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

% Date of Decision: 13.08.2019

+ CO.PET. 426/2014

PILLER GERMANY GMBH & CO. KG..... Petitioner

Through Mr.Gyanendra Kumar, Ms.Shikha
Tandon and Mr.Robin Grover, Advs.

versus

PCI LTD

..... Respondent

Through Mr.Ajit Warriar, Mr.Aditya Nayyar
and Mr.Varun Byreddy, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

1. This petition is filed under Sections 433(e), 434 and 439 of the Companies Act, 1956 seeking winding up of the respondent Company. The case of the petitioner is that the petitioner entered into a Distribution Agreement dated 20.06.2012 with the respondent Company wherein the respondent Company was appointed as an exclusive distributor of the products of the petitioner within India. Thereafter, there was an amendment to the said agreement on 14.08.2012. It is stated that under the said agreement the respondent Company was obliged to make payment to the petitioner within 45 days after the date of invoices raised by the petitioner.

2. Upon the due performance of the petitioner's obligations, the petitioner raised various invoices on the respondent Company in terms of the Distribution Agreement. However, despite lapse of 45 days, the payments were not made by the respondent. The principal amount against the invoices being a sum of Euro 194,618.33 became outstanding. Copies of the outstanding invoices and the ledger account are attached to the petition.

3. By e-mail dated 06.12.2013, the respondent company expressed its inability to pay the outstanding amount but remitted the interest amount of Euro 2,175 with the assurance that the entire outstanding invoices would be paid soon. On 10.12.2013, the petitioner sent a default notice to the respondent asking him to propose a binding payment plan. The respondent Company vide an e-mail of his Chairman dated 11.12.2013 said to have unequivocally admitted the outstanding dues of the petitioner and assured the petitioner that the dues would be paid. It is pleaded that the respondent Company has unequivocally admitted its liability to pay the outstanding amount. It is further stated that on account of defaults of the respondent Company in payments under the Distribution Agreement, the petitioner was constrained to terminate the Distribution Agreement vide letter dated 06.01.2014. A notice under Section 434(1) (a) of the Act was issued on 21.04.2014. On 13.05.2014, it is stated that a reply was received which did not deny the debts due but raised misconceived claims which had no correlation with the debts owed to the petitioner. Hence, the present petition.

4. The respondent has filed its reply. They also filed an additional affidavit of Mr. Vijay Sarpal dated 15.10.2016.

5. Learned counsel for the respondent has taken me through the additional affidavit to broadly plead as follows:-

(a) It is stated that in terms of the Distribution Agreement dated 23.05.2012, the respondent was appointed as an exclusive distributor of UPS Power Systems manufactured by the petitioner within the territory of India. The respondent had the option to appoint sub-distributors to effect sales of the products within the territory of India. One of the sub-distributors appointed by the respondent was PCI Asia Pacific Pvt. Ltd. which has its

office at Hong Kong. The respondent was affecting certain sales of the products of the petitioner through the said PCI Asia Pacific Pvt. Ltd. It is stated that the petitioner was fully aware about the activities of PCI Asia Pacific Pvt. Ltd. and never objected to the arrangement.

It is further stated that in consonance of the above practice, Vacmet entered into two separate contracts with PCI Asia Pacific Pvt. Ltd. on 28.02.2013 for supply, installation, and commissioning of Dynamic Uninterrupted Power Supply Systems manufactured by the petitioner. PCI Asia Pacific Pvt. Ltd. placed two purchase orders on the petitioner on 26.03.2013. On 13.05.2013, Vacmet got issued a letter of credit in favour of PCI Asia Pacific Pvt. Ltd. being 90% of the total invoice amount. PCI Asia Pacific Pvt. Ltd. got issued a letter of credit in favour of the petitioner for 100% of the invoice amount. It is further stated that after installation of the equipment, Vacmet did not release the balance 10% payment to PCI Asia Pacific Pvt. Ltd. due to pending jobs on account of certain faulty parts being supplied by the petitioner. On 20.01.2014, the respondent put the petitioner to notice of the said relevant facts and the petitioner was advised to attend and comply with Vacmet's service requirements. It is further stated that the petitioner made false representations to the respondent and deceived the respondent to release the balance payment stating that they will attend Vacmet's service requirements. However, the petitioner failed to attend to the services requirements of Vacmet. On the contrary, the petitioner contacted Vacmet directly and entered into some clandestine arrangements with the said customer without involving the respondent. It is stated that this was in breach of the petitioner's expressed assurance to continue to service all existing contracts in India. Hence, it is stated that this act of the petitioner

resulted in Vacmet reneging upon its financial obligations towards PCI Asia Pacific Pvt. Ltd. Hence, a sum of Euro 140,000 continues to be withheld by Vacmet, non-release of which is directly attributable to the petitioner's act of omissions and commissions. Hence, it is stated that the respondent is entitled to set off the amount as against the alleged outstanding amount claimed by the petitioner. It is further stated that this aspect has been very cleverly concealed from the court in the present winding up petition.

(b) Learned counsel has also taken me through the Distribution Agreement especially clause 7.1 which specifically states that the Agreement shall be governed by the laws of England. It is stated that as laws of England are the applicable for the present contract, the respondent is unable to initiate appropriate proceedings claiming set off.

6. I have heard learned counsel for the parties.

7. Learned counsel for the respondent has vehemently argued that though PCI Asia Pacific Pvt. Ltd. is a separate entity and is a wholly owned subsidiary of the respondent company and in terms of the agreement between the parties, the respondent was entitled to appoint a sub-distributor. Reliance is placed on the judgment of the Supreme court in the case of ***Pankaj Aluminium Industries vs. Bharat Aluminium Company, (2011) 166 Com. Cas. 64*** and ***DHN Food Distributors Ltd. vs. Tower Homlets London Borough Council, [1976] 1W.L.R. 852*** to state that being an interconnected party, the respondent is entitled to claim set off for the dues pending for PCI Asia Pacific Pvt. Ltd. For the purpose of considering as to whether the defence of the respondent is bona fide, I have taken the said contention of the respondent to be correct and considered the bonafides of the defence.

8. I may look at some of the correspondences relied upon by the petitioner. On 06.12.2013, the respondent have expressed their apologies for the delay in making payment. They however agreed to remit the interest of Euro 2,175 up to March 2014 for the overdue invoices.

9. In response, the petitioner wrote a communication stating that the petitioner cannot accept prolongation of the final payment till March 2014 and requested that the payment be made by the end of January 2014. Detailed calculations of the amount dues were stated. On 11.12.2013, the Chairman of the respondent company wrote a communication where he stated that apart from other, the payment would be cleared by the end of the next month though the respondent had paid interest on the outstanding dues up to March 2014 only as a precaution. Thereafter on 06.01.2014, the petitioner terminated the Distribution Agreement. Relevant part of the termination letter reads as follows:-

“In summary it is clear that PCI is no longer representing the best interests of Piller and has taken actions that are harmful to the Company's business and its reputation. It has also failed on more than one occasion to inform Piller of material events including the formation of a company using Piller's mark, which clearly shows that it is to restrain Piller's activities and interests in some way. The duty owed by PCI to Piller has now been irrevocably breached.

For the avoidance of doubt, it is clarified that the termination is effective forthwith. Piller does not presently intend to invoke its right under clause 6.2.3, to terminate any orders currently under execution which are listed in Annexure A hereto.

We hereby call upon you to take the necessary steps to delete the name 'Piller' from corporate name of 'Piller India Private Limited' and cease and desist from carrying on any activity in that name of similar and deceptively similar to our corporate name 'Piller'.

Furthermore and in accordance with clause 6.3, we will require you to immediately release Piller owned tools and consignment stock and return all information and advertising material to a location to be advised by Piller.”

10. It clearly follows from a perusal of the e-mails sent by the respondent dated 06.12.2013 and 11.12.2013 that the respondent company categorically admitted the outstanding dues. Especially, it may be noted that e-mail dated 11.12.2013 was sent in response to a communication which contains the full details of the outstanding dues payable to the petitioner. It also transpires from the termination notice that there are allegations against the respondent for not representing the best interest of the petitioner including formation of a company using the mark of the petitioner.

11. The only defence raised by the respondent is their attempt to set up a set off claiming damages based on the alleged illegalities done by the petitioner while executing a contract. The said contract was entered into by PCI Asia Pacific Pvt. Ltd., a subsidiary of the respondent with their customer Vacmet. The allegation is that after termination of the contract by the petitioner on 06.01.2014, the balance portion of service requirements of the contract with Vacmet was done independently by the petitioner. On account of this act of the petitioner and on account of termination of the contract by the petitioner, Vacmet has withheld large amount of dues of PCI Asia Pacific Pvt. Ltd.

12. In my opinion, the defence sought to be raised by the respondent lacks bona fide and merits. The admitted fact is that the dues which are claimed as set off pertains to a subsidiary of the respondent PCI Asia Pacific Pvt. Ltd. Assuming as pleaded by the learned counsel for the respondent that the

respondent is entitled to claim set off for the dues for inter connected parties, the plea on its strength lacks merit. The admitted position is that the respondent has fulfilled the contract with Vacmet independently. It is not pleaded that Vacmet has any grievance that the products/goods supplied to it are not functioning in terms of the agreement. The grievance is that the respondent has directly dealt with Vacmet and completed the contract to the satisfaction of Vacmet and hence, Vacmet is not paying the dues of the petitioner. There is no clarity how based on these facts the respondent can make a counter claim. Clearly, the grounds given to raise a counter claim are utterly vague and lack merits.

I am fortified in the above view by the fact that there is nothing to show that PCI Asia Pacific Pvt. Ltd. has commenced any legal proceedings against Vacmet for recovery of its pending dues.

13. Reference may be had to the judgment of the Supreme Court in *Madhusudan Gordhandas & Co. vs. Madhu Wollen Industries Pvt. Ltd.*, 2018 SCC OnLine Del 9512.

“21. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable (See *London and Paris Banking Corporation* [1874] L.R. 19 Eq. 444. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See *Re. Brighton Club* and

Norfold Hotel Co. Ltd. [1865] 35 Beav. 204.

22. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (See *Re. A Company* 94 S.J. 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (See *Re. Tweeds Garages Ltd.* [1962] Ch. 406. The principles on 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.”

14. In my opinion, given the unequivocal acknowledgement of debt sent by the respondent on 06.12.2013 and 11.12.2013 and the fact that there are no recovery proceedings pending against Vacmet, there is no bona fide defence raised by the respondent Company.

15. Accordingly, I admit the present petition. The Official Liquidator attached to this Court is appointed as the Provisional Liquidator. He is directed to take over all the assets, books of accounts and records of the respondent-company forthwith. The citations be published in the Delhi editions of the newspapers ‘Statesman’ (English) and ‘Veer Arjun’ (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing.

16. Petitioner shall deposit a sum Rs.75,000/- towards cost of the publication with the Official Liquidator within 2 weeks, subject to any further amounts that may be called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavour to prepare a complete

inventory of all the assets of the respondent-company when the same are taken over; and the premises in which they are kept shall be sealed by him. At the same time, he may also seek the assistance of a valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets of the respondent-company. The OL will also seize all the bank accounts of the respondent.

17. The aforesaid order appointing the Official Liquidator as the Provisional Liquidator is suspended for six weeks to enable the respondent to pay the dues of the petitioner.

18. At this stage, it has been clarified by the learned counsel for the parties that in the course of the mediation proceedings, it was acknowledged and accepted that a sum of Euro 51,977 has been paid by the respondent on account of some taxes which have to be deducted from the dues claimed by the petitioner. Accordingly, the respondent has to pay to the petitioner a sum of Euro 142,641.33 plus interest at the agreed rate of 3.31% w.e.f. from the date of the filing of the present winding up petition till date.

19. In case the aforesaid payment is made within six weeks, the aforesaid order shall stand recalled.

20. List on 16.10.2019.

JAYANT NATH, J

AUGUST 13, 2019/rb

Corrected & released on 31.08.2019