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

COMPANY PETITION NO.419 OF 2015

Nasir Amin Hungund Age 43 years, Occupation, Business, Proprietor, Limra Glasfab, carrying on BUSINESS at 212/4-A, Sattar Compound, Behind Kurla Police Station, Kurla (W), Mumbai – 400 007.	))))))	...Petitioner

….Versus....

M/s.Glasspaane Aluminium (I) Pvt. Ltd. A Company duly registered under The Companies Act, 1956, having its Registered Office at A-754, A-Block, TTC, MIDC Industrial Area, Central Pipeline Road, Village Khairane, Navi Mumbai, District Thane	)))))))	...Respondent

Mr.Manoj P. Gholap for the Petitioner.

Dr.A. Chandrachud with Ms.Nupur Awasthi i/b Consulta Juris for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 5TH APRIL, 2017.

ORAL JUDGMENT :-

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. It is the case of the petitioner that during the period

between 2006 and 2007, the petitioner sold, supplied and delivered various goods to the respondent. It is the case of the petitioner that during the period between 1st April, 2006 and 13th July, 2011, the respondent made various payments to the petitioner. Learned counsel appearing for the petitioner invited my attention to Exhibit "B" to the petition and would submit that during the said period, the respondent had made payment to the petitioner in the sum of Rs.28,83,330/- and balance outstanding amount payable to the petitioner was Rs.24,01,215/-. He submits that that the respondent had made part payment of Rs.50,000/- on 13th July, 2013 in cash. In support of this submission, learned counsel invited my attention to the alleged cash voucher dated 11th July, 2011 and 12th July, 2011 alleged to have been made by the respondent to the petitioner in the sum of Rs.16,000/- and Rs.18,000/- respectively.

3. It is submitted by the learned counsel that since the respondent did not pay the balance amount to the petitioner, the petitioner issued notice on 11th February, 2012 to the respondent calling upon the respondent to pay the sum of Rs.32,98,552.76 ps. He submits that in response to the said notice of demand, the respondent called upon the petitioner to supply various documents, though the same were already supplied by the petitioner to the respondent vide letter dated 23rd February, 2012.

4. The petitioner thereafter issued a statutory notice on 1st May, 2012 at the office address of the respondent calling upon the respondent to pay the sum of Rs.24,01,125/- with further interest thereon. The petitioner filed a winding up petition bearing Company Petition (Lodging) No.569 of 2012 in this Court against the respondent. On 12th February, 2012, this Court recorded the statement made by the learned counsel for the petitioner that the said statutory notice dated 1st May, 2012 was served upon the respondent at the business address of the respondent and not at its registered office. This Court accordingly granted a liberty to the petitioner to withdraw the said Company Petition (Lodging) No.569 of 2012 with liberty to file a fresh petition on the same cause of action after issuing proper notice in accordance with law.

5. The petitioner thereafter issued another statutory notice on 26th February, 2014 at the registered office of the respondent calling upon the respondent to pay the sum of Rs.53,12,683/- with further interest thereon. It is the case of the petitioner that the said statutory notice was returned unserved by the Post Office with remarks “Left company. Return to sender” on 13th March, 2014.

6. It is submitted that since the respondent did not make the balance payment and since there was no response to the statutory notice, the respondent is unable to pay its debts and thus this petition

deserves to be admitted.

7. Dr.Chandrachud, learned counsel appearing for the respondent on the other hand submits that according to the petitioner the respondent had made various part payments during the period between 1st April, 2006 to 13th July, 2011. He submits that all payments except the alleged payment of Rs.50,000/- which was alleged to have been made by the respondent to the petitioner on 13th July, 2011 were during the period between 2006 and 2008.

8. Learned counsel invited my attention to the notice dated 11th February, 2012 addressed by the petitioner and more particularly paragraph 3 thereof and would submit that in the said notice, it is alleged by the petitioner that the last payment of Rs.15,000/- made by the respondent to the petitioner was on 13th July, 2011. He also invited my attention to the statutory notice dated 1st May, 2012 and more particularly paragraph 3 thereof, in which there is a reference to the alleged part payment of Rs.16,000/- made by the respondent to the petitioner on 13th July, 2011 inclusive of a deduction of Rs.1,000/- by way of TDS. He submits that there is vast discrepancy in the amount shown as part payment in the notice of demand dated 11th February, 2011 and in the statutory notice dated 1st May, 2012 with the statement at Exhibit “B”. He submits that in the statement at Exhibit ”B”, the petitioner has shown alleged part

payment of Rs.50,000/- on 13th July, 2011.

9. Learned counsel for the respondent invited my attention to the affidavit in reply and in particular paragraph 3 thereof raising an issue of limitation by the respondent. He submits that the said payment received by the petitioner on 12th January, 2011 was in respect of different transaction and not in respect of the transaction which is the subject matter of this company petition. He submits that even the alleged said voucher annexed at page no.50 of the company petition are dated 11th July, 2011 and 12th July, 2011, whereas in Exhibit "B", the date of the alleged part payment is dated 13th July, 2011. He submits that there is no rejoinder filed by the petitioner to the averments made by the respondent in the reply. He submits that since on the date of filing of the company petition, the claims made by the petitioner were barred by law of limitation, the petitioner ceased to be a creditor of the respondent and thus this Court cannot entertain this company petition. In support of this submission, learned counsel invited my attention to the judgment of the Division Bench of this Court in case of ***Modern Dekor Painting Contracts Pvt. Ltd. vs. Jenson & Nicholson (India) Ltd., 1984, Mh.L.J. 988*** and in particular paragraphs 2, 12 and 17.

10. The next submission of the learned counsel for the respondent is that the statutory notice was not served at the

registered office address of the respondent notified with the Registrar of Companies. He invited my attention to pages 69 and 70 of the petition which shows an endorsement made by the Postman “Left Company, Return to sender”. He submits that it is not clear from the perusal of the said endorsement made by the Postman, whether the notice was left at the premises of the respondent or the respondent company itself had left. He invited my attention to the averments made in the affidavit in reply in support of his submission that the registered office of the respondent is at the same address on which the statutory notice was alleged to have been sent by the petitioner. He submits that the respondent company is a running concern and various orders have been placed on the respondent to execute for its customers.

11. Learned counsel placed reliance on the judgment of the Supreme Court in case of ***Landesban Baden – Wurttemberg vs. Pushkaraj Packaging India Pvt. Ltd., 2016 SCC OnLine Bom 4135*** and in particular paragraphs 11 to 13, 15 and 19. He submits that the petitioner did not make any efforts to serve the respondent even by way of hand delivery or by any other mode though the statutory notice was alleged to have been returned with the remarks “left”. He submits that since the statutory notice was not served upon the respondent by the petitioner at the registered office of the company in

compliance with section 431(1)(a) of the Companies Act, 1956, the petition for winding up itself is not maintainable.

12. The last submission of the learned counsel for the respondent is that several invoices annexed to the petition by the petitioner are filed in duplicate and the claims are made twice in respect thereof. In support of this submission, learned counsel invited my attention to the documents annexed at pages 32, 33, 34, 41, 45, 51, and 54 of the petition. He submits that the last three invoices are duplicate. He submits that there are various disputed questions of fact and the defence of the respondent being *bonafide* and not moonshine, the company petition for winding up cannot be entertained.

13. Learned counsel for the petitioner in rejoinder submits that the respondent was fully aware when the respondent had received the notice of demand dated 11th February, 2012 that the petitioner was demanding the sum of Rs.32,98,552.76. He submits that the respondent did not give its any other address to the petitioner. He submits that since the packet was returned with the endorsement “left”, the said service was a good service and thus the company petition filed by the petitioner is maintainable.

14. Insofar as the issue of limitation is concerned, it is submitted by the learned counsel that the respondent has admitted in

the affidavit in reply that part payment of Rs.50,000/- was made by the respondent to the petitioner however, has alleged that the same was relating to a different transaction. He submits that the defence raised by the respondent is not *bonafide* defence and thus the petition deserves to be admitted.

15. I shall first deal with the issue of limitation raised by the respondent. A perusal of the averments made in the petition indicates that according to the petitioner, the transactions between the parties were during the period between 2006 and 2007. It is the case of the petitioner that during the period between 1st April, 2006 and 13th July, 2011, the respondent had made various payments to the petitioner. The said statement indicates that the last payment excluding the cash of Rs.50,000/- was made by the respondent on 1st October, 2008. The TDS of Rs.567/- was deducted on 28th September, 2008.

16. In support of the submission that the respondent had made part payment of Rs.50,000/- on 13th July, 2011, the petitioner has placed reliance on two alleged vouchers at Exhibit C-2 which are dated 11th and 12th July, 2011 for Rs.16,000/- and Rs.18,000/- respectively. A perusal of the notice dated 11th February, 2012 indicates that it was the case of the petitioner that the respondent had made last payment of Rs.15,000/- to the petitioner on 13th July,

2011. In the statutory notice dated 1st May, 2012, the petitioner has claimed that part payment of Rs.16,000/- was received from the respondent on 13th July, 2011 inclusive of deduction of Rs.1,000/- on TDS. Learned counsel for the petitioner is not able to explain the discrepancies in the amount of the alleged part payment shown in the vouchers and two notices issued by the petitioner and the amount reflected in Exhibit "B" to the petition. The alleged vouchers also shows that the amounts mentioned therein were allegedly paid to the brother of the petitioner.

17. Be that as it may, the respondent in paragraph 3 of the affidavit in reply has alleged that the amount received by the petitioner in cash on 12th January, 2011 was relating to some other transaction. The petitioner has not filed any rejoinder controverting this averment made by the respondent. The petitioner is not able to demonstrate that the said amount of Rs.50,000/- as shown in Exhibit "B" was by way of part payment in respect of the transactions in question. If the said entry of Rs.50,000/- is deleted from Exhibit "B", the claims of the petitioner would be *ex-facie* barred by law of limitation.

18. The Division Bench of this Court in case of ***Modern Dekor Painting Contracts Pvt. Ltd.*** (supra) has held that the company petition for winding up can be entertained only if debt is within time on

the date of filing of the winding up petition. It is held that the doubt must be recoverable on the date of filing winding up petition and the person who is entitled to file such petition has to be a creditor. He has to satisfy that there was a debt uncertainable or due and payable to him which he could claim. If the claim is barred by law of limitation on the date of filing of the petition, the petitioner ceased to be the creditor and thus the company petition is not maintainable. In my view the judgment of this Court in case of ***Modern Dekor Painting Contracts Pvt. Ltd.*** (supra) would squarely apply to the facts of this case. In my view, since the claim of the petitioner was barred by law of limitation on the date of filing of the petition, the petitioner ceased to be the creditor of the respondent and thus could not file this petition.

19. Insofar as the submission of the learned counsel that the petitioner has already filed the company petition in the year 2012 but the same was required to be withdrawn in view of the petitioner not having been issued a statutory notice at the registered office of the respondent company is concerned, in my view the said petition which was filed without issuing a statutory notice at the registered office of the respondent would not save limitation. The letter dated 23rd February, 2012 addressed by the respondent calling upon the petitioner to furnish certain details would also not extend the period

of limitation. It is held in catena of judgments that the correspondence does not extend the period of limitation unless there is acknowledgement of liability.

20. Insofar as the issue raised by the learned counsel for the respondent that the notice was not served upon the registered office of the respondent and the packet containing such notice was returned unserved with the remark “left” is concerned, a perusal of the said registered AD indicates that the Postman has made an endorsement on the said envelope “Left company. Return to the sender”. It is not the case of the petitioner that the petitioner made any efforts thereafter to serve the notice personally at the registered office of the respondent. A perusal of the affidavit in reply indicates that it is the case of the respondent that the registered office address of the respondent continues even till today and that the respondent company is carrying on business from the said address. No rejoinder is filed to controvert this averment. In my view, Dr.Chandrachud is right in his submission that the statutory notice not having been served at the registered office of the respondent company, the petition for winding up was not maintainable on that ground also.

21. Insofar as the last submission of the learned counsel for the respondent that there are duplicate invoices is concerned, a perusal of the documents annexed to the petition indicates that there

is some duplication of invoices. The explanation of the learned counsel for the petitioner on this issue that they are not duplicate invoices but were issued for various works executed by the petitioner for the respondent from time to time is not convincing. This disputed fact cannot be gone into by this Court in the company petition

22. In my view, the defences raised by the respondent in the affidavit in reply to which there is no rejoinder, are *bonafide* and are not moonshine. The disputed questions cannot be gone into in this winding up petition.

23. The petition is devoid of merits and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)