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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY PETITION NO. 490 OF 2013

Landesban Baden-Wurttemberg ...Applicant
Versus
Pushkaraj Packaging India Pvt. Ltd. ...Respondent

Ms. Usha Srivastava, *i/b M/s. Consulta Juris, for the Petitioner.*
Mr. Simil Purohit, *with Mr. Farhan Khan & Ms. Sunitha Perumal, i/b Mr. Sachin Masurkar, for the Respondents.*

CORAM: G.S. PATEL, J.
DATED: 17th March 2016

PC:-

1. Heard.

2. On 14th March 2016, I heard both sides and began to dictate an order. On a limited question, i.e., on the issue of whether the statutory notice was served as required in law, both sides then asked for time and the matter was stood over to today.

3. Paragraphs 1 to 5 of my order dated 14th March 2016 cover the principle defence and the case of the Petitioner. For convenience, these are set out below:

> "1. The Petitioner seeks a winding up of one M/s. Pushkaraj Packaging India Pvt.

Ltd ("**the Company**"). The Petitioner is a German financial institution. The basis of the Petition, set out in paragraph 5 is that the Petitioner under a loan agreement dated 8th/18th October 2010 granted a loan of Euro 913,580.00/- to one S.K. Agrotech Ltd. The purpose of this loan was to finance 85% of the aggregate value of a another contract entered into between S.K. Agrotech Ltd and one Kiefel GmbH, a German company. That transaction was for the export of two automatic pressure form machines. It is necessary only to note that the present Respondent was not the importer.

2. In the agreement in question in this Petition, i.e., the loan agreement, the Petitioner is shown as a guarantor in Article 1. Its liability as guarantor arises under a Letter of Guarantee. This is set out in a document at page 44, schedule B to the principal loan agreement. By this Letter of Guarantee, the Respondent unconditionally guaranteed as principal obliger jointly and severally with S.K. Agrotech Ltd. to pay without delay on demand to the Petitioner a sum of Euro 915,580/-.

3. This loan was slightly amended so that the loan would be repaid by the Respondent to the Petitioner in 10 equal consecutive instalments starting of 30th April 2012. This amendment agreement is 17th January 2012. A copy is at Exhibit "D" to the Petition. The Respondent executed a

> confirmation of guarantee Exhibit "E", also dated 17th January 2012.
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> 4. The case of the Petitioner is that as S.K. Agrotech Ltd, the principal borrower, and the Company both failed to pay the amount demanded, a legal notice was sent by the Petitioner to the Respondent. There was no reply to that statutory notice. A copy of the statutory notice is Exhibit "F" to the Petition.
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> 5. Mr. Purohit for the Respondent Company submits that one must have regard to the entirety of the transaction. He says that there is material annexed to the affidavit in reply to show that the machines supplied by Kiefel GmbH to S.K. Agrotech Ltd. were defective. The Company's liability as a guarantor is a part and parcel of what he describes as one integrated transaction. I understand this to mean that in his formulation of it, the Respondent's liability as guarantor cannot be separated from the liability of the principal borrower S.K. Agrotech Ltd. In other words, if S.K. Agrotech Ltd has a grievance with its supplier, this is sufficient to raise a bona fide dispute and a valid defence to the present Petition, one brought by a lender against a guarantor."

4. Today my attention is drawn to an order dated 7th December 2015 passed, apparently, in Company Petition No. 340 of 2013. It seems that in that order the title taken was of a group of Company

Petitions, including the present Petition. However, what seems to have been disposed of was only Company Petition Nos. 340 and 341 of 2013. In that order, the Court dealt, *inter alia*, with a situation that is substantially similar to the one in this case. The principal borrower there was also S.K. Agrotech Industries Limited. In that case, as in the present one, an irrevocable and conditional guarantee was required by the Respondent-gurantor.. That guarantee was furnished. The Petition was filed on the basis of that guarantee.

5. There, as here, the Respondent-guarantor contended, *inter alia*, that the machinery imported by the principal borrower was defective and did not function satisfactorily. A considerable amount of correspondence was relied on. Ultimately, the Court held that it could not be said that the defence was not *bona fide*.

6. It is to be noted that Company Petition No. 341 of 2013 was against the principal borrower (S.K. Agrotech) and Company Petition No. 340 of 2013 was against one of three guarantor. In the present case also, the principal borrower is S.K. Agrotech Industries Limited and the present Respondent is another one of the three guarantors. Left to myself, I would have drawn a distinction between the Petition brought on a guarantee and the Petition brought on the contract with the principal borrower. The latter, against the principal borrower, might have required very different considerations from an action against a guarantor.

7. Having said that, I do not believe that I can draw that distinction, for the order of 7th December 2015 passed by Hon'ble Mr. Justice K.R. Shriram also deals with the case where the

Respondent in one of the two Petitions before him was a guarantor. The result of that order was a finding that the defence is substantial. Indeed, paragraph 8 of the order dismisses Company Petition No. 340 of 2013. That was the Petition that was filed not against the principal borrower but against the guarantor.

8. Whatever may be my view, I am bound by the order of Hon'ble Mr. Justice K.R. Shriram. I cannot go behind it. I certainly cannot sit in appeal over it. Nothing is shown to me to indicate that that order was *per incuriam*. It is not enough to ask me to take a different and contrary view, at least not on facts that are so close. This I cannot do as a matter of law.

9. The second defence raised by Mr. Purohit is that the statutory notice was never served on the Respondent as required in law. A copy of the statutory notice is at page 139 of the Petition. It is dated 20th February 2013. What is shown to me at page 145 is that the registered post parcel was returned undelivered with a postal remark "I.P.". I am told that this means that "Intimation Posted" to the addressee, the Respondent-Company. Ms. Srivastava for the Petitioner urges me to hold that this endorsement is in itself 'sufficient' or 'substantial' compliance with the provisions of Section 434(1)(a) of the Companies Act, 1956 and that the packet of the statutory notice must be 'deemed' to have been delivered to the Respondent-Company.

10. Ms. Srivastava relies first on the decision of a Division Bench of this Court in *Cavendish Shipping Limited v Polaris Marine*

Management Private Limited.[1] In particular, she relies on the observations in paragraph 34. I do not see how this helps her at all. That paragraph refers to a decision of the Delhi High Court in which a statutory notice was returned with a remark that the "addressee had left the premises". The Delhi High Court in that case held that it is the duty of the Company in law to maintain a proper registered office at which it can be served. Proceedings against a company cannot be invalidated by the company's own acts of illegality. This was the consideration of the Delhi High Court and the Division Bench of this Court.

11. On the other hand, Mr. Purohit draws my attention to Section 27 of the General Clauses Act, which reads thus:

> "27. **Meaning of service by post.**- Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, where the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

1 (2010) 1 Bom CR 696

12. I believe he is correct in saying that 'service by post' under Section 27 of the General Clauses Act is distinct from the requirement of Section 434(1)(a). That Section reads thus:

> "434.(1) A company shall be deemed to be unable to pay its debts-
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> (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, **by causing it to be delivered at its registered office**, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor."

13. Clearly, the requirement in the Companies Act, 1956 is not merely that it should be *sent* by registered post or otherwise. It uses a different language. It uses the all-important words "by causing it to be delivered at its registered office". This requires actual delivery of the notice. In this context, Mr. Purohit cites a decision of a learned Single Judge of this Court in *Vysya Bank Limited v. Randhir Steel and Alloys (P) Limited*,[2] where precisely the same question arose. The Court observed thus:

> "Now, in the present case, the Petitioners sent the notice by registered post to the company's registered office but it was returned to the Petitioners undelivered

2 1993 (76) Company Cases 244

> and unserved. Thereafter the Petitioners sent the notice to the company at 89/19, Ramesh Bhawan, first floor, Tamba Kanta, Bombay 400 003. It is on this basis that it is claimed on behalf of the Petitioners that they have complied with the provisions of section 434(1)(a) of the Companies Act. I do not agree. The provisions of section 434(1)(a) have already been reproduced above. The demand in question has to be served on the company and what amounts to serving on the company has been laid down in the said clause (a) of sub-section (1) of section 434 itself by stating "by causing it to be delivered at its registered office". Admittedly, the demand was not delivered at the registered office of the company."

14. Mr. Purohit is also correct in relying on the decision of a learned Single Judge of this Court in *Kold-Hold Industries (P) Limited v. Arabian Exports Limited*[3] saying that there is no question of substantial compliance with the provisions of Section 434 of the Companies Act, 1956.

15. In that case, it was found that the notice was sent to a previous registered office address although the Company had been careful to intimate its application for change of registered address well in advance. The Court held that it is the duty of the Company to ensure that its correct registered office is maintained in the official records. Following the decision of the Division Bench of this Court in *N.L. Mehta Cinema Enterprieses (P) Limited v.*

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3 (2004) 55 SCL 131 (Bom.)

Pravinchandra P. Mehta,[4] the learned Single Judge held that the requirement under Section 434 of serving a demand notice on the registered office of the Company is mandatory and has to be strictly complied with. There is, therefore, no question of substantial compliance with this provision. This concept comes in only where a provision is held to be directory.

16. At this stage, Ms. Srivastava says that by another order dated 13th October 2014, this Court in *Deepak Patange, Sole Proprietor of JP Skytek Engineering v. M/s. Intensiv Filter India Pvt. Ltd.*[5] has held, as a matter of law, that every time a packet is returned undelivered with an endorsement, it is deemed to be a good service for the purposes of Section 434(1)(a) of the Companies Act, 1956. This is a complete misreading of Mr. Justice S.J. Kathawalla's order. He said nothing of the kind. He was not even dealing with a case under Section 434(1)(a). He was considering the question of service of a notice under Rule 28 of the Company (Court) Rules, 1959, after an order of admission and advertisement had been made. This is hardly a decision that can be extended even by implication to Section 434 of the Companies Act, 1956.

17. Ms. Srivastava then turns to upon a decision of a learned Single Judge of this Court in *Re: Ispat Industries Limited v. Unknown.*[6] There, the Court had before it a case where a notice despatched by post with the correct address was returned unclaimed. In that case, not one but three statutory notices were

4 (1991) 70 Comp. Cas. 31 (Bom.)

5 Company Petition No. 539 of 2013, decided on 13th October 2014 by Hon'ble Mr. Justice S.J. Kathawalla.

6 2005 (2) Bom CR 94

sent between October 1999 and April 2000. The first of these was sent to the office at Mahalaxmi, Mumbai. The second two were served at the Pune and Khar (Mumbai) offices respectively. A further statutory notice was sent on 21st July 2000 to the Pune Office. The company contended that its registered office was at Mahalaxmi. It was in this context that the Court held, *inter alia*, in paragraph 8 that this made no difference for a statutory notice had admittedly been served at the company's Mahalaxmi address. Secondly, another notice was served at the Khar address, which was actually the registered office of the company. There was some dispute about this and it is in this context that the observations in paragraphs 13, 14 and 15 of this judgment came to be made. The *Ispat* Court not only examined Section 434(1)(a) of the Companies Act, 1956, but also Section 27 of the General Clauses Act and relied on certain observations from a treatise on interpretation of statutes. A decision of the Supreme Court in *K. Bhaskaran v. Sankaran Vaidhyan Balan & Another*[7] was cited to the effect that a notice returned as unclaimed is presumed to have been served. That decision, however, was under Section 138 of the Negotiable Instruments Act, not the Companies Act at all. There were no words of the kind we find in Section 434(1)(a). It was to stop in their tracks fraudsters issuing bad cheques that the Court took such a liberal view. On the other hand, none of the decisions of the Division Bench in *N.L. Mehta Cinema Enterprises*; of the learned Single Judge in *Kold-Hold Industries* ; and of another learned single Judge in *Randhir Steel Alloys* were cited before the *Ispat* Court. These are directly on the question of service of notice under Section 434(1)(a) and not a general question of service of notices.

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7 (1999) 7 SCC 510

All three were binding. Whether or not the want of consideration of these judgments renders the *Ispat* decision *per incuriam* is a matter that I decline to address at this stage. I do not think it is necessary. For, in my view, the facts in the *Ispat* case were so entirely different that this case can be distinguished from that judgment on that ground alone. Apart from anything else, in the matter before the *Ispat* Court, service was actually effected on two separate addresses. The only question was which of these was the statutory notice and which of these was the corrected registered address at the time. The decision in *Ispat* does not lend itself to the kind of overbroad generalisation that Ms. Srivastava commends; and I do not find from her any answer to the three binding decision squarely on point in *N. L. Mehta Cinema Enterprises*, *Kold-Hold Industries*, and *Randhir Steel Alloys*. I am bound by all three, and one of these is a decision of a Division Bench.

18. I must note that in the case before me all that we have is two alphabets "I.P." and these, I am told to assume without proof, man "Intimation Posted". Even if this is true, this is not refusal of delivery. This is not sufficient proof that the packet was returned 'unclaimed'. This is only indication that intimation was posted. It is no better than saying that a letter was *sent* by registered post. It does satisfy the requirement of Section 434(1)(a) of having a letter by registered post (or other means; clearly hand-delivery is good enough) actually delivered. Something further would be required to be shown to establish that delivery was refused though attempted.

19. Matters might have been different if the Petitioners would have been able to establish that they had tried again to send that notice by registered post or hand-delivery and that the fresh notice had once again met the same fate. Even this material is not on record. In any case, there are the words “or other means”. This presumably allows for delivery by hand; none was attempted.

20. There is also the matter of correctness of this endorsement on the packets and the curious question of why the Petitioner did not attempt hand-delivery. Mr. Purohit shows me an Inward Register (though the printing is to the contrary) maintained between January 2013 and going on well into 2016. There are entries through February 2013, including around the time of the date of the statutory notice. Mr. Purohit points out that in the regular course there are entries showing correspondence received even from this particular Petitioner. That is the entry at Serial No. 154 of 4th April 2013. There is another entry of 15th April 2013 and yet another of 21st October 2013. The endorsement on the packet at page 141 is dated 25th February 2013. I find this extremely strange because in this register there are at least eight entries of that very date of letters received by the Respondent from various other parties. There are several too over the next few days. In other words, Mr. Purohit says, the registered office was open and functioning. Letters were being received and all were entered in various modes. There are later letters received from this very Petitioner. The Respondent had no cause to refuse delivery, and it did not in fact refuse delivery. None was attempted, that is all; and that is what the material shows.

21. Therefore, even on the ground of want of service of the statutory notice, I would have been moved to dismiss this Petition, reserving, however, liberty to the Petitioner to file a fresh Petition after issuance of a fresh notice. In either case, the result would have been almost the same, but given the previous order of 7th December 2015, I do not see how I can even reserve that liberty to the present Petitioner.

22. I am unable to find any merit in the distinctions that I am asked to draw, viz., that the contract in question was a different contract from that before the Court on 7th December 2015; that the Petitioner was a different Petitioner; and that the machines involved and the underlying contracts were different. The same defence was taken in Company Petition No. 340 of 2013 against another guarantor as is taken here. That Petition was dismissed. So must this.

23. Consequently, this Petition is dismissed with no order as to costs.

(G. S. PATEL, J.)