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

COMPANY PETITION NO.65 OF 2015
WITH
COMPANY APPLICATION NO.216 OF 2015
IN
COMPANY PETITION NO.65 OF 2015

M/s. Nainil International ....Petitioner

Vs.

Devanshi Impex Pvt. Ltd. ....Respondent

Mr. Niraj Shah i/b. Mr. Siddharth Murarka for petitioner.
None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 14th DECEMBER, 2017

P.C.:

1 On 9th March, 2017 when the petition came up for admission, after hearing the counsel for petitioner and respondent, this Court was pleased to pass the following order :

> *1. By this petition, the petitioner seeks winding up of the respondent on the ground that the respondent is unable to pay its debts.*
>
> *2. Some of the relevant facts are as under :*
>
> *It is the case of the petitioner that in the year 2013, the petitioner had sold, supplied and delivered the goods to the respondent as per the orders placed by the respondent. The petitioner had raised various invoices upon the respondent for sale and supply of the those goods totaling to US $ 99,154.50. The respondent duly received those goods and did not raise any dispute of any nature whatsoever when the goods were delivered to the respondent.*
>
> *3. During the period between 2013-14, the respondent made part payment of US $ 12,500. It is the case of the petitioner that though the petitioner made regular follow ups with the respondent and sent various e-mails, though the respondent promised the petitioner to pay the balance amount, did not pay any further amount to the petitioner. Some of those e-mails are annexed at Exhibit "G" to the petition.*
>
> *4. The petitioner thereafter issued a statutory notice through its advocates on 3rd January, 2014 under sections 433(e) and 434(1) of*

the Companies Act, 1956 and called upon the respondent to pay a sum of US $ 86,654.50. The said statutory notice was sent to the respondent at the office address as shown on the website of the Ministry of Corporate Affairs and also to its corporate office. A copy of the said notice was also sent at the residential address of the Directors and also to the other Managers of the respondent. The envelope containing the said notice sent to the respondent at its registered office address is returned with the remarks "Intimation" and the notice sent to the corporate office of the respondent is duly served. The notice sent at the residential address of the Directors and the other Managers are also duly served upon them. The petitioner has annexed the proofs of delivery of the statutory notice upon the respondent.

5. The respondent through its advocate's letter dated 22nd January, 2014, replied to the said statutory, denying that the goods were received as ordered or that the respondent did not make any complaint regarding the quality of the goods and the rates. In the said reply for the first time the respondent alleged that the goods supplied by the petitioner were of inferior quality and not as ordered. It was further alleged that within a few days of supply of goods, the respondent started receiving complaints about the quality of the goods on account of various defects.

6. The petitioner through its advocate's letter dated 1st April, 2014 replied to the said letter dated dated 22nd January, 2014 and denied the allegations made therein. The petitioner thereafter filed this petition inter-alia praying for winding up of the respondent.

7. Mr.Murarka, learned counsel appearing for the petitioner invited my attention to various documents annexed to the petition and would submit that the respondent had admittedly received the goods sold and delivered by the petitioner. He submits that the respondent never raised any dispute regarding the quality or of any other nature whatsoever in respect of the goods sold and delivered by the petitioner. He submits that on the contrary in the e-mails sent by the respondent, the respondent acknowledged the liability and made an assurance to pay the balance amounts to the petitioner. The respondent was expecting the payment from a third party and had assured the petitioner of payment. He submits that the allegations of the respondent about the alleged defect in the quality of the goods is made for the first time in reply to the statutory notice and is after thought. He submits that the respondent had already made part payment in respect of the said goods and failed to pay the balance amount.

8. Mr.Andhyarujina, learned counsel appearing for the respondent on the other hand submits that the petitioner had not executed the power of attorney which is relied upon by the petitioner in favour of the alleged constituted attorney. He submits that the said power of attorney was not registered. He submits that the petitioner herself was not present before the notary public, before whom the said power of attorney was alleged to have been executed by the petitioner. He submits that the petition thus filed by the petitioner could not have been affirmed by the alleged constituted attorney. He invited my attention to the order dated 3rd

October, 2016 passed by this Court in this petition and also the affidavit filed by Mr.S.M.N. Naqvi, the notary public dated 29th August, 2016 stating that the petitioner herself was not present before him when the said power of attorney was attested by him.

9. Insofar as the merits of the matter is concerned, it is submitted by the learned counsel for the respondent that the goods supplied by the petitioner were defective and in view of the defective goods supplied by the petitioner, the respondent rightly did not make the balance payment. He submits that these disputed facts cannot be gone into by this Court in this company petition.

10. Mr.Murarka, learned counsel for the petitioner in rejoinder submits that the petitioner has never disputed the authority of the constituted attorney to file this company petition. He submits that the respondent has no valid defence of any nature whatsoever. The petitioner herself has filed an affidavit before this Court dated 29th June, 2016 stating on oath that she was present before the notary public. She denied the allegations of the respondent that the petitioner was not present before the notary public. He invited my attention to the detailed orders passed by this Court on 3rd October, 2016 and 24th October, 2016. He submits that this Court was satisfied that the date of arrival of the petitioner in India after perusing various documents referred in the said order dated 24th October, 2016. He submits that this Court has already accepted the statement made by the petitioner that she was present in India when the power of attorney was executed by her and had refused to postpone the hearing of this petition that that ground.

11. This matter was argued at great length by both the learned counsel for the parties. The matter was adjourned at the request of the learned counsel for making an attempt to settle the dispute amicably. The matter however, could not be settled between the parties.

12. A perusal of the record clearly indicates that the petitioner had sold and delivered various goods to the respondent. The respondent had also made part payment to the petitioner under those invoices annexed to the petition. A perusal of the e-mails exchanged between the parties which are annexed to the petition, clearly indicates that the respondent did not raise any issue of the alleged defective quality of goods sold and delivered by the petitioner and had on the contrary made assurances to make payment to the petitioner as early as possible during April, 2013. In my view, there is no substance in the objection raised by the respondent about the alleged defective quality of goods belatedly raised in the reply to the statutory notice. The respondent did not dispute that in respect of the same goods, the respondent had made part payment to the petitioner.

13. Insofar as the submission of Mr.Andhyarujina, learned counsel for the respondent that the alleged constituted attorney of the petitioner could not have affirmed and verified the company petition on the ground that the petitioner herself was not present before the notary public for attestation of the said general power of attorney is concerned, a perusal of the order passed by this Court indicates that this Court also has made *an enquiry into the allegations made by the respondent alleging absence of the petitioner before the notary public.*

14. A perusal of the orders dated 3rd October,2016 and 24th October, 2016, clearly indicates that after considering the affidavit filed by the notary public and by the parties and after perusing the copies of the air tickets issues to the petitioner on 30th June, 2014 by Air India Limited accompanied by the certificate dated 12th October, 2016 from Air India Limited, clarifying that the petitioner had travelled by Air India ticket and she was booked on flight Air India to Mumbai on 7th April, 2014 from Hong Kong, this Court accepted the statement made by the petitioner and refused to adjourn the hearing of the petition any further. A perusal of the record further indicates that the petitioner herself has filed an affidavit dated 29th June, 2016 before this Court to demonstrate that she had travelled and landed in India on 7th July, 2014 till the period 16th August, 2014. It was her statement in the affidavit that she was present before the notary public on 18th July, 2014 but she did not recollect as to whether her signature was taken on the register or not.

15. A perusal of the record prima-facie indicates that the respondent is unable to pay its debts. No further payment was made after giving part payment to the petitioner inspite of the assurances made by the respondent. In my view, there is thus no substance in the objection raised by the learned counsel for the respondent that the constituted attorney of the petitioner could not have affirmed and verified the company petition or that the said power of attorney was required to be registered by the petitioner.

16. I therefore, pass the following order :-

a). The company petition is admitted and shall be advertised in two local newspapers, namely (i) Free Press Journal (in English) and Navshakti (in Marathi) as also in the 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 non-compliance with this direction or with the Companies (Court) Rules, 1959.

b). The company petition is made returnable on 2nd May, 2017. The petitioner shall deposit Rs.10,000/- towards publication charges with the Prothonotary & Senior Master, under intimation to the Company Registrar, within three weeks from the date of admission, failing which the petition shall stand dismissed for the nonprosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the petitioner.

c). In that event the service of the petition under Rule 28 of the Companies (Court) Rules, 1959 shall be deemed to have been waived.

17. At this stage, the learned counsel for the respondent makes an oral application that petition be not advertised for a period of two weeks which application is vehemently opposed by the learned counsel for the petitioner.

18. The petitioner shall not advertise the petition for a period of two weeks from today. If any appeal is filed by the respondent against this order, a copy of the appeal memo along with the papers and proceedings and notice shall be served upon the petitioner's advocate in advance.

2 Mr. Shah, counsel for petitioner states that respondent did not challenge this order at all. Mr. Shah further states that no further affidavit in reply has been filed after the petition was admitted. Mr. Shah states that since all the defences raised by respondent in their affidavits and during the arguments at the stage of admission have been considered and still the Court felt that the company was unable to pay its debts and admitted the petition, nothing further remains in this matter and company should be ordered to be wound up.

3 Petitioner has filed affidavit of one Prakash Bane affirmed on 17th June, 2017 confirming publication in Free Press Journal (in English) and Navshakti (in Marathi) and also in Maharashtra Government Gazette. At the time of admission of petition, notice under Rule 28 of the Companies (Court) Rules, 1959 has been waived.

4 This Court while admitting the petition has come to a conclusion that a perusal of the record prima facie indicates that respondent is unable to pay its debts and no further payment was made after giving part payment to petitioner inspite of the assurances made by respondent. I have considered the pleadings and the documents annexed to

the petition. I am also satisfied that the company is unable to pay its debts, is commercially insolvent and requires to be wound up.

5 Company petition is, therefore, allowed in terms of prayer clauses – (a) and (b), which read as under :

> (a) that the Respondent Company, namely Devanshi Impex Pvt. Ltd. having its registered office at 84 V V Chandan Street, 2nd floor, Mumbai – 400 003 be wound up by and under the orders, directions and supervision of this Hon'ble Court;
>
> (b) that the Official Liquidator or some other fit and proper person be appointed as Liquidator of the Respondent Company with all powers under the provisions of Companies Act, 1956 or later enactment to take charge of the Respondent Company and to conduct its affairs during the course of its winding up."

6 Official Liquidator shall forthwith act on an authenticated copy of this order without waiting for any notification.

7 Petition accordingly stands disposed.

COMPANY APPLICATION NO.216 OF 2015

In view of the above order, nothing survives in this application. Therefore, application stands disposed.

(K.R. SHRIRAM, J.)