THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

COMPANY PETITION No.221 of 2015

ORDER:

This Company Petition is filed by the petitioner bank under the provisions of Sections 433 and 434 of the Companies Act, 1956 (for short 'the Act'), seeking to wind up the respondent company as it is not paying a sum of Rs.6,61,25,606/- due to the petitioner.

The case of the petitioner bank is that on an undertaking and assurance given by the respondent company, which is engaged in manufacturing various pharmaceutical products, medicines etc., to pay the amounts directly to it, the petitioner agreed to provide certain credit facilities to Mission Vivacare Limited (hereinafter referred to as 'Mission'), which was engaged in manufacturing certain medicines, by way of discounting the bills/invoices raised with respect to the material supplied by it to the respondent. It is also the case of the petitioner that in view of the said undertaking and assurance given by the respondent, it discounted the three invoices and made available a total sum of Rs.3,76,55,339.12 ps. to Mission and forwarded the same to the respondent for payment but the respondent refused to pay the same on the ground that the amount payable under the invoices is liable to be adjusted towards its existing dues, as such, the petitioner issued a legal notice, dated 13.08.2012, to the respondent, which in turn, gave a reply to the same vide reply notice, dated 20.09.2012.

The respondent filed a detailed counter-affidavit asserting that it had in fact, agreed that the amounts due and payable to Mission with respect to the material supplied to it would be paid to the petitioner, but, it has not given up the right to adjust/appropriate the amounts due to it on account of the business transactions with Mission; that it had supplied Active Pharmaceutical Ingredients (API) to Mission for the purpose of manufacturing pharmaceutical products; that there exists a Site Transfer, Manufacturing and Supply Agreement, dated 11.08.2011, between Mission and itself and as per the said agreement, the respondent has to pay only net amount for the supplies of API and that in response to the legal notice, dated 13.08.2012 issued by the petitioner, a reply, dated 20.09.2012 was sent by the answering respondent specifically stating that there are no amounts due and payable to Mission and as a matter of fact, a sum of Rs.23.8 Crores is recoverable from Mission. It denied the right of the petitioner to claim interest @ 24% per annum.

Sri R. Raghunandan Rao, learned Senior Counsel appearing for the petitioner, has drawn the attention of this Court to the correspondence exchanged between the petitioner and Mission and also the respondent and submits that the respondent had agreed and assured to make the payments to the petitioner with respect to the amounts due as regards the material supplied to it by Mission and it is only on account of the same, the bill discounting facility was extended to Mission and that the respondent at no point of time had informed the petitioner that there is any amount payable to it by Mission, as such, the petitioner is entitled to appropriate all the monies that are liable to be paid to Mission. He has drawn the attention of this Court to the letters, dated 28.02.2012, whereunder, the respondent, petitioner and Mission had unequivocally given consent to honour the arrangement among them, apart from the power of attorney, dated 05.03.2012 made by Mission in favour of the petitioner and E-Mails exchanged between the authorized representatives of the petitioner and the respondent, and submitted that there was an assurance given by the respondent that it would pay the amounts to the petitioner.

While refuting the submissions made on behalf of the petitioner, Sri S. Ravi, learned Senior Counsel appearing on behalf of the respondent, would assert that E-Mails are general in nature and the language in the letters, dated 28.02.2012, in which, consent was given, was specific. By drawing the attention of this Court to the said letters, the learned Senior Counsel would assert that nowhere in the correspondence, the respondent had given up its right or assured unequivocally to the petitioner that it would make the payments *de hors* the amounts due to it and that he laid emphasis on the words "amounts payable to it (Mission) by you, for future supplies of goods". He would further assert that as a matter of fact, in the reply notice, the respondent had specifically denied as to there being any liability, much less, assurance that the amounts would be paid ignoring the amounts which are due and payable to it by Mission. He would further assert that as a matter of fact, the petitioner filed O.A.No.617 of 2015, which was re-numbered as O.A.No.1475 of 2016, before the Debts Recovery Tribunal-II, Mumbai, against Mission as well as the respondent seeking to recover the amounts due to it. He would further assert that Mission is being wound up by Mumbai High Court and the same is under liquidation process. Pursuant to the notice, dated 13.08.2012, the respondent had called upon Mission for payment of a sum of Rs.28 Crores and the Official Liquidator has recognized the respondent as a creditor of the Company in Liquidation i.e., Mission. He would reiterate that there was no assurance by the respondent that the invoices would be honoured *de hors* the amount due to it. Therefore, he prays for dismissal of the Company Petition.

At this juncture, the question which falls for consideration is, whether there was any obligation cast on the respondent in making payment for the supplies made through the three invoices raised by Mission to the petitioner.

Having heard the respective counsel and perused the record, for appreciation of the respective submissions, it may be necessary for this Court to refer to the correspondence, particularly, the letter, dated 28.02.2012, by which, the Mission informed the respondent that they have decided to discontinue the banking transactions with Yes bank and henceforth deal with the petitioner particularly with respect to the facility of discounting the invoices and further requested the petitioner to make the payment of the invoices raised after 28.02.2012 to them. A copy of the said letter was also marked to the petitioner. With the same date, there is also a letter addressed by the petitioner and Mission jointly to the respondent and it reads as under:

1. Mission Vivacare Ltd. has availed of financial facilities from KMBL and has undertaken that effective today the amounts payable to it by you, for future supplies of goods ("the Receivables") shall be made to KMBL.
2. Please therefore make the payament of the receivables (including advances, if any) by way of Cheque/RTGS/NEFT favoring "KMBL A/c Mission Vivacare Ltd- 7111146320".
3. Please do not change the above payment methodology until Mission Vivacare Ltd. Submits a written consent from KMBL to you.
4. This will not be construed as a guarantee from Mylan Laboratories Limited for the credit facilities availed by Mission Vivacare Ltd.

The above letter was accepted by the respondent agreeing to the arrangement, by way of counterfoil, which reads as under:

> "No changes will be accepted from Mission Vivacare Ltd without the written consent of Kotak Mahindra Bank Limited"

There is no dispute that the transactions, which are subject matter of this Company Petition, are taken place after the arrangement/agreement has been crystallized through the letter, dated 28.02.2012.

A careful reading of the letter, dated 28.02.2012 shows that the respondent accepted the arrangement entered between Mission and the petitioner and had undertaken to make payments. The letter contains qualified words "payable to it" (payable to the Mission). In other words, the obligation of the respondent is only with respect to the amounts which are reasonable and payable by Mission and that there is no reference to specific invoice except the arrangement is with effect from 28.02.2012. It is well settled that a creditor is entitled to appropriate and withhold the sum due and payable to it. Likewise, E-Mails do not really support the case of the petitioner, and at one point only, an acknowledgment of receiving funds was made by the respondent (E-Mail, dated 19.03.2012). There is no assurance or undertaking with regard to the payments to Mission. It may be noted that in the letter, dated 28.02.2012 addressed by the petitioner and Mission to the respondent, it was categorically stated "this will not be construed as a guarantee from the respondent for the credit facilities availed by Mission Viva Care Limited".

In those circumstances, this Court is of the view that there is no legal obligation on the part of the respondent to make the subject payment to the petitioner on account of Mission and there is no legal hurdle in their appropriating the amounts due to it and receivable from Mission. Therefore, the Company Petition does not deserve consideration. Though the learned Senior Counsel had referred to financial strength of the respondent, in the light of the conclusion reached by this Court that there was no legal obligation on the part of the respondent to the petitioner, it is not necessary to advert to the financial strength of the respondent.

The Company Petition is accordingly dismissed.

CHALLA KODANDA RAM, J

6th JUNE, 2018.

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