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

% *Date of Decision: 14th February, 2023*

+ **CO.APP. 3/2018 & CM No.6777/2018**

PCI LTD.

..... Appellant

Through: Mr. Naveen Chawla, Ms. Surabhi
Rana & Ms. Monika Madaan,
Advs.

Versus

KANAKIA SPACES PVT. LTD.

..... Respondent

Through: Ms. Suruchi Suri, Adv.
Ms. Megha Bharara, Adv. for Ms.
Ruchi Sindhwani, Adv. for OL.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant has filed the present appeal impugning an order dated 24.01.2018 (hereafter '**the impugned order**') passed by the learned Company Court in Company Petition No.637/2016.

2. The respondent (petitioner in the company petition) had filed the said petition under Section 433(e) and 433(f) of the Companies Act, 1956 (hereafter '**the Companies Act**') seeking winding up of the appellant company (respondent in the company petition).

3. It was the respondent's case, that it was interested in purchasing an aircraft and had accordingly entered into an arrangement with the appellant in this regard. In terms of the said arrangement, the

respondent was required to pay 30% of the agreed consideration in advance. The balance 70% of the consideration was required to be paid four weeks before the date of delivery of the aircraft.

4. The aircraft was required to be purchased from an Austrian aircraft manufacturer named, Diamond Aircraft Industries GmbH. It was the respondent's case that it had remitted a sum of ₹30,00,000/- (Rupees Thirty Lacs Only) to the appellant and, thereafter, at the insistence of the appellant, it had paid €145,400 (Euro One Hundred Forty Five Thousand Four Hundred Only) to the appellant's affiliate entity in the United Arab Emirates (namely, PCI Middle East FZE). The respondent alleges that the said amount at the material time was equivalent to ₹1,19,19,892/- (Rupees One Crore Nineteen Lacs Nineteen Thousand Eight Hundred Ninety-two only).

5. The respondent claims that the appellant failed to procure the aircraft in question and also failed and neglected to refund the amount already paid by the respondent. Since the appellant had failed and neglected to repay the said amount, which was refundable, the respondent issued a notice under Section 434 of the Companies Act demanding a refund of the said amount. The appellant failed to comply with the said notice. Thereafter, the respondent filed a petition for winding up of the appellant company under Section 433(e) and 433(f) of the Companies Act, on the ground that the appellant was unable to pay its debts and it was just and equitable to wind up the appellant company.

6. The learned counsel appearing for the appellant disputes that the appellant is unable to pay its debts. He states that according to the appellant, there is a *bona fide* dispute as to whether there is any amount refundable to the respondent. According to the appellant, the respondent had failed to pay the balance amount when called upon to do so, and the amount paid was not refundable.

7. The learned counsel appearing for the appellant states that notwithstanding the said dispute, the appellant has deposited a sum of ₹1,38,92,389/- (Rupees One Crore Thirty Eight Lacs Ninety Two Thousand Three Hundred Eighty Nine Only) with the Registry of this Court in compliance with the orders passed by this Court. He contends that the same clearly indicates that the respondent's allegation that the appellant is unable to pay the debt is erroneous.

8. At this stage, it would be briefly necessary to refer to the documents referred to by the learned Single Judge in the impugned order. It is observed in the impugned order that the Agreement between the parties is embodied in a Communication dated 11.07.2013. The said Communication is set out below:

**“KANAKIA
SPACES**

11th July 2013

To,
PCI Middle East Fze.
E-LOB, Office No. E-59 G 22 P.O. Box 419336
Hamriyah Free Zone – Sjh Dubai, UAE

Dear Sir,

With reference to your quotation No. 005/13-14/OA dated 1st July 2013, we Centaur Mercantile Pvt. Ltd. accept your quotation as per the below mentioned terms and conditions. A detailed purchase order for the same will be sent by 15th July, 2013.

NAME OF THE PRODUCT: Diamond DA42-VI Twin Engine Aircraft

Quantity – 1 Nos.

Port of Delivery- Mumbai, India

PRICE

Type	Price
Aircraft	€513,659
Ferry	€18,000
TAS	€11,000
DME	€8,092
Stromscope	€6,911
LRT	€9,646
Chart View	€2,336
Air Con	€23,751
Platinum Edition	€5,092
Sun Glare & Canopy Lining	€1,182
Total EUR	€599,668

Terms of Payment: 30% advance (Non Refundable upon the placement of the order and balance 70% to be paid 4 weeks before the date of delivery. All the payment shall be in favour of PCI Middle East FZE.

BUYERS FULL NAME CENTAUR MERCANTILE PVT. LTD.

FOR PCI LTD.

COMPANY SEALS

(Sd/-)
Mr Rashish Kanakia
Director”

Pritam Mukherjee
Sr. Manager Marketing

9. It is clear from the above that the letter dated 11.07.2013 was addressed by the respondent to PCI Middle East FZE and not to the appellant company.

10. The same was in response to a quotation dated 01.07.2013. It is not clear whether the said document is signed on behalf of the appellant. *Prima facie*, the arrangement mentioned in the said communication is between Centaur Mercantile Pvt. Ltd. and PCI Middle East FZE and not the appellant.

11. The appellant had sent a communication dated 04.11.2014, *inter alia*, stating that “Your new DA42 bearing MSN: 42, N165 is in the final stage of being manufactured and tested” and calling upon the respondent to pay the balance payment of €417,168 (Euro Four Hundred and Seventeen Thousand One Hundred and Sixty Eight Only) for an additional order of optional equipment. Although, the letterhead is of that of the appellant, the aforesaid communication is signed on behalf of PCI Middle East FZE. The said communication is signed on behalf of the respondent by its Director.

12. The appellant had also sent a letter dated 02.02.2015 addressed to the respondent calling upon it to pay the balance amount of €399,168 (Euro Three Hundred and Ninety Nine Thousand One Hundred and Sixty Eight Only) for the aircraft and €34,000/- (Euro Thirty Four Thousand) for the additional order of optional equipment. The said communication also stated that separate invoices for the insured ferry by a highly experienced pilot for flying the aircraft from

Austria to Juhu airport have been provided and the payment for the same be made at least 72 hours before the start of the ferry flight. The said letter also indicates that the payment was required to be made to PCI Middle East FZE.

13. In addition to the above communications, the learned Single Judge had also referred to an email dated 07.12.2015 sent by one of the officials of the manufacturer. The said email reads as under:

“Dear Mr. Kanakia,

first of all we would like to thank you very much for having you as our valued customer and member of the Diamond family.

We are getting back to you regarding your aircraft serial number 42.N163. Thank you very much for all your documents on the payment to PCI and other information on the permissions status. We are glad that things are moving regarding the permissions on your side.

Regarding the aircraft purchase agreement that you have with PCI we would like to inform you about the following. Last week we have been sitting together with PCI (In Austria) in order to agree on the best way to solve the current situation. As agreed with Mr. Mehta from PCI (Chairman of the company in copy of this email), PCI will send back to you the down payment received from you last year in July 2014.

A new contract for the airplane will be established directly between your company and Diamond Aircraft for this plane. Kindly send us the down payment once you receive the invoice from us. The remaining payment will be paid at delivery. This procedure was agreed between PCI and Diamond Aircraft in order to help you to receive your aircraft as soon as possible.

Your aircraft has been already ready for delivery since end of January 2015.

Soon we will send you an update on the validation of the 1,999 kg MTOM and we believe that we will be able to deliver the plane to you in the first quarter of 2016 (pending validation). As soon as the validation is received we will take your aircraft as priority in order

to finalize and re-issue all documents needed so we can close the delivery process.

We do thank you very much for your patience, cooperation and great support so far.

Best regards,
Amila Karagic”

14. The above email dated 07.02.2015 indicates that there were some problems and certain discussions were held between the manufacturer and the appellant. It was also suggested that the new contract be established directly between the respondent and the appellant.

15. Admittedly, the entire payment was not made. According to the appellant, the respondent had failed and neglected to pay the balance payment as required despite being called upon to make the payments in terms of communications dated 04.11.2014 and 02.02.2015. The respondent contends that it was not required to make any payment till four weeks, prior to the delivery and no such communication was issued.

16. It is clear from the above that there are some contentious issues involved. In terms of the communication dated 11.07.2013, the down payment was a non-refundable payment.

17. In view of the above, we are unable to accept that the amount, as claimed by the respondent, is an admitted debt payable by the appellant to the respondent.

18. It is well settled that proceedings for winding up of the

company are not recovery proceedings. A company is liable to be wound up under Section 433(e) of the Companies Act, 1956 if it is unable to pay the debt. In terms of Section 434 of the Companies Act, if a company fails to pay an admitted debt after receipt of the notice under the said Section, it would be deemed to be unable to pay the debt. We are unable to accept that in the given facts, the appellant has failed to repay an admitted debt.

19. Admittedly, only a sum of ₹30,00,000/- (Rupees Thirty Lacs Only) was received by the appellant and the respondent had paid the remaining amount as claimed by it to PCI Middle East FZE. The learned Company Court had also noted that PCI Middle East FZE was a subsidiary of the appellant. Although, PCI Middle East FZE may be a subsidiary of the appellant, it is a separate entity.

20. The amount claimed by the respondent was clearly not an admitted debt. In the circumstances, the petition under Section 433(e) of the Companies Act, would not be maintainable.

21. The learned Company Court had briefly examined the controversy between the parties and had observed that the defence raised by the appellant is a sham defence. Undeniably, in cases where the defence against the claim of debt is found to be moonshine or a sham, the petition for winding up would be maintainable on account of inability to pay the debt. However, the facts of the case must clearly establish that there is no plausible defence available to the debtor company. The defence so raised has been solely for the purposes of

avoiding repayment of admitted debt and in most cases, to camouflage the inability to do so. We are unable to accept that the defence raised by the appellant to the claims of the respondent can be treated as a sham or moonshine for maintaining a petition for winding up the appellant company.

22. It is relevant to note that the appellant has since deposited the entire amount, as claimed by the respondent, with the Registry of this Court. Thus, the question of accepting that the appellant is unable to pay its debt does not arise.

23. There is also no reason to wind up the appellant company under Section 433(f) of the Companies Act on the ground that it is just and equitable to do so. There is not material to hold that the substratum of the appellant company stands eroded.

24. In view of the above, the present appeal is allowed and the impugned order is set aside.

25. Having stated the above, it is also relevant to note that the respondent's petition for winding up was allowed by the impugned order and the present appeal has been pending adjudication for over four years. In the meantime the respondent has not availed of any other remedy for recovering its dues. In the circumstances, we consider it apposite to direct that the amount deposited by the appellant in this Court shall not be released to the appellant for a period of six weeks from date.

26. The release of the said amount shall abide by any orders that may be passed by any Court in any proceedings that may be initiated by the respondent. It is clarified that if there is no order interdicting the release of the said amount, the Registry of this Court shall refund the said amount along with interest to the appellant, after the expiry of the aforesaid period of six weeks.

27. The appeal is disposed of in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

FEBRUARY 14, 2023

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