

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

APPEAL NO.122 OF 2018
in
COMPANY PETITION NO.501 OF 2015

Zhejiang Hengdian Apelo Imp & Exp Co.Ltd ... Appellant
vs
Surbhit Impex Private Limited Respondent

WITH

APPEAL NO.129 OF 2018
in
COMPANY PETITION NO.744 OF 2014

Jiangsu Guo Tai Int'l Group Hua Tai Imp and Exp.Co Appellant
vs
Surbhit Impex Private Limited .. Respondent

Mr.Shyam Kapadia a/w Ms.Krithika Anand I/b
M/s Dhruve Liladhar & Co for Appellant
Mr.Vishal Kanade I.b Ms.Neha Mehta for Respondent

**CORAM: NARESH H.PATIL AND
G.S.KULKARNI, JJ
DATE: 30th JULY, 2018**

P.C.

1. These appeals arise out of an order dated 29th January, 2018 passed by the learned single Judge whereby the petition of the appellant seeking winding up of the respondent-company "Surbhit Impex Pvt.Ltd" under section 433 (e), 434 and 439 of the Companies Act, 1956 stands rejected. The learned single Judge in the impugned order has held that there was no material to hold that the defence which was put forward by the respondent was improbable or moonshine or bogus. The learned single

Judge has held that it was not a case of a clear transaction between the appellant and the respondent, and a third party namely Mr.Vijay Hiran was involved in the said transaction between the petitioner and the respondent and thus, on facts it was not a case for the learned single Judge to exercise jurisdiction to wind up the company under the provisions of the Companies Act, 1956 and reached to a conclusion that there being disputed question of facts, the company cannot be wound up and accordingly, dismissed the petitions.

2. Learned counsel for the appellant arguing on merits of the winding-up petitions, would contend that there were two purchase orders issued by the respondent and in pursuance to which, the appellant had raised two invoices both dated 13.7.2012 each for USD 168800 in respect of supply of 16000 kgs of ciprofloxacin acid. It is submitted that in view of these documents there was no dispute on the contract entered into between the parties and there was a clear liability on the part of the respondent to make payment of the amounts under the invoices.

3. When asked as to whether delivery under the invoices was effected on the respondent, learned counsel for the appellant conceded that delivery at the instance of the respondent was effected on an another company known as "M/s Actgen Pharma Pvt.Ltd". It is submitted that genuineness of the contract between the appellant and the respondent is

required to be believed, as there was no tripartite agreement between the appellant and the respondent and M/s Actgen Pharma Pvt.Ltd and thus, there was no foundation for the theory as pressed on behalf of the respondent as there was no liability on the part of the respondent to make payment under the said invoices.

4. On the other hand, learned counsel for the respondent has supported the impugned order to submit that there is no material to show that the respondent had asked the appellant to supply material to M/s Actgen Pharma Pvt.Ltd. It is submitted that the learned single Judge has carefully taken into consideration the entire correspondence and emails addressed by the appellant to one Mr.Vijay Hiran of M/s Actgen Pharma Pvt. Ltd. It is submitted that from this correspondence between the appellant and Mr.Vijay Hiran it is clear that Mr.Vijay Hiran was liable to make the payments. It is submitted that the payment was the liability of the third party namely M/s Actgen Pharma Pvt. Ltd and not of the respondent.

5. We have heard learned counsel for the parties. We have also perused the impugned order and the record. It appears, to be not in dispute that Mr.Vijay Hiran of M/s Actgen Pharma Pvt Ltd had entered into correspondence with the appellant in regard to payments. The emails dated 13.4.2017, 15.4.2013 and 11.6.2013 in this regard, are material. The emails are reproduced by the learned single Judge in paragraph 6 of the

impugned order. A perusal of these emails are clearly indicative of the negotiations between appellant and Mr.Vijay Hiran in regard to the payment in respect of the invoices in question. This clearly shows that there was some arrangement between the parties, whereby a third party was involved in the said transaction. After analyzing all these correspondences, the learned single Judge in paragraphs 7, 8 ,9 and 10 has made the following observations, which read thus:

“7. Ms.Mehta also pointed out that even reply dated 14.4.2013 in response to the email dated 13.4.2013, has been sent by petitioner's agent to Vijay Hiran and not to company.

8. Ms.Mehta submitted that if what petitioner states is to be accepted that Hiran only introduced the company, then these emails would not have been addressed to or from Actgen/Vijay Hiran and the expression 'we' everywhere would not have been used by Actgen/Vijay Hiran. Ms. Mehta also submitted that nowhere in the emails it is mentioned that Actgen would persuade the company to make the payment. Ms.Mehta states that these are disputed question of facts and the company court cannot come to a conclusion without evidence being led as to who was ultimately liable to pay and hence petition should be dismissed.

9. 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.

10. 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 the respondent are improbable or moonshine or bogus. I am unable to come to that conclusion. The reason being, it is admitted position that Mr.Vijay Hiran has been involved in the transactions between petitioner and the company. “

6. On perusal of the record, we are in complete agreement with

the findings as recorded by the learned single Judge in not entertaining the company petitions as there are clearly disputed questions of fact. It is not a case, where the learned single Judge could proceed to pass an order to exercise jurisdiction under the Companies Act, 1956 to wind up the company. We find no merit in these appeals. Appeals are accordingly, rejected.

(G.S.KULKARNI, J)

{NARESH H. PATIL, J}