# IN THE HIGH COURT OF BOMBAY AT GOA

## <u>COMPANY PETITION NO. 26 OF 2014</u>

M/s. Cellpap India Private Limited,
602, Vishva Nanak, ICT Link Road Chakala,
Andheri East Mumbai,
400 099 (Registered Address). …... Petitioner

***Versus***

Global Ispat Limited
at Plot no. L - 16,
Cuncolim Industrial Estate,
Cuncolim, Salcete, Goa. …... Respondent

Mr. Amey Kakodkar, Advocate for the Petitioner.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. V. Palyelar, Advocates for the Respondent.

**Coram :-** **F. M. REIS, J**

**Reserved for Order on :** **21st October, 2016**

**Order pronounced on :** **16th December, 2016**

**ORDER**

Heard Shri Amey Kakodkar, learned Counsel appearing for the Petitioner and Mr. Usgaonkar, learned Senior Advocate appearing for the Respondent.

2. The above Petition filed by the Petitioner, inter alia, prays that the Company Global Ispat Ltd be wound up by the Court under the provisions of the Companies Act, 1956.

3. Briefly, the case of the Petitioner is that at the request of the Respondent-Company, the Petitioners gave a loan of Rs.10,00,000/- and that as the Respondent failed to repay such loan, the Petitioners addressed a notice on 10.01.2014 under Sections 433 and 434 of Companies Act, 1956, calling upon the Respondent to repay the said loan. But, however, on 28.01.2014, the Respondent-Company replied asking for documents executed in respect of such loan. It is further contended that on 17.02.2014, the Petitioner replied to the Respondent that the loan was given pursuant to an oral request by Mr. Kushal Agarwal, a Director of the Respondent-Company. It is further their case that the Respondent-Company has failed to repay the loan to the Petitioners and, as such, the above Petition came to be filed seeking winding up of the Respondent-Company. It is further pointed out that the Petitioners also learnt that the Respondent-Company is heavily indebted and that there are charges registered by Andhra Bank against the Respondent-Company to the tune of Rs.12,63,00,000/-. It is further pointed out that even the returns filed before the Company-Registrar, there is a loss shown to the tune of Rs.28,59,674/-. It is accordingly claimed that the Petitioner is entitled for the said reliefs sought in the Petition.

4. The Respondent-Company filed their reply. It is contended that on 07.06.2016, that the Respondent-Company engaged in the business of manufacturing mild steel billets/ingots at the Industrial Estate, Cuncolim. It is further contended that the Company- named M/s. Indicaa Group Limited, is based in Dubai and supplies commodities to the Companies based in India and, accordingly, on 07.06.2013, the said Indicaa Company and the Respondent-Company entered into a transaction wherein the Indicaa Company and the

Respondent-Company entered into a transaction whrein Indicaa Company had to supply steel scraps of around 1000 MTS per month to the Respondent-Company and that it was further claimed that the Petitioner was engaged by the said Indicaa Company to act as an indenting agent of the said Indicaa Company which meant that it was handling all the affairs pertaining to the said purchase Orders. It is further pointed out that in July 2013, the said Indicaa-Company sent around 80 containers at a time without prior intimation to the Respondents on the ground that as the international price of scrap was diminishing, it would be appropriate to send such supply. It is further pointed out that M/s. MSC Agency India Private Limited which is a Shipping Company, allowed the consignment only after payment of the detention and demurrage charges, As the consignment sent was almost amounting to around 2000 MTS which was sent without any prior intimation, the Respondent-Company was not in a position to arrange for such considerable amount for the consignment. It is further pointed out that the consignment remained at the port free of cost for a period of 14 days for the purpose of customs clearance and after the expiry of the said period, demurrage and detention charges are levied by the Shipping Company. It is claimed that the Respondent-Company had already released most of the consignment but, however, only 48 containers of scrap remained to be released. It is further pointed out that accordingly Respondent no. 3 requested the Petitioner to inform the said Indicaa Company to extend the time to pay the amount. It was further pointed out that in case the Shipping Company does not grant free days to release the said consignment to remain on the port, then the demurrage and detention charges shall be paid by the Respondent-Company on behalf of the said Indicaa Company provided the said Indicaa Company requests the Shipping Company to reverse the demurrage and detention charges payable by the Respondent-Company but, however, if the Shipping Company refused to reverse the demurrage and detention charges, the same shall be refunded to the Respondent-Company by the said Indicaa Company. It is further pointed out that after 14 days, the said Shipping Company levied demurrage and detention charges for the 48 containers which amounted to a sum of Rs.35,80,140/-. It is further pointed out that the Respondent-Company was not liable to pay demurrage and detention charges as the consignment was sent by said Indicaa Company. It is further pointed out that the Petitioner on behalf of the said Indicaa Company requested the Respondent-Company to make a part payment of the demurrage and detention charges amounting o Rs. 25,80,140/- with an assurance that the same would be subsequently re-imbursed to the Respondent-Company. It is further contended that remaining sum of Rs.10,00,000/- would be arranged by the said Indicaa Company to be paid by the Respondent-Company to the Shipping Company and, accordingly, the Petitioner released an amount of Rs.10,00,000/- through RTGS on 30.09.2014 on the Bank Account of Respondent-Company which was to be paid as demurrage charges for the remaining 48 containers. It is further submitted that the said amount of Rs.10,00,000/- claimed by the Petitioners is not a lone but demurrage charges which the said Indicaa Company had undertaken to pay for the extra consignment. Accordingly, the Respondents prayed that the Petition be rejected.

5. Thereafter, a rejoinder was filed by the Petitioner. It was pointed out that the said Respondent-Company and Indicaa Company had executed a contract dated 17.05.2013 for the supply of 1000 MT of steel scrap at the rate of USD 402 per metric ton and as the price of steel scrasp fell, lower than the contract price,

the Respondent-Company asked the Indicaa Company to offer a discount and, therefore, the same contract was modified to USD 352 per metric ton. It is further pointed out that another contract was signed on 10.06.2013 for the supply of 1000 metric ton of steel scrap which the Respondents have deliberately suppressed. The supply of the scrap in July 2013 of 80 containers was in accordance with the two contracts. It is further pointed out that the Respondent-Company had no finance to release the consignment from the Port and the consignment was lying at the Port which incurred demurrage which the Respondents are liable to pay. Thereafter, at the request of the Respondent-Company, M/s Indicaa Group also arranged for an additional 14 days from the charges and even a 40% waiver was given to the Respondent-Company at the instance of the Indicaa Company to release the consignment but, however, Respondent-Company did not release the consignment and finally out of desperation and on account of commercial duress, M/s. Indicaa Group gave a letter to the Respondent-Company informing that the Respondent-Company to pay the detention charges under protest and if MSC does not refund the amount paid M/s Indicaa Group will be responsible. It is further pointed out that the Respondent-Company was short of Rs.10,00,000/- which was given by the Petitioner to the Respondent. It is further pointed out that the entire transaction was between the Respondent-Company and M/s Indicaa Company. The Petitioner also denied the allegations made by the Respondent and, consequently, prayed that the reliefs be granted as prayed for.

6. A sur-rejoinder was also filed by the Respondent. The allegations made in the rejoinder were disputed by the Respondent in the sur-rejoinder and submitted that the Respondent-Company is not liable to pay the said sum of

Rs.10,00,000/- as claimed by the Petitioner. Thereafter, an additional affidavit was filed by the Petitioner to point out that on the basis of the stand taken by the Respondent, a request was made to M/s Indicaa Company to clarify the issue and accordingly the Petitioner received a letter dated 21.07.2015 from M/s. Indicaa Company Limited stating that at no point of time, they had paid Rs.10,00,000/- or any amount to the Respondent or through the Petitioners or any other entity and that the contention of the Respondent-Company that Rs.10,00,000/- was paid by the said Indicaa Company in September-October 2013, is false. A letter to that effect is also produced. An affidavit of the Chartered Accountant Mr. Pandurang Nayak was also placed on record. He has stated that a sum of Rs.10,00,000/- from the Petitioner on behalf of the Indicaa Company has been received by the Respondent-Company as payment towards the demurrage charges which were duly paid on 30.09.2013. An additional affidavit thereafter was also filed by Mr. Naik, inter alia, contending that the sum of Rs.10,00,000/- has been reduced by the Respondent-Company from the expenses of detention and other charges paid on Port which are on the voucher. An additional affidavit was also filed by the Petitioners. It was further pointed out that in the course of the hearing, this Court had asked the Respondent to produce the balance sheets and the books of account for the financial year 2013-14 which were not produced by the Respondent-Company but, however, the Respondents have produced their annual report of the year 2013-14 which includes the benefit as well as profit loss account which does not list M/s. Indicaa Company as a debtor. It is further pointed out that the ledger accounts produced by the Petitioner along with the ledger account dated 24.08.2015 does not inspire confidence as the ledger entries do not correspond to the vouchers produced by the Respondent-Company. Thereafter, another affidavit was filed by the Respondent. It is further pointed out that the Respondent-Company has maintained a separate ledger account for MSC Agency Private Limited entering all the particulars of the payments made to the said Agency which are reflected in Debit Column which shows that the said amount was paid to the Oriental Bank of Commerce Panaji. It is further pointed out that the disputed amount of Rs.10,00,000/- given by the Petitioner on behalf of M/s. Indicaa Company to the Respondent-Company towards payment of detention and demurrage charges, which have been adjusted in the aforesaid payment of Rs.23,41,060/-.

7. Mr. Amey Kakodkar, learned Counsel appearing for the Petitioners,. Submits that the fact that a sum of Rs.10,00,000/- was paid by the Petitioner to the Respondent-Company cannot be disputed. Learned Counsel further pointed out that even in the books of account, the amount received from the Petitioner is disclosed which confirms the receipt of such amount from the Petitioner. It is further pointed out that the allegation of the Respondent-Company that such amount was paid on behalf of Indicaa Company is belied from the books of account produced by the Respondent-Company themselves wherein said amount is not shown in the ledger account of having been received from M/s. Indicaa Company. Learned Counsel further submits that the very fact that the books of account show that such amount was received from the Petitioner itself suggests that the contention of the Petitioner has to be accepted. Learned Counsel further submits that after giving due notice as the Respondent-Company has failed to pay the amount, it is deemed that the Respondent-Company is unable to pay a legal debt which entitles the Petitioner to file the present Petition.

8. On the other hand, Shri Sudin Usgaonkar, learned Senior Advocate appearing for the Respondent, vehemently disputes the contention of the Petitioner. It is submitted by the learned Senior Advocate that a transaction was entered between the Respondent-Company and M/s. Indicaa Company and that as the said Indicaa Company had supplied the products much in excess to the orders sent by the Respondent, the Respondent-Company could not clear the goods expeditiously despite of concession given by the Shipping Company and as demurrage charges were mounting, the said Indicaa Company offered to pay such charges to the Respondent so as to clear the goods. It is further submitted that such amount was adjusted towards the amounts due by the Respondent-Company to the said Indicaa Company and, as such, according to the learned Senior Advocate, there is no legally enforceable debt from the Respondents herein. Learned Senior Advocate further pointed out that the financial status of the Respondent-Company is in good shape and, as such, admitting the winding up Petition would cause grave prejudice to the Respondent-Company and its reputation. Learned Senior Advocate further submits that once there is a bonafide dispute raised by the Respondent-Company, the question of admitting and proceeding with the winding up of the Company Petition would not at all be justified. Learned Senior Advocate has thereafter taken me through the statement of accounts as well as records produced in the file to point out that the amounts which have been received from the Petitioner have been adjusted with the amounts payable to Indicaa Company which itself would show that the Petitioner did not have a legally enforceable debt against the Company. Learned Counsel as such submits that the Petition be dismissed.

9. I have duly considered the rival contentions of the parties and I have also gone through the records. The details/facts as recorded herein above, would clearly show that the Petitioner had paid Rs.10,00,000/- to the Respondent-Company. It is contended by the Respondent-Company that such amount was paid by the Petitioner at the instance of M/s. Indicaa Company but, however, the Respondents have failed to produce any material, prima facie, to substantiate such claim. On the contrary, as rightly pointed out, in case such amount was paid by the Petitioner at the instance of M/s. Indicaa Company, the book of accounts of the Respondent-Company as well as the ledger account would show that such amount was received for the Petitioner on behalf of M/s. Indicaa Company. It is an admitted position that the statement of account did not disclose the said aspect but, however, such amounts are shown to have been received from the Petitioner. It is also not disputed that the demurrage charges and detention charges were otherwise payable by the Respondent-Company on the consignment supplied by the Indicaa Company. Once this aspect is not disputed, it cannot be comprehended how the Respondent-Company is not liable to pay the said amount to the Petitioners. To verify the said fact, this Court called upon the Respondent-Company to produce the books of Accounts and the learned Senior Advocate was unable to show any entry in the books of accounts which remotely show that the amounts received from the Petitioners were shown to have been received from M/s Indicaa Company. Even in the balance sheets and the books for the final year 2013-14, the Indicaa Company is not shown as the debtor of the Respondent-Company. On perusal of the financial statement of the year ending of March 2014, neither in the list annexed thereto M/s. Indicaa Company is shown as a debtor in connection with the subject transaction. In fact, the Respondents produced some

ledger accounts along with additional affidavits but, however, the entries of the ledger accounts did not correspond to the vouchers produced by the Respondent-Company. The said inconsistencies in the piecemeal documents produced by the Respondents would itself show that the contention of the Respondent-Company that the amount of Rs.10,00,000/- admittedly received from the Petitioner was on behalf of the Indicaa Company cannot be prima facie accepted.. Apart from that, the affidavit produced by the Petitioners would further corroborate the fact that M/s Indicaa Company did not admit that they have ever paid or agreed to pay the sum of Rs.10,00,000/- on account of demurrage and detention charges.

10. The Judgment of the Delhi High Court reported in **1999 (49) DRJ 145** in the case of ***Jyoti Limited vs International Pumps & Projects*** relied upon by the learned Senior Advocate appearing for the Respondent, is not applicable to the facts of the present case. The Respondents are unable to point out that any material is suppressed by the Petitioners.

11. In view of the above, upon prima facie consideration of the material on record and taking note of the reluctance on the part of the Respondents in producing the complete financial records of the Respondent-Company, I am of the opinion that the matter requires consideration and is not liable to be summarily dismissed. Admittedly, the amount has been received from the Petitioner by the Respondent-Company, the claim that the amount has been received on behalf of Indicaa Company has not been established by the Respondents. In such circumstances, it cannot be said that the Respondents have shown any bonafide dispuite with regard to the claim put forward by the Petitioners. The Respondent-

Company received a notice and only sought documents from the Petitioner though the fact that the amount was received from the Petitioners by the Respondent-Company was clearly found from the books of account maintained by the Respondent.

12. The Apex Court in the Judgment reported in ***1971 (3) SCC 632*** in the case of ***M/s. Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt. Ltd.,*** has observed at Paras 20 and 21 thus :

> "20. 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*) 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 properly was not allowed. (See *Re. Brighton Club and Horfold Hotel Co. Ltd.*
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> 21. 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.* 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.* 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."

Taking note of the said observations, I find that for the reasons stated herein above, the debt of Rs.10,00,000/- claimed by the Petitioners has been prima facie established and there is not doubt prima facie that the Respondent-Company owes the said amount to the Petitioners, as the amount was admittedly paid to the Respondents by the Petitioners which they were otherwise not liable to pay in terms of the contract.

13. It was pointed out by learned Senior Advocate appearing for the Respondent-Company that grave injustice would occasion to the Respondent-Company in case any orders of admission is passed by this Court as it would gravely affect the activities carried out by the Respondent-Company as it would affect the interest of their secured creditors. But, however, it was pointed out by the learned Counsel appearing for the Petitioners that this Petition would ensure to the benefits of any such other creditors.

14. The Division Bench of this Court, Principal Seat at Mumbai, in the case of **Videocon Industries Limited Vs Intesa Sanpaolo S.P.A., in Appeal (L) No. 29 of 2014 in Company Petition No. 528/2012** has observed at paras 42 and

43 thus :

"42. When we so indicated at the conclusion of the arguments, learned counsel for Videocon, however, submits that in any view of the matter the learned Company Judge erred in directing Videocon to pay the amount to the Bank. It is submitted that at the most the amount could have been directed to be deposited in Court but not paid over to the Bank. It was vehemently submitted that the winding up petition is for the benefit of all the creditors and any amount paid after filing of the winding up petition would enure for the benefit of all the creditors and, therefore, the impugned direction given by the learned Judge requiring Videocon to pay 38 Million Euros to the Bank is contrary to the settled legal position.

43. The argument is fallacious for the simple reason that after Videocon pays the amount to the Bank, the winding up petition would stand dismissed and, therefore, there would be no order of admission of the winding up petition or publication of the advertisement for inviting other creditors to come forward with their claims. That stage would not at all arise if Videocon makes the payment. It is only if Videocon fails to make payment even after three adjudications that

Company Petition would stand admitted, which would be followed by publication of the advertisement for inviting claims from the other creditors. We, therefore, do not find any merit in this contention also."

15. Taking note of the said observations of the Division Bench of this Court, I find that the Respondent-Company should be directed to pay the said amount of Rs.10,00,000/- within a period of three months from today and on failure to do so, the consequences would follow.

16. In view of the above, I pass the following :

**ORDER**

(i) The Respondent-Company is directed to deposit in this Court Rs.10,00,000/- within three months from today.

(ii) In case the Respondent-Company fails to do deposit the said sum of Rs.10,00,000/- within the said period, the Petition shall stand admitted and the Petitioners shall proceed to publish the notice in two newspapers one in "The Navhind Times" and other in regional language Marathi "Gomantak Times"

(iii) In case the amount is deposited within the said period stipulated herein above, the Petition shall stand accordingly dismissed with liberty to the Petitioner to recover the legal dues from the Respondent in accordance with law.

(iv) The Petition stands disposed of accordingly.

**F .M. REIS, J.**

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