,

We had to make this payment from other bank, other than Bank of India, to which you had send the original invoice.

We are doing the second payment today from surbhit, will keep you informed.

For the balance payment will check and revert how to do the same.

Thanking you in advance and Look forward to your reply.

With Best Regards

Vijay Hiran
Actgen Pharma Private Limited
Mumbai
Fax No. +91-22-40953099
Email : vijay@actgen.in

" From : Vaishali [mailto : finance@actgen.in]
Sent : Tuesday, June 25, 2013 1:24 PM
To : `janus.desai@tcmmail.com'

Subject : high exchange rate not able to pay

Dear Sir,

We have done payment of M/s.Surbhit Impex Pvt. Ltd. of Rs.75,00,000/- Few Days Back. Due to high Exchange rate of dollar, we are not able to pay you at this stage. We will pay you up to 10th July as soon as dollar rate

Comes Down.

Hence we request you to please Co-operate with Us.

We will appreciate you kind Support.

Best Regard,

Vaishali.
Actgen Pharma Pvt. Ltd.
Hiran Orgochem Ltd.
Unit no.437 & 438, 4th Floor, Ijmima Compound,
Off. Link Road, Malad-west,Mumbai-400 064"

Mr.Kanade submitted that if what petitioner states has to be accepted that Mr.Hiran only introduced the company, then in these 2 e-mails, Actgen Pharma/Mr.Vijay Hiran would not have used the expression "we" everywhere and nowhere in the emails it is stated we/he would persuade the company to make the payment to petitioner.

7 Mr.Kanade further submitted that these are disputed questions of facts. The company court cannot come to a conclusion without evidence being led as to who was ultimately liable to make payment to the company and hence petition should be dismissed.

8 It is settled law that if disputed question of facts arise and

defences raised cannot be stated to be moonshine or bogus, the court should not pass an order of winding up of a company.

9 When one considers the petition with the documents annexed thereto, the affidavit in reply with documents annexed thereto and the submissions made by opposing Counsel, two different theories emerge. For court to pass an order of winding up, the court has to come to a conclusion that the defences put forward by respondent are improbable or moonshine or bogus. I am unable to come to that conclusion. The reason being, it is an admitted position that Mr.Vijay Hiran has been involved in the transactions between petitioner and the company. The purchase order placed by the company expressly provides under shipping instructions, `Manufactured for Vigor Pharma Private Limited'. Admittedly Mr.Vijay Hiran is a director of Vigor Pharma Private Limited. Even in the emails annexed to the petition which are at Exh.E & Exh.F as quoted above, it prima facie appears that Actgen Pharma is taking up the responsibility of making payment. I must hasten to add that it is a prima facie view and not a conclusive view and this should not come in the way of petitioner if it decides to file any proceedings against respondent.

10 Moreover, in paragraph-8 of the petition, it is stated "Mr.Hiran forwarded the relevant details of the Respondent Company in order to enable the Petitioner to make inquiries pertaining to the Respondent Company with SINOSURE. Pursuant thereto the Respondent Company through Mr.Hiran forwarded their Purchase Order dated 19th June, 2012 to the petitioner. Pertinently, the said purchase order was duly signed and stamped by the Respondent Company." No such communication is annexed to the petition or to the rejoinder to establish the fact that Mr.Vijay Hiran was only an introducing party. There are also documents annexed to the affidavit in reply to show that the final receiver of the goods exported by petitioner was Actgen Pharma. Even in the purchase order `the notify party is shown as Vigor Pharma Pvt. Ltd.', which is the group company of Actgen Pharma and Mr.Vijay Hiran is admittedly a director of both companies.

11 Therefore, considering the pleadings, the documents annexed and the submissions made by the opposing counsel, the stand taken by respondent appears probable or plausible and not moonshine. Therefore, as stated earlier when disputed questions of facts arise, the company should not be wound up.

The petition came to be admitted on 5.1.2015 pursuant to an ex-parte order in as much as respondent did not remain present despite notice. At that time the court did not have the benefit to consider rival arguments.

12 In the circumstances, petition stands dismissed with no order as to costs.

13 If petitioner wishes to commence arbitration, they may do so and apply to arbitrator for excluding the time spent in this petition from limitation period and the arbitrator may consider the same in accordance with law.

14 In view of the above order, Company Application No.20 of 2016 also stands disposed.

Company Petition No.501 of 2015 be listed for admission on 8.1.2018.

(K.R.SHRIRAM,J)

KJ