

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

COMPANY PETITION NO. 790 OF 2014

M/s. Gati Kintetsu Express Private Ltd.	.. Petitioner
Vs.	
M/s. Provogue India Ltd.	.. Respondent

Ms. Shilpa Kapil for petitioner.

Mr.Ajay Basutkar for respondent.

**CORAM : K.R.SHRIRAM, J.
DATE : 25TH JANUARY, 2016**

P.C.

1 The petitioner has filed this petition on the ground that the respondent has neglected to pay the amount payable to the petitioner within 21 days period as per the statutory notice and hence the respondent is commercially insolvent and is unable to discharge its debts and ought to be wound up.

2 The petitioner and the respondent had entered into an agreement dated 17.10.2012 whereby the petitioner agreed to carry goods on behalf of the company and deliver it to the company's customers/outlets. Under clause 5 of the said agreement, it was agreed that the payment for the invoices raised by the company shall be made within 25 days from the date of invoices and if the payment is not so made, an interest at 2% per month shall be charged

on the outstanding amount.

3 Clause 7 of the agreement also provided that the company shall, if it has any claim for loss or shortage or damage or non-delivery or breakage or leakage or pilferage etc., the claim in writing will have to be lodged within 30 days from the date of docket subject to remarks on Proof of Delivery. It is also mentioned that remarks on invoice are not eligible for Claim Process. It is also mentioned in Clause 7 that no deduction or adjustment or set off any claim from the outstanding amount payable to the petitioner can be done and if the company has any claim, a complete process of Claim Settlement as prescribed by the petitioner to be followed.

Clause 7 reads as under :-

7.0 CLAIMS :

(a) No claim shall be entertained by GATI KINTETSU EXPRESS PRIVATE LIMITED for any loss, shortage, damage, non-delivery, breakage, leakage, pilferage, etc. for the shipment unless a written claim is lodged within thirty (30) days from the date of docket, subject to remarks on the Proof of Delivery (POD). Remarks on invoices are not eligible for Claim Process.

(b) The Customer shall not deduct/adjust/set off any claim from the outstanding amount payable to GATI KINTETSU EXPRESS PRIVATE LIMITED. A Complete Process of Claim Settlement as prescribed by GATI KINTETSU EXPRESS PRIVATE shall be

followed. However, customer is entitled for a claim strictly on payment strictly on payment of HRR/ROV as per Annexure II. Any claim above Rs.5000/- will be settled through the claim procedure. Gati Kintetus Express will issue on Observation Note (OBN) for any such claim.

4 There are 16 invoices, which according to the petitioner, are outstanding. The total amount payable under these 16 invoices is Rs.15,65,962.48. As the company did not make this payment, the petitioner vide its letter dated 15.10.2013 called upon the company to pay this amount of Rs.15,65,962.48 together with interest thereon at 2% p.m. The company did not reply. Therefore, the petitioner, by its letter dated 19.11.2013, caused a statutory notice to be issued under Section 433, 434 of the Companies Act, 1956. In response, the company called upon the petitioner to meet for settlement on 6.12.2013. By a letter dated 5.12.2013, the company wrote to the petitioner's advocate informing the advocate about the meeting. The letter also contained a general denial. The meeting happened on 6.12.2013. After the meeting, the petitioner sent the draft of the minutes of the meeting to the respondent to which the company did not even respond. A copy of this draft minutes is annexed to the affidavit in reply. The stand taken in the affidavit in reply which is also reflected in the draft minutes of the meeting is that the petitioner agreed that a total amount of Rs.14,49,743.88 minus Rs.1,39,192/-, i.e., Rs.13,10,551.88 was payable by the company to the

petitioner. The minutes also shows that the petitioner agreed to accept debit note of Rs.1,21,561/- leaving a balance of Rs.11,88,990/-. The sticking point between the parties is that the company handed over to the petitioner debit note against shortage/damage in the sum of Rs.5,08,113.82 which was not being accepted by the petitioner but the petitioner accepted only Rs.1,21,561/-.

Clause 7 reproduced above provides that no claim from the company shall be entertained for any loss, shortage, damage, non-delivery, breakage, leakage, pilferage etc. unless this written claim was lodged within 30 days. There is no document annexed to the affidavit in reply to show that such a written claim was lodged within 30 days.

It is also mentioned in affidavit in reply that any shortage of goods or damage caused to the goods used to be noted on the invoice and signature of the person delivered the article was taken. First of all, no such invoices are annexed to the reply. In any event, Clause 7 provides “*remarks on invoices are not eligible for claim process*”.

5 In the circumstances, in my view, there is absolutely no defence to the claim of the petitioner. When the petitioner sent the demand letter dated 15.10.2013, the company did not reply. For the statutory notice also the company did not reply, but asked the petitioner to meet. The petitioner met

and sent the minutes of meeting. Again the company did not reply but have relied upon the said minutes in its reply. Therefore, the attitude of the company smacks of dishonesty, i.e., not to pay the petitioner at any cost. By an order dated 23.02.2015, the company undertook to pay the petitioner a sum of Rs.9,50,000/-.

6 The counsel for the petitioner confirms having received the sum. At the same time, there is no defence to the balance amount of Rs.2,38,990/- out of the principal amount which is Rs.11,88,996/-. As per the minutes of the meeting annexed to the reply, there is no defence whatsoever to the agreed rate of 2% per month that the company had agreed to pay on the outstanding invoices. Therefore, in my view, *prima-facie* the company is unable to pay the debts of the petitioner. Hence, the following order is passed :

(i) The Company Petition is admitted and made returnable on 4.04.2016.

(ii) The petitioner is directed to advertise the Petition in two local newspapers, viz. 'Free Press Journal' (in English) and 'Navshakti' (in Marathi) and also in Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of

notice shall not invalidate such advertisement or notice and shall not constitute noncompliance with this direction or with the Companies (Court) Rules, 1959.

(iii) The petitioner shall also deposit an amount of Rs. 10,000/- with the Prothonotary and Senior Master of this Court towards publication charges, within a period of two weeks from the date of this order, with intimation to the Company Registrar failing which the Petition shall stand dismissed for non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the petitioner.

7 A copy of this order shall forthwith be served on the company by hand delivery and by Registered Post AD by the Advocate for the petitioner.

8 Notwithstanding above, the advertisement of the petition as mentioned in paragraph 6(ii) above is stayed for a period of three weeks. In the meanwhile, it is open for the company to pay the balance principal amount of Rs.2,38,990/- together with interest at 2% p.m. on Rs.11,88,990/-, from 15.10.2013, the date on which the petitioner called upon the company to pay.

9 If the company makes this payment to the petitioner, the petition will stand dismissed. If not paid within three weeks, provided above, the directions in paragraph 6(ii) will get triggered automatically without further reference to the Court and without any notice to the company.

(K.R. SHRIRAM, J.)