

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

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+ **Co. Pet. No. 66 of 2013**

CBZ CHEMICALS LTD Petitioner
Through: Mr. Ashwini Mata, Sr. Advocate with
Mr. Sunil Agarwal, Advocate

versus

KEE PHARMA LTD Respondent
Through: None

CORAM: JUSTICE S. MURALIDHAR

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ORDER
11.02.2013

1. The Petitioner, CBZ Chemicals Ltd., has filed this petition under Sections 433 and 434 of the Companies Act, 1956 ('Act') read with Section 439 thereof seeking the winding up of the Respondent, Kee Pharma Ltd. on the ground of its inability to pay its debts owing to the Petitioner.

2. The background to the petition is that, on 18th May 2009, an agreement was entered into between the parties for the sale of design for the process of manufacturing a drug, 'Atorvastatin' for a total consideration of US\$ 550,000 to be paid by the Respondent to the Petitioner. It is stated by the Petitioner that what was sold to the Respondent was only the 'design of

process' which would lead to the production of the drug 'Atorvastatin' and not the sale of the process itself.

3. It is stated that under Clause 3 of the agreement, the Petitioner was to provide all relevant details and technical support to the Respondent "to facilitate the validation of the design of the process, the development of the process that leads to the manufacture of Atorvastatin and filing of the Patent for the same." Clause 4 of the agreement dealt with the mode of payment of US\$ 550,000 by the Respondent to the Petitioner. A sum of US\$ 40,000 was to be paid to the Petitioner by the Respondent and would be treated as an interest free refundable deposit. The amount would be refundable immediately in case the sale of the process design agreement was terminated in terms of Clause 2.c and 2.d or otherwise adjusted in terms of Clause 4.d. Under Clause 4.c (ii), a sum of US\$ 60,000 was to be paid immediately after the successful validation of the design of the process. Thereupon the Petitioner was to have no further claims under the bank guarantee ('BG') issued by the Respondent. However, if the Respondent defaulted in making the payment within the stipulated time period, the Petitioner would have the liberty to invoke the BG issued by the Respondent. Upon the Respondent filing for patent of the process and grant

of the patent by the Patent Office, the agreement was to come to its logical conclusion.

4. Under Clause 4.d, the payment of US\$ 550,000 was for successful validation of the process developed and patented by the Petitioner leading to a patentable process to manufacture the drug 'Atorvastatin' and accordingly certified by the Respondent, followed by an application for patent for the process being filed with the Patent Office, at which stage the remaining consideration of US\$ 450,000 would become due and would be discharged in four parts as under:-

“(i) The first part, constituting an amount of US \$ 100,000 will be paid within one month of filing of the Patent for the process, i.e. after the end of the time period mentioned under Clause # 2.6.

(ii) The second part, constituting an additional amount of US \$ 100,000 will be paid by the end of the Quarter, following the quarter in which the first part of US \$ 100,000, as detailed in Clause # 4.d.i above, has been paid.

(iii) The third part, constituting a further amount of US \$ 125,000 will be paid by the end of the next Quarter, following the quarter in which the second part of US \$ 100,000, as detailed in Clause 4.d.ii above, has been paid.

(iv) The fourth and final part, constituting a further amount of US \$ 125,000 will be paid by the end of the next Quarter, following the quarter in which the third part of US \$ 125,000, as detailed in Clause # 4.d.iii above, has been paid.”

5. According to the Petitioner, pursuant to Clause 2.c of the agreement, it made available initially to the Respondent directly and subsequently to its subsidiary Helvetica Industries (P) Ltd. a technology package, comprising of adequate documents and details and all support from time to time and thus fulfilled all its obligations under the agreement. However, the Respondent was unable to complete the validation process by the stipulated date of 28th February 2010. According to the Petitioner, by a communication dated 5th March 2010, the Respondent accepted the design of the process and stated that it was going ahead with the purchase of the design. It, however, requested the Petitioner to consider the deferment of further payments by a period of three months. This was repeated by another email dated 15th March 2010. In response thereto, the Petitioner agreed to defer the payment for a period of three months.

6. It is stated that by an email dated 8th October 2010, the Respondent admitted and confirmed its liability towards US\$ 350,000, being the balance consideration after deducting tax at source. It is also stated that the Respondent, through its subsidiary, had already filed for two patents, based on the design for the process, as provided by the Petitioner – one patent

having been filed simultaneously in USA, UK and India and the other having been filed under the Patent Cooperation Treaty. It is stated that since of the total consideration of US\$ 550,000, the Respondent has paid only US\$ 200,000 and the balance of US\$ 350,000 constituted an admitted liability which, despite several reminders, remains unpaid. A legal notice was issued on 26th May 2012 by the Petitioner under Section 433 of the Act.

7. According to the Petitioner, in reply to the above legal notice, the Respondent admitted its liability but raised frivolous and irrelevant issues with *malafide* intention, in a bid to deflect the attention from the main provisions and the essence of the agreement.

8. It is reiterated by Mr. Ashwini Mata, learned Senior counsel appearing for the Petitioner, that with there being a clear admission of liability by the Respondent in the reply to the legal notice, the further attempt by the Respondent to deny liability is nothing but a sham defence. It is pointed out that as per the balance sheet of the Respondent, its net current assets stood at Rs. 1,59,00,000 only. Even if the Respondent was to liquidate all its current assets and discharge its current liabilities it would be unable to generate sufficient amount to pay off the debt owing to the Petitioner.

Consequently, it is submitted that the Respondent is unable to pay its debts and should be deemed to be commercially insolvent.

9. This Court is, however, not persuaded to accept the above submission. In its reply dated 19th June 2012 to the notice dated 26th May 2012 the Respondent has denied any liability whatsoever. It is, *inter alia*, stated in the reply sent by the Respondent through its counsel that “In the facts and circumstances, please advise your client that my client is not liable to pay any sum of US\$ 350,000 or any other amount under the Agreement dated 18.05.2008 as alleged. In fact the said sum of US\$ 350,000 has not even become due or payable, for the reasons stated above. Even in spite of this, if your client initiates any winding up proceedings or any civil suit or any other proceedings, as threatened in your notice, my clients take all required steps to protect themselves against your client’s illegal actions besides making your client shall be made responsible and liable for all consequences arising therefrom.” The Petitioner has been asked to withdraw the notice and directed to extend the technical support to the Respondent pursuant to the agreement for the sale of design for the process.

10. In ***Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami*** **1965 (35) Company Cases 456**, the Supreme Court ruled that a winding up petition “is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the Court.”

11. In ***M/s. Madhusudan Gordhandas v. Madhu Woollen Industries Pvt. Ltd. (1971) 3 SCC 632*** it was held that “the principles which the Court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly, the company adduces *prima facie* proof of the facts on which the defence depends.”

12. In ***Pradeshia Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd. (1994) 3 SCC 348*** the prayer for winding up was refused on a finding that “the defence raised is a substantial one and not mere moonshine” observing that “the admission of the winding up petition

is fraught with serious consequence as far as the Appellant is concerned”, the Supreme Court disapproved of reasoning of the High Court that the winding up petition had to be admitted as there were “arguable issues”. It was reiterated that “the machinery for winding up will not be allowed to be utilized merely as a means for realising debts due from a company.”

13. In the present case, the Court is not persuaded to hold that the requirements of Sections 433 and 434 read with Section 439 are satisfied. The response of the Respondent to the legal notice issued by the Petitioner raises disputed questions of fact, which will require examination of evidence in other appropriate proceedings. It is not possible to conclude that the defence of the Respondent is a mere “moonshine” and not *bonafide*.

14. Consequently, leaving it open to the Petitioner to avail of any other remedies that may be available to it in law, the petition is dismissed.

S. MURALIDHAR, J.

FEBRUARY 11, 2013

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