IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH.

CP 189 of 2013

Date of Decision: April 3, 2017

M/s Allied Pharmaceuticals

.....Petitioner

Vs.

M/s Calpro Foods Pvt. Ltd.

.....Respondent

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

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Present:- Mr.Anil Kumar Aggarwal, Advocate for the petitioner.

Mr. S.K.S. Bedi, Advocate for the respondent.

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M.M.S. BEDI, J.

The petitioner Company through instant petition under Section 433 (e) (f) and Section 434 of the Companies Act, 1956 for short 'the Act', has sought winding up of M/s Calpro Foods Pvt. Ltd., hereinafter referred to as the 'respondent Company', inter-alia on the ground of its inability to pay its debts including an admitted debt which is due to the petitioner Company.

The respondent Company is registered under the Act as private Company limited by shares under Registration No.55-34539 dated January 4, 1989. The registered office of the respondent Company is situated in

Gurgaon. The respondent Company is allegedly engaged in the business of processing and production of Food Grade Chemicals in its factory located in District Gurgaon with administrative office at Sarswati House, A-5, Naraina Industrial Area, Phase II, New Delhi.

The petitioner is engaged inter-alia in the business of providing agency services as Consignment Agents, Warehousing Agents and C&F Agents and the activities of the petitioner Company relates to service sector.

Vide agreement dated April 21, 2010, the petitioner was appointed as Consignment Agent of the respondent Company for the territory of Central and Eastern UP on terms and conditions incorporated in the agreement dated April 21, 2010, copy of which has been placed on record as annexure P-2. As per the terms and conditions of the agreement, the petitioner gave a security deposit of Rs.5.00 lacs to the consigner respondent Company on May 11, 2010. Money was remitted through RTGS to the respondent Company. As per the agreement, the responsibility of marketing and sale of the products and collection of the sale proceeds was that of the respondent Company and the responsibility of supplying the products along with vouchers was that of petitioner. The respondent Company was to pay fixed commission at the rate of 3% after deduction of TDS on stock transfer price to the petitioner. This commission was to include all expenses borne by the petitioner towards godown rent, godown insurance, electricity, water, security, local cartage/ freight, coolie charges and other incidental expenses like stationery etc. At the end of the execution of the agreement the respondent Company had committed the sale of Rs.15 lacs per month in the territory of the petitioner. The petitioner was led to believe this commitment of sale on the ground that the respondent Company is a big Company and its turnover and other incomes during financial year ended March 31, 2009 was Rs.845.32 lacs which was going to cross Rs.1,000 lacs during the financial year ending on March 31, 2010. the petitioner has appended the balance sheet of the respondent Company as on March 31, 2010 as downloaded from the official website of the Ministry of Corporate Affairs. The actual sales done by the respondent Company in the assigned territory of the petitioner were far below the minimum commitment. Petitioner claims that the sale of respondent products were grossly falling short of their projection given to the petitioner, therefore, on petitioner's representation, the matter was given due consideration by the respondent. It was mutually agreed that respondent Company shall pay commission on minimum sale of Rs.5 lacs per month w.e.f. November 10, 2010. It was further agreed that respondent Company shall also finalize payment of interest on the security deposit of the petitioner. This was confirmed by the respondent Company through e-mail dated November 26, 2010. Copy of the e-mail dated November 25, 2010 of the petitioner and the e-mal dated November 26, 2010 of the respondent Company have been appended with the petition as annexure P-4. It is pleaded in the petition that it was agreed that the respondent Company shall pay interest on the security deposit at the rate of 12% per annum. During currency of the agency, statement of account relating to sale, realizations, commission, interest on security and remittances made to the respondent Company were drawn by the petitioner and were submitted to the respondent Company through e-mails which were duly received by the respondent Company. No objection to these monthly account statements and remittances was raised by the respondent Company. The petitioner has appended statements as annexure P-5. The petitioners claimed that the consignment agreement between the petitioner and the respondent Company was terminated w.e.f. July 15, 2011 as the respondent Company stopped Consignee Agent System in every State. In order to draw the final statement of account, the petitioner requested the respondent Company for a joint meeting which took place on July 16, 2011 at Karachi Khana, Kanpur, when Sh.S.C. Oswal, Proprietor of the petitioner and Mr.Arjit Bhattacharya, National Sales Manager of the respondent Company were present and discussed outstanding issues. Minutes of the meeting were drawn and were reduced to writing in form of a letter which was signed by both the parties as a token of their acceptance about the status of credits and debits to be accounted by them at their respective ends. The petitioner has pleaded that on September 8, 2012, a fire broke out in the office of Mr. Adesh Tandon, Practising Company Secretary, who was handling the matter on behalf of the petitioner as a result of which originals of the above said letters dated July 16, 2017 got partly burnt and mutilated, therefore, typed copies of annexures P-6 and P-7 have been appended. As per the minutes drawn, the respondent Company was liable to pay

Rs.3,15,741/- and Rs.1,15,019/- aggregating to Rs.4,30,760/- as on July 16, 2011. On November 28, 2011, the petitioner sent a reminder to the respondent Company to pay its dues. This reminder was sent through e-mail along with the consolidated statement of account as on July 31, 2011 with further interest calculated upto October 31, 2011. Copy of the reminder has been appended with the petition as annexure P-11. The respondent Company did not pay the due amount despite reminder as such the petitioner issued notice to the respondent Company and its Directors on April 20, 2012 under Sections 433 read with Section 434 of the Act calling upon the respondent Company to pay dues of Rs.4,32,456/- as on November 30, 2011 with further interest @ 12% upto the date of payment within 21 days of the receipt of the notice. Consolidated statement of account as on November 30, 2011 also accompanied the notice. Copy of the demand notice has been appended with the petition as annexure P-9. Demand notice also sent through speed post on April 21, 2012 to substantiate the said plea. Copy of the postal receipts has been placed on record as annexure P-10. The demand notice was also sent to the respondent Company at its registered office at Gurgaon and at its corporate office at New Delhi. The demand notice had been sent to the respondent Company at its Corporate office, New Delhi and also to its Directors were delivered to the respondent Company. The same has not been returned as undelivered. The demand notice sent to the respondent Company at its registered office has come back with the report "no such firm" exist. The petitioner got the notice published in newspaper

'Punjab Kesari' on May 23, 2012. It is claimed that the Company has neglected and failed to pay the admitted amount of debt to the petitioner within 21 days from the date o0f issue of demand notice under Section 434 of the Act without any substantial and bona fide defence. In the above said background it is deemed that the respondent Company is unable to pay its debts and is liable to be wound up under the provisions of Section 433 (e) read with Section 434 of the Act. In view of the commercial insolvency and inability to pay its admitted debts, therefore, it will be in the interest of creditors and other stake holders of the respondent Company that the respondent Company be wound up by this Court under the provisions of the Act. As per the annual return dated September 30, 2011 filed by the respondent Company with the Registrar of Companies, the registered office of the Company is shown to be situated at Plot No.17, Ist Floor, Road No.H-8, DLF City, Phase I, Gurgaon-122 002, but when the petitioner sent demand notice under Section 434 of the Act at the above said address, the same is returned by the post office with the remark that "no such firm" exists at the said address. With the above said background the petitioner claimed that the respondent Company is not maintaining its registered office at the registered address, thus in view of said circumstance, it will be just and equitable that the respondent Company be wound up under the provisions of Section 433 (f) of the Act.

The respondent Company has filed written statement taking up the preliminary objection that the petition is not maintainable. The execution of the agreement dated April 21, 2010 has been admitted but it is pleaded that the petitioner had agreed to sell the goods of the respondent Company on the terms and conditions detailed in the agreement. Condition Nos. 4, 12 and 18 of the agreement have been referred to, to allege that without the consent of the respondent company, the petitioner had given credit to various dealers and distributors and did not account for the proceeds of the sale for which the petitioner would be responsible in terms of clause 4 read with clause 12 of the agreement and is liable to pay the said amount to the respondent Company, which the respondent Company has adjusted from the security deposit of the petitioner, accordingly, there is no liability on the part of the respondent Company. The petitioner is liable to pay Rs.15079.60/- besides interest thereon to the respondent Company at the time of termination of his agency. This amount of Rs.15079.60 is only after adjustment of Rs.5 lacs security deposit of the petitioner. The statement of accounts showing the liability of the petitioner is shown in annexure R-1. Condition Nos.4, 12 and 18 of the agreement reads as follows:-

> "4. That the Consignee will get confirmed and written orders from Distributors/ Dealer/ Bakers or any other customer along with PDC cheque/ full payment/ payment against delivery. The Consignee will provide credit in the market at its own risk or as recommended by area sales manager in writing and approval by the authorized person of the principal Company.

> 12. The Principal Company shall not be held responsible or accountable for any oral or written commitment made form any their field staff with regard to debit note/ credit notes/ adjustment/ breakage/ damages, princes etc. ONLY a written document signed by the Director/ Authorized Signatory of the Principal Company, which mentions the individual party along with consignee specific instruction shall be valid for settlement of any such claims.
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> 18. That all disputes are subject to Delhi Jurisdiction only. Arbitration clause will also apply."

It is pleaded that disputed facts are involved for determination of the matter in controversy and the petitioner has to invoke the jurisdiction of the civil Courts and it cannot proceed against the respondent Company under the provisions of the Act as there is no admitted liability of the respondent Company towards the petitioner. Replying on merits, the creation of agency in favour of the petitioner to act within four corners of the agreement dated April 21, 2010 (P-23) has been admitted. It has been denied that the responsibility of marketing, sale of products, collection of sale proceeds was that of the respondent Company. In terms of condition No.4 of the agreement dated April 21, 2010, petitioner was to get orders against cash payment or with PDC cheques/ full payment/ payment against delivery and not on credit. The credit as detailed in the agreement is at the responsibility of the petitioner. The credit, if any, was at the responsibility of the petitioner unless and until it is approved by the authorized person of the respondent Company. There should not have been any outstanding amount payable to the respondent Company on account of supplies at the instance of petitioner at the time of the conclusion of the agreement, had the petitioner complied with the condition as laid down in clause 4 of the agreement dated April 21, 2010 (P-2). The payment of commission and other charges to the petitioner is in terms of clause 2 of the agreement dated April 21, 2010 which reads as follows:-

> "2. That the consignor will pay a fixed commission 3% (after deduction of TDS) on stock transfer price to consignee. This shall be paid on monthly basis within 3 days after receipt gross sales proceeds from the consignor. The commission shall include all expenses borne by consignee to conduct sale which includes not limited to godown rent, godown insurance, electricity, water, security, local cartage/ freight, hamali/ cooli charges and other incidental expenses."

It is denied that the respondent Company had committed with the petitioner for the sale to the extent of Rs.15 lacs per month, since the petitioner was appointed for the sale of goods in terms of agreement dated April 21, 2010 and was responsible for the same. It was denied that the responsibility of affecting sales in the area of petitioner was of respondent Company. It was denied that the products of the respondent Company were falling short of their projection. It was also denied that the maximum sale was reduced to Rs.5 lacs per month w.e.f. November 10, 2010. It is also denied that annexures P-4 and P-5 amended the agreement dated April 21, 2010. It was specifically denied that the respondent Company ever agreed to pay interest at the rate of 12% per annum on the security as alleged by the petitioner. There was no such reference either in annexure P-4 for payment of interest at the rate of 12% per annum nor there is any such detail in annexure P-5. False pleas have been taken in the Company Petition to harass the respondent Company. It has been alleged that as the petitioner was not working in terms of the agreement annexure P-2, agency of the petitioner was terminated w.e.f. July 15, 2011. Referring to annexures P-6 and P-7 pertaining to settlement of accounts, it has been pleaded by the respondent Company that there is no undertaking given by the respondent Company about the authority of the petitioner Company to sell goods on credit or that the credit sale done by the petitioner Company stood accepted by the respondent Company. It is denied that as per the minutes drawn, the respondent Company was liable to pay sum of Rs.4,30,760/- as on July 16, 2011. Rather it has been averred in the written statement that the petitioner Company is liable to pay Rs.15079.60/- to the respondent Company. In context to reminder as pleaded in the petition, it has been clarified in the written statement that the petitioner was informed that statement of account annexure P-8 was not correct as the credits given by the petitioner were at his own risk and responsibility in terms of condition No.4 of the agreement dated April 21, 2010 (P-2). Liability to the extent of Rs.4,90,119/- has been denied. Receipt of any notice by the respondent Company has been denied.

The petitioner had been given an opportunity to file rejoinder. The petitioner has raised objections to the written statement claiming that without any Board resolution or authorization the written statement has been signed by Mr. Ashish Kumar, who is not the Director and that the monthly periodic statement of accounts sent by the petitioner had been accepted by the respondent Company without objections. Under clause 7 of the agreement dated April 21, 2010, the petitioner Company had been sending monthly/ periodic statement and that the petitioner Company had been remitting the amount to the respondent Company as per the statements of account. The bank statement of the petitioner has been enclosed as annexure P-13 to which objections were not raised. The petitioner again reiterated that from the very beginning, the petitioner was only Consignment Agent and used to procure orders for supplies from the distributors/ dealers of the Company and to intimate about these orders to the petitioner. The petitioner accordingly supplied goods to the said distributors of the Company. Sales representatives used to collect sale proceeds from the distributors and deposit the same with the petitioner. The sales representative were not authorized to send the sale proceeds directly to the respondent Company. It is averred in the rejoinder that the respondent

Company has admitted that their representatives sent Rs.2,01,600/- directly to the respondent Company instead of depositing the same with the petitioner. Referring to annexure R-1, statement of account appended with the written statement, the respondent Company had adjusted security amount of Rs.5 lacs on December 1, 2010 even when the agreement was continuing and was in operation as it was done without information, knowledge or consent of the petitioner. The claim of the petitioner cannot be declined on the basis of fake and fabricated statement annexure R-1 which is not in consonance with the monthly/ periodic statements of account and the final statement of account drawn on July 16, 2011 which was signed by both the parties and appended as annexure P-6. A serious objection has been raised by the petitioner to the adjustment of the security amount of Rs.5 lacs without information and consent of the petitioner. It has also been pleaded that the petitioner was not responsible to procure the orders from the distributors/ dealers and the petitioner supplied the goods to the distributors/ dealers of the respondent Company as per the orders procured by its sales representatives and that it was the duty of the sales representatives of the respondent Company who were required to deposit the collection with the petitioner.

Mr.Anil Kumar Aggarwal, learned counsel for the petitioner has vehemently contended that it is a case of admitted liability on the basis of the statements of account and the admissions made in the written statement. The respondent Company as such is liable to be wound up in accordance with law.

On the other hand, counsel for the respondent has vehemently urged that on account of debatable issues arisen on the basis of the pleadings, it is not a case where the respondent Company is liable to be wound up on account of having been unable to pay its debts to the extent of Rs.4,30,760/-.

I have heard counsel for the petitioner as well as counsel for the respondent at length. The acceptance of agreement of consignor and consignee annexure P-2 is not disputed. The contents of the winding up petition and the reply filed by the respondent Company reflect that a dispute which has arisen regarding the enforcement of the contractual rights out of the agreement annexure P-2. Petitioner claims that a sum of Rs.4,30,760/- is payable by the respondent Company which should have been paid despite demand notice having been issued along with statement of account. The respondent Company has debated the correctness of the statement of account raising a claim which is in the nature of set off to the extent that a sum of Rs.15079.60/-, after adjustment of sum of Rs.5 lacs which was deposited by the petitioner with the respondent as security. A serious dispute has been raised whether there is an agreement between the parties by virtue of which the petitioner Company could sell the goods on credit which would be agreeable to the respondent Company. Another debatable issue has arisen whether the credit sales undertaken by the petitioner have been accepted by the respondent Company. The claim of the petitioner on the basis of the statement of account has been controverted by the respondent Company. The accounts maintained by both the Companies are debated on the basis of the existence / non-existence of the sales made by the petitioner. There are disputed questions of fact which are required to be adjudicated upon before arriving at a conclusion whether there is liability of the respondent Company on account of certain acts in contravention to the terms and conditions of annexure P-2 and whether the agreement annexure P-2 has been validly terminated and if so, what would be the effect of the same on the rights of the contracting parties.

The present case does not appear to be a case where the liability of the respondent Company is admitted. It is settled principle of law that a petition under Section 433 (e) and (f) is maintainable and a Company can be permitted to be wound up when it is a case of admitted liability and the assets of the Company are required to be sold to satisfy the creditors, secured or unsecured where the winding up petition is apparently not bonafide and had been resorted to only as a pressure tactics to extract money from the respondents by twisting their arms under the cloak of the provisions of the Companies Act, the same should not be allowed. Disputed claims cannot be adjudicated in winding up proceedings. Therefore, I do not find any merit in the petition.

In view of the said circumstances, I do not find any ground to wind up the respondent Company. The petition is dismissed without prejudice to the legal rights of the petitioner Company for enforcing the contractual obligations arising out of the agreement dated April 21, 2010 (P-2) by seeking rendition of accounts.

April 3, 2017 (M.M.S.BEDI)
sanjay JUDGE

Whether speaking/ reasoned:	Yes/ No.
Whether reportable:	Yes/No.