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

COMPANY PETITION NO. 576 OF 2013
WITH
COMPANY APPLICATION NO.124 OF 2014
IN
COMPANY PETITION NO.576 OF 2013

NKGSB Co-op.Bank Ltd. ...Applicant/Petitioner
vs
M/s Medichem Life Sciences Pvt. Ltd. ...Respondent.

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Mr Harihar Bhave a/w Mrs Rupa Bhave & Ms Aarti Kulkarni i/b Bhave & Co. for the Petitioner
Ms Rajani Iyer, Sr. Advocate a/w Tasneem Jaruwala i/b Vidhi Partners for the Respondent.

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CORAM : S.C. GUPTE, J.

OCTOBER 23, 2015

P.C. :

The Company Petition seeks winding up of the Respondent company on the ground of its deemed inability to pay debts under Section 433 and 434 of the Companies Act, 1956 ("the Act").

2 The case of the Petitioner in brief is that the Petitioner had given certain bill discounting facility to the Respondent. The bills drawn by the Respondent company and accepted by M/s Arch Pharmalabs Ltd. were agreed to be discounted by the Petitioner. The Respondent had, accordingly, drawn nine bills of exchange aggregating to a sum of about Rs.8.20 Crores. These bills of exchange, which were stated to be payable after 90 days from their respective dates, were duly accepted by M/s Arch Pharmalabs Ltd. Upon these bills being discounted, the Petitioner duly paid the Respondent company the discounted sums on these bills of exchange. It is the case of the Petitioner that upon maturity, these bills were duly presented for payment to the acceptor, M/s Arch

Pharmalabs Ltd. The bills were, however, dishonoured by non payment. The Petitioner claims to have issued a statutory demand notice to the Respondent company on the basis of the dishonoured bills. Since, despite such statutory notice the debt was not discharged by the Respondent, the present winding up petition is filed by the Petitioner.

3 The Respondent has raised several defences including the defence that the bills of exchange are not duly stamped and that the Respondent was not given any notice of dishonour in respect of non-payment of these bills by the acceptor.

4 Section 30 of the Negotiable Instruments Act, 1881 ('the Act') provides for the liability of drawer of bills of exchange. The drawer of the bills of exchange, in case of dishonour by the acceptor thereof, is bound to compensate the holder provided due notice of dishonour has been given to, or received by, the drawer as provided under the Act. Section 93 of the Act provides for the manner of giving such notice of dishonour. When a bill of exchange is dishonoured by non-acceptance or non-payment, the holder thereof must give a notice that the instrument has been so dishonoured to all other parties including the drawer whom the holder seeks to make liable on the instrument. The mode in which such notice may be given is provided under Section 94 of the Act. Section 94 *inter alia* requires that such notice ought to be given within a reasonable time after dishonour. Section 105 of the Act provides that in determination what is the reasonable time for giving notice of dishonour, regard must be had to the nature of the instrument and the usual course of dealings with respect to similar instruments. Section 106 of the Act provides that if the holder and the noticee (i.e. party to whom such notice of dishonour is to be given) carry on business at different places, such notice is given within a reasonable time, if it is dispatched by the next post or on the day next after the day of dishonour. If, on the other hand, the parties carry on business in the same place, such notice is given within a reasonable time if it is dispatched in time to reach its destination on the day next after the day of dishonour. Section 98 of the Act provides for cases where no notice of dishonour is necessary. Such cases include a case where the notice of

dishonour is dispensed with by the parties entitled thereto or when the party charged could not suffer damage for want of notice, etc. According to this scheme of the Act, giving of a notice of dishonour within a reasonable time to the drawer to make him liable on the instrument is absolutely necessary. What is such reasonable time in a given case, may be a matter for the Court to decide, though there is a deeming provision under Section 106 of the Act for what would in particular cases amount to a reasonable notice.

5 In the present case, after this defence was raised by the Respondent in its reply to the petition, the Petitioner has filed a rejoinder stating therein that the notice of dishonour was issued to the Respondent on 18 July 2013. Exh E to the Petition is the notice of 18 May 2013 to the Respondent, termed as statutory demand notice. In other words, what is claimed is that the statutory notice under Section 434 is itself a notice of dishonour and upon non-payment of bills of exchange despite such notice, there is a deemed inability to pay. The argument is clearly fallacious inasmuch as under Section 434 of the Act, for raising the presumption of deemed inability to pay on the part of the company, the company must, in the first place, be indebted to the creditor in a sum exceeding the sum mentioned therein. Only then, the creditor can serve on the company a statutory demand notice within the meaning of clause (a) of sub-section (1) of Section 434, failure to comply with which gives rise to the statutory presumption. The indebtedness, in the premises, is a *sine qua non* for raising the presumption. Such indebtness must already exist before the statutory demand notice is issued under Section 434(1)(a). In accordance with the scheme of the Negotiable Instruments Act referred to above, the indebtedness of the drawer to the holder of the instrument arises only after a notice of dishonour is duly given by the holder to him. Till such notice is given, the drawer cannot be said to be indebted to the holder. In the premises, the holder can never give a statutory demand notice for the debt to the company without making a prior demand for payment on the basis of a notice of dishonour. The statutory demand notice cannot itself count as a notice of dishonour.

6 In any event, all these matters do give rise to bona fide disputes

concerning the debt of the Petitioner and, accordingly, cannot sustain a winding up petition. The presumption of inability to pay within the meaning of Section 434 of the Act does not, in the premises, arise in the present case.

7 The Company Petition is, accordingly, dismissed. There shall be no order as to costs. It is clarified that the observations made herein are merely for the purpose of assessing whether or not the Petitioner's debt, which forms the basis of the present petition, is bona fide disputed by the Respondent and shall not affect the merits of the Petitioner's claim. In view of dismissal of the Petition, the Company Application does not survive and the same is also disposed of.

(S.C.GUPTE J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/ Order.