

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 2035 OF 2017
IN
COUNTER-CLAIM NO. 1 OF 2015
IN
SUIT NO. 2943 OF 2010

Organon (India) Pvt Ltd ...Plaintiff
Versus
Martin & Harris Pvt Ltd & Ors ...Defendants

Mr Rohan Rajadhyaksha, *with Sherna Doongaji, i/b AZB Partners,*
for the Applicant.
Ms Krishna Raje, *i/b LJ Law, for the Defendants.*

CORAM: G.S. PATEL, J
DATED: 23rd January 2018

PC:-

1. There is a Suit and there is a Counter-claim. Organon (India) Pvt Ltd (“**Organon**”) is the 1st Defendant to the Suit filed by Martin & Harris Pvt Ltd (“**MHPL**”). Organon is the Plaintiff to the Counter-claim and MHPL is the Defendant is that Counter-claim.
2. This is a Notice of Motion by Organon. The prayers read thus:

“(a) That this Hon’ble Court be pleased to grant liberty to the Applicant to apply to the Registrar (Original Side), Hon’ble High Court of Calcutta for transfer of the amount of INR 21,87,25,287.70 (Rupees Twenty One Crores Eighty Seven Lakhs Twenty Five Thousand Two Hundred and Eight Seven and Seventy Paise only) deposited as security in Company Petition No. 448 of 2012 (before the High Court of Calcutta) by Respondent No. 1 from the Registrar (Original Side), Hon’ble High court of Calcutta to the Prothonotary & Senior Master of this Hon’ble Court to be treated as security in the captioned Counter-claim;

(b) That this Hon’ble Court be pleased to pass appropriate orders to give effect to paragraph 47 of the Judgment and Order dated September 12, 2017 passed by the Hon’ble High court of Calcutta in A.P.O. No.1 2 of 2015 in Company Petition No. 448 of 2012 for the transfer of the amount of amount of INR 21,87,25,287.70 (Rupees Twenty One Crores Eighty Seven Lakhs Twenty Five Thousand Two Hundred and Eight Seven and Seventy Paise only) deposited as security in Company Petition No. 448 of 2012 (before the High Court of Calcutta) by Respondent No. 1 from the Registrar (Original Side), Hon’ble High court of Calcutta to the Prothonotary & Senior Master of this Hon’ble Court to be treated as security in the captioned Counter-claim;

(c) That upon transfer of the amount amount of INR 21,87,25,287.70 (Tupees Twenty One Crores Eighty Seven Lakhs Twenty Five Thousand Two Hundred and Eight Seven and Seventy Paise only) to the Prothonotary & Senior Master of this Hon’ble Court, this Hon’ble Court be pleased to allow the Applicant to withdraw the amount of INT 21,87,25,287.70 (Rupees Twenty One Crores Eighty Seven Lakhs Twenty Five Thousand Two Hundred and Eight Seven and Seventy Paise only) along with accrued

interest, if any, on such terms as this Hon'ble Court may deem appropriate;

(d) In the alternate to prayer clause (c) above, pending the hearing and final determination of the captioned Counter-Claim, upon receipt of the amount of INR 21,87,25,287.70 (Tupees Twenty One Crores Eighty Seven Lakhs Twenty Five Thousand Two Hundred and Eight Seven and Seventy Paise only) from the Registrar (Original Side), Hon'ble High Court of Calcutta, the Prothonotary & Senior Master of this Hon'ble Court be directed to invest the same by way of a fixed deposit with any nationalized bank;"

3. A brief background to the frame of these prayers takes us to an order dated 12th September 2017 passed by a Division Bench of the Calcutta High Court on its Original Side in Appeal No. 12 of 2015 in a winding up Company Petition No. 448 of 2012. There, Organon was the Petitioning Creditor and it sought winding up of MHPL. Organon was the Appellant against an order dismissing the Company Petition. The Division Bench of the Calcutta High Court (Sanjib Banerjee & Siddhartha Chattopadhyay JJ) passed an order in which it was noted that there was an admission of indebtedness by MHPL to Organon. Paragraphs 44 to 47 of the Division Bench judgment read thus:

"44. The admission of the company in respect of the amounts of Rs. 4,55,85,744.21 and Rs. 8,90,48,129.38 is clear, unambiguous and unequivocal. In the absence of any contractual or statutory or even a common law lien being cited by the company, there is no dispute as to such amounts being unimpeachably due. Again, in the light of company's admission that the amounts of Rs.

6,68,31,784.68, Rs. 84,06,359.70 and Rs. 88,53,269.73 were the values of the stocks retained by the company as at December 29, 2011, there is no dispute that such further sum of Rs. 8,40,91,411.11 is liable to be paid by the company to the Appellant.

45. In terms of the tests as laid down in *Kironmoyee Dassi* [(49) CWN 246] when the company is unable to make out any bona fide defence to the petitioning creditor's claim, the creditor is entitled to be immediately paid the amount due and owing to it. The form of an order in such a situation, on a creditor's winding-up petition, is to admit the petition for the relevant amount and permit the company to pay off the same to ward off advertisements; or take a risk to have the advertisements published and seek the benefit of the discretion at the final stage of the company not being wound up despite an undisputed debt being established. It is also possible that when the debt is undisputed and there is no bona fide defence indicated by the company, the court may still not require immediate payment to be made to the petitioning creditor to avoid the publication of advertisements, but allow the company to secure the undisputed debt to avoid the petition being advertised and partaking a representative character with an open invitation to other creditors to join in. The distinction between the two choices open to the company court is not based on the quality of the defence. It has more to do with the company being required to establish its solvency despite the debt being undisputed. For, in the ultimate analysis, it is the solvency of the company that is questioned in a creditor's winding-up petition.

46. It is the second option which appears to be more appropriate in this case. The judgment and order impugned stand set aside and the company petition is admitted in the sum of Rs. 21,87,25,287.70 (Twenty one

crore eighty seven lakh twenty five thousand two hundred eighty seven and seventy paise only). The petition will be advertised in the "Times of India" and in "Bartaman" newspapers within four weeks from date, indicating that the matter will appear before the company court on November 7, 2017. However, the advertisements should not be issued within two weeks from date to afford the company an opportunity to secure the entire amount by way of cash deposit with the Registrar, Original Side. If the security is furnished with intimation to Advocate for the Appellant within the time permitted, the advertisements will not be published.

47. If the security is furnished, the Registrar will invest the same by way of a fixed deposit with any nationalised bank having its branch within the vicinity of this court and the security may be transferred, without being diminished, to the appropriate officer of the Bombay High Court upon an order in such regard being obtained from the Bombay High Court in the pending suit. In default of such security being furnished within the time indicated, the advertisements will follow. Publication in the official Gazette will stand dispensed with."

4. This is how an amount of Rs. 21,87,25,287.70 came to be deposited by MHPL, the Respondent company in the Calcutta High Court.

5. As is evident from paragraph 47 quoted above, the Calcutta High Court then left it open to Organon to apply for a transfer of the deposited funds to this Court upon Organon obtaining an appropriate order here. Therefore, the present application.

6. It remains to be noted that a Special Leave Petition from the Division Bench order has been dismissed. I am informed that — somewhat predictably — a Review Petition has been filed. This is of course not to comment on the Review Petition itself but it is enough to note that there is no stay of the Division Bench order.

7. The only other ground raised — to my quite considerable bemusement — is that the transfer must be to the credit of *MHPL's* Suit against Organon. That does not even stand to reason. The deposit was ordered on the basis of an admission by MHPL that it owed the admitted amount of Rs. 21,87,25,287.70 to Organon. The argument that there is an adjustment given and, therefore, the transfer must be to the credit of MHPL's Suit is not one that commends itself. Evidently paragraph 47 of the Calcutta High Court Division Bench order must be read in context and the only context is that the transfer must be to the credit of a claim made in this Court by Organon against MHPL. I have also very little doubt that in the course of hearing in Review Petition that MHPL may have filed, Organon will also seek a clarification, if it thinks fit, to this effect, although I believe none is necessary.

8. There will be an order in the Notice of Motion, therefore, in terms of prayer clauses (a), (b) and (d).

9. As regards prayer (c) which seeks liberty to withdraw the amount, I will leave it open to the Plaintiff, Organon to apply. The only reason for deferring this at this stage is that undoubtedly I will have to hear both sides on the question of the terms of that

withdrawal. I am, however, making it clear that I have not rejected the prayer (c) at this stage.

10. All contentions in that behalf are kept open.

11. The Notice of Motion is disposed of in these terms. There will be no order as to costs.

12. Liberty to the parties to apply.

(G. S. PATEL, J)