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

COMPANY PETITION NO.523 OF 2012

Venilaxmi Import and Export Ltd. … Petitioner
versus
Hydroair Tectonics (PCD) Limited … Respondent

Mr. K.H.Halai with Mr. P. Ranjan i/by M/s. Halai and Co., for Petitioner.
None for Respondent.

CORAM: S.J. KATHAWALLA, J.

DATE: 5th FEBRUARY, 2015

P.C.

1. By the above Petition, the Petitioner seeks winding up of the Respondent Company – Hydroair Tectonics (PCD) Ltd., ("the Company") on the ground that it is unable to pay its debts. The Company Petition is taken up for hearing and final disposal.

2. The petitioner claims that an amount of Rs.4,50,10,304/- is due to it from Hydroair Tectonics (PCD) Limited ("the Company"). The principal amount is Rs.3,07,97,553/-. The rest is a claim for interest at 21% per annum. This claim also includes a sum of Rs.11 Lakhs with interest of Rs.4,93,643.84 at 21% per annum, due, the petitioner claims, under a Memorandum of Understanding dated 12th November 2010.

3. On 11th November 2010, the Company placed a purchase order on the petitioner for supply of various raw materials known as 'steel shots'.

The petitioner fulfilled this order. It sold, supplied and delivered the required material to the Company. It drew three invoices for Rs.1,90,99,080/-, Rs.1,05,98,473/- and Rs.75,30,494/-. All were dated 16th November 2010. The aggregate value of the three invoices was Rs.3,72,28,047-. There were corresponding delivery challans. These have also been produced. The petitioner drew three bills of exchange, one in respect of each invoice. All three bills of exchange were accepted by the Company. This much is undisputed.

4. The petitioner claims that although the bills of exchange were presented by the petitioner's bankers, Indian Overseas Bank, to the Company for payment, all three bills of exchange were dishonoured. The Company claims that the petitioner discounted these bills of exchange and that the petitioner has, therefore, received payment. This is denied.

5. The petitioner also claims that in addition to the goods supplied, the petitioner paid a sum of Rs.11 Lakhs to the Company in relation to the Company's project at Turbhe. In this connection, a Memorandum of Understanding dated 12th November 2010 was drawn up and executed between the parties. This reflects the payment of Rs.11 Lakhs. The petitioner claims that this amount of Rs.11 Lakhs is also payable by the Company to the petitioner.

6. The Company issued three cheques dated 23rd February 2011 to the petitioner. Each cheque was for Rs.1.06 crores. All three cheques were dishonoured. They were first dishonoured and returned with a remark “account seized”. The petitioner wrote to the Company by letter and email on 26th April 2011. The petitioner re-presented the cheques. They were dishonoured again on 28th April 2011 this time for insufficiency of funds.

7. In the meantime, on 8th March 2011, the Company made a part payment of Rs.75,30,494/- to the petitioner by RTGS. The remaining amount was unpaid.

8. On 18th May 2011, the petitioners, through their Advocates, sent a statutory notice under Sections 433 and 434 of the Companies Act, 1956 to the Company at its Registered Office address. The Company received this notice. It replied by its Advocates’ letter dated 13th June 2011. It denied all liability. It claimed that the petitioner’s sister concern, one TechnoFab Engineering Ltd, had been given some 390,000 equity shares of the Company as security. The value of these shares was said to be Rs.9.36 crores. The Company alleged that the petitioner had “appropriated the collateral” in addition to getting the three bills of exchange discounted by the petitioner’s bankers.

9. By an order dated 18th February, 2014, the above Company

Petition was admitted by this Court (Coram : G.S.Patel, J.) and directed to be advertised. Paragraph Nos.8 to 12 of the said order are relevant and reproduced hereunder :

> *"8. Mr. Halai for the petitioner submits that there is no substance in the defence whatsoever. The bills of exchange were never discounted. They were presented for payment by the petitioner's bankers to whom they were given for collection; they were dishonoured on the bankers' presentment. The transaction regarding the equity shares is, he submits, a entirely independent transaction. The petitioner's sister concern, Technofab Engineering Ltd, has paid consideration for the equity in the amount of Rs.1.56 crores. Technofab Engineering's acquisition of this equity has nothing whatever to do with the present transaction. He also points out that previous winding up petitions have been admitted and made absolute against the Company, but that these were later compromised and the winding up orders set aside or recalled. The Company has very substantial debts to as many as six banks.*
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> *9. The affidavit in reply filed by the Company does not, in my view, assist the Company's case at all. In paragraph 9, Company contends that the part payment of about Rs. 75 Lakhs was "a goodwill gesture". That is most unlikely. There is nothing whatever to show that this is so. Whatever be the Company's chosen description at this stage, there is no doubt that the payment is an acknowledgement of liability and indebtedness. It is also contended by the Company in paragraph 36 of its affidavit in reply that the part payment was "a misunderstanding"; that the three cheques that were dishonoured were given as security; and that the petitioners have, indeed, discounted the thee bills of exchange with their bankers. There is nothing whatever to establish the correctness of any of these statements.*
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> *10. The Company has filed an additional affidavit in reply. In this, it seeks to amplify on the case sought to be made in the first*

affidavit in reply. The documents annexed to the further affidavit in reply as Exhibit E and H are communications from the Indian Overseas Bank asking the Company to make payment of the three bills of exchange. Prima facie, these do not show that the bills of exchange have been discounted. On the contrary, they support the petitioner's contention that Indian Overseas Bank only presented them for payment.

11. In my view, there is no defence at all to the petition. None of the defences raised can be said to be bona fide or of any substance. From the documents annexed to the petition, it is clear that the Company is heavily indebted to several secured and unsecured creditors. Its part payment, said to be made as a 'goodwill gesture', is no defence at all. That statement alone is an admission of liability. The absence of any documentary evidence from the Company in support of its contentions regarding this "goodwill gesture" or that the cheques were meant as security is telling. There is nothing to indicate, too, that the equity purchase by the petitioner's sister concern had anything at all to do with the present transactions. What is not denied, however, is that the petitioner sold, supplied and delivered the goods under the three invoices to the Company.

12. The inevitable conclusion can only be that the Company has, without just cause, neglected to pay the demand made by the petitioner's statutory notice. The Company must, therefore, be deemed to unable to pay its debts with the meaning of Section 434 (1) (a) of the companies Act 1956".

10. It is pertinent to note that the Respondent preferred an Appeal challenging the order admitting the above Company Petition which came to be dismissed. The Respondent thereafter, preferred a Special Leave Petition, which too was dismissed. From the said order of dismissal of the SLP, the Respondent preferred a Review Petition before the Supreme Court of India,

which was also dismissed.

11. Pursuant to the order of admission dated 18th February, 2014, the Petition has been advertised and an Affidavit proving publication dated 24-03-2014 is on record. Notice under Rule 28 of the Companies (Court) 1959, is also served on the Company on 14-01-2015. The Company has not come forward to oppose the Petition at this stage i.e. final hearing stage. For the reasons set out in the order dated 18th February, 2014, and herein, I am satisfied that the amount as claimed by the Petitioner is due and payable by the Company to the Petitioner. The Company has not appeared before the Court despite Notice under Rule 28 of the Companies (Court) Rules, 1959, being received by them. I am satisfied that the Company is unable to pay its debts, is commercially insolvent and deserves to be wound up. The Company Petition is therefore, allowed in terms of prayer clause (a), which are reproduced hereunder :

> "(a) that this Hon'ble Court be pleased to order that the Respondent Company be wound up under the provisions of the Act;

12. The Official Liquidator shall forthwith act on a copy of this order without waiting for any Notification.

13. The Company Petition is accordingly disposed of.

(S.J.KATHAWALLA, J.)