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

COMPANY PETITION NO.203 OF 2016

Mitali Alloys Private Limited)
A Private Limited Company duly registered)
under the provisions of Companies Act, 1956)
having its office at Unit No.S/07/78, 2nd floor)
Haware Centurian Complex, Plot No.88-9,)
Sector No.19-A, Seewood Nerul (East),)
Navi Mumbai, Maharashtra.)
Through its authorised Person/Director)
Mr.Dheeraj Kumar Gupta, age 33 years,) .. Petitioner

Versus

Pranav Construction Systems Private Limited)
A Company duly registered under the)
provisions of Indian Companies Act, 1956,)
having its registered office at Plot No.C-10,)
T.T.C. Indl. Estate, M.I.D.C., Pawne,)
Navi Mumbai - 400 705.)
and other office at F-8, Badlapur,)
Kharvi Road, Badlapur.) .. Respondent

ALONG WITH
COMPANY APPLICATION NO.52OF 2017
IN
COMPANY PETITION NO.203 OF 2016

Karbon Steelmart Pvt. Ltd.)

Versus

Pranav Construction Systems Private Limited)

Mr.Siddharth Murarka a/w Mr.Niraj Shah i/by M/s.Law Chamber of Siddharth Murarka petitioner.
Mr.Anil Agarwal a/w Ms.Babita Malik for the applicant in Company Application.
Ms.Ankita Singhania a/w Mr.Kersi Dastoor a/w Ms.Jyoti Singh a/w Ms.Smiti Verma i/by M/s.Phoneix Legal for the respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 16th March 2017
PRONOUNCED ON : 29th March 2017

Oral Order :-

. By this petition filed under Section 433 of the Companies Act, 1956, the petitioner seeks winding up of the respondent-company 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 23rd September 2014 and 28th September 2014, as per the orders placed by the respondent, the petitioner sold, supplied and delivered various goods to the respondent under four invoices being Invoice Nos.24, 25, 26 and 28 totaling to Rs.44,56,657/-. It is the case of the petitioner that as per the terms of the invoices, the respondent was liable to pay interest @24% p.a. after expiry of 30 days from the date of receipt of the goods till actual payment. It is the case of the petitioner that the respondent, however, made part payment of Rs.9,87,953/- only in respect of invoice no.24.

3. The respondent had issued three cheques for amount of Rs.44,16,447/- which were dishonoured with the remarks “Exceeds arrangements.” The petitioner thus issued a statutory notice dated 10th

September 2015 calling upon the respondent to pay a sum of Rs.42,59,734/- towards principal amount with interest calculated till 10th September 2015 along with further interest @24% p.a. on Rs.34,68,704/- from 11th September 2015 till actual payment. There was neither any payment nor any response thereto. The petitioner thus filed this petition praying for winding up of the respondent -company.

4. The petition is opposed by the respondent by filing an affidavit-in-reply dated 16th March 2017 on various grounds.

5. The matter was adjourned for the purpose of settling the dispute between the parties on few occasions. The matter, however, could not be settled.

6. Mr.Murarka, learned counsel appearing for the petitioner invited my attention to the invoices annexed to the company petition and also to the copies of cheques with cheques return memos issued by the bankers of the petitioner showing that the cheques were dishonored upon presentation. He submits that the respondent neither made any payment in response to the statutory notice nor gave any response thereto. It is submitted that the respondent company is thus unable to pay its debts and thus this petition shall be admitted against the respondent.

7. Ms.Singhania, learned counsel appearing for the respondent, on the other hand, submits that this petition is not maintainable as the respondent company is a running concern and is capable of paying its debts. She submits that the respondent is a leading player in the organised segment relating to design, manufacturing, supply and

installation of sophisticated and precision oriented form works, scaffoldings, centring material and accessories for RCC concrete casting in India and has its two plants located at Badlapur and Pawane near Mumbai and its marketing offices are located in various States.

8. It is submitted by the learned counsel that the respondent has executed several projects successfully in the segment of metros and mono rails, bridges and highways, flyovers, tunnelling, break water and water retaining structures, airports and power plants, multi-storeyed buildings mass housing and individual/commercial projects etc. In paragraph 11.1 of the affidavit-in-reply, the respondent has set out details of some of the major projects completed by the respondent and also set out the current projects in hand as on 10th March 2017 which are to the tune of Rs.1,155.50 lakh.

9. It is submitted that the Badlapur plant of the respondent is the India's largest form work plant with an annual capacity of 45000 MT. The respondent manufactures and supplies a range of standard products for a form work and scaffolding related applications. The respondent has acquired Plot No.C-10 at M.I.D.C., T.T.C. Turbhe, admeasuring about 8098 sq.mtr. and has constructed factory shed of around 50000 sq.ft. and office building of around 13000 sq.ft. The actual cost incurred for land and building is Rs.480/- lakh. The present market value of the said factory, land & building is around Rs.4500 lakh. In so far as the Badlapur Unit is concerned, the respondent has built a plant at a prime location at F-8 MIDC, Badlapur and the said land is spread at around 500000 sq.ft. area.

10. It is submitted by the learned counsel that the respondent has four financial creditors i.e. (i) Bank of India, (ii) Bank of Baroda, (iii) Axiz Bank and (iv) Thane Bharat Sahakari Bank who had initially advanced individual loans to the respondent. The respondent company has requested those four financial creditors for restructuring of its debts and those banks have accepted the request of the respondent for restructuring of its debts and the same is under restructuring. She submits that on 1st February 2017, a Joint Lender Meeting was held by those financial creditors wherein it was agreed that an escrow account would be opened by the respondent in Bank of India which is the lead bank, so that a cut-back of 5% could be held in the said escrow account.

11. Learned counsel invited my attention to the Minutes of the Consortium Meeting annexed to the affidavit-in-reply. It is submitted that the financial creditors are holding a cumulative debt of approximately Rs.66 crore and are making efforts to deal with the temporary liquidity issues faced by the respondent whereas the purported debt of the respondent is only an amount of Rs.42,59,734/-. She submits that the respondent has already settled the dues of several operational creditors and is willing to settle the legitimate dues of the petitioner also. The respondent has already settled the dues set out in paragraph 16 of the affidavit-in-reply. It is submitted that the respondent is commercially solvent and thus no order as prayed by the petitioner shall be passed by this Court. The respondent has also annexed a copy of the audited balance-sheet of the respondent as on 31st March 2016 and list of the creditors and debtors. She submits that the respondent also has to recover large amounts from its debtors.

12. Learned counsel for the respondent placed reliance on the judgment of this Court in the case of ***IDFC Bank Limited Vs.M/s.Ruchi Soya Industries Limited***, decided o 14th February 2017 in Company Petition Nos.570 of 2016 and other companion matters and would submit that since the Joint Lender Forum has decided to restructure the respondent company, any adverse order in this company petition against the respondent would hamper the process of revival of the respondent company. She placed reliance on paragraphs 79, 101, 107 to 111 and 114 thereof. She submits that this Court has considered the judgment of this Court in the case of ***Tata Capital Financial Services Limited Vs. Infraprojects Limited,*** reported in ***(2015) SCC OnLine Bom 3597*** in which it has been held by this Court that though there was no defence to the debts of the petitioner and there was a clear case of deemed inability to pay it on the part of the company, but that does not mean that the Company Court is obligated to admit a winding up petition. It is held that advisability of a winding up order is not a matter to be considered by the Company Court.

13. Learned counsel for the respondent also placed reliance on the judgment of the Gujarat High Court in the case of ***Rishi Enterprise, In Re.,*** reported in ***(1992) 73 Comp Cas 271*** and in particular paragraphs on pages 273 to 275 in support of the submission that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. She also placed reliance on the judgment of this Court in the case of ***Life Insurance Corporation of India Vs.Varun Global Limited,*** decided on 23rd December 2016 in Company Petition No.892 of 2014 in support of the aforesaid submission.

14. It is submitted by the learned counsel that the petitioner has claimed interest @ 24% p.a. from the date of invoices till payment which dues is totally exorbitant.

15. Mr. Murarka, learned counsel for the petitioner in rejoinder submits that the respondent has admitted its liability and is unable to pay its debts. He submits that since the rate of interest @24% p.a. is provided in the bills, the claim for interest @24% p.a. is justified. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of ***TVC Skyshop Limited Vs. Reliance Communication and Infrastructure Limited,*** reported in ***(2013) 11 SCC 754.*** He submits that Supreme Court in the said judgment has not interferred with an order passed by the High Court granting interest @30% p.a. as per the terms of the agreement between the parties. He submits that his client is not willing to accept the interest less than @24% p.a. upto the date of filing the petition and is willing to accept the interest @12% p.a. on the principal amount from the date of filing the petition till payment.

16. It is not in dispute that the cheques issued by the respondent which are annexed to the petition were dishonored on presentation on the ground of "Exceeds arrangements." It is also not in dispute that the respondent did not give any reply to the statutory notice. A perusal of the affidavit-in-reply, however, indicates that the respondent has completed several major projects referred in paragraph 11.1 of the affidavit-in-reply and has projects in hand as of 10th March 2017 being executed for an amount of Rs.1,155.50 lakh. The respondent has set out various details about recoveries to be made by the respondent from its debts.

The respondent has also furnished various details of the properties of the respondent and the valuation thereof.

17. In paragraph 15.1 of the affidavit-in-reply, the respondent has placed on record that the respondent has four financial creditors i.e. (i) Bank of India, (ii) Bank of Baroda, (iii) Axis Bank and (iv) Thane Bharat Sahakari Bank which had initially advanced individual loans to the respondent and has accepted the request of the respondent for restructuring of its debts and that the respondent company is currently under restructuring. Reliance is placed on Consortium Meeting dated 1st February 2017.

18. In paragraph 15.2 of the said affidavit-in-reply, it is stated that while the financial creditors holding a cumulative debt of approximately Rs.66 crore are making efforts to deal with the temporary liquidity issues faced by the respondent, the instant company petition wherein the purported debt of the respondent is only an amount of Rs.42,59,734/-, cannot be allowed to defeat the restructuring process. The petitioner has not filed any rejoinder controverting various averments made by the respondent in the affidavit-in-reply.

19. A perusal of the record indicates that the respondent has settled the disputes with some of the creditors. An isolated petition was admitted by this Court which is also settled and the order of admission is recalled by this Court. The respondent has settled the dispute with several creditors and has made a proposal for settlement of this dispute also with the petitioner. Though petitioner may not be a party to Joint Lenders Forum, only on that ground this petition cannot be admitted.

20. This Court in the case of ***IDFC Bank Limited Vs.M/s.Ruchi Soya Industries Limited (supra)*** after considering several judgments including the judgment of the Supreme Court in the case of ***M/s.Madhusudan Gordhandas & Co. Vs.Madhu Woollen Industries Pvt. Ltd.,*** reported in ***1971 (3) SCC 632*** and the judgment of the Gujarat High Court in the case of ***Tata Iron and Steel Co. Vs. Micro Forge (India) Ltd.,*** reported in ***(2001) 104 Comp Cas 533*** has held that merely because any one of the circumstances enumerated in section 433 of the Companies Act exists, the court is not bound to order winding up of the company. Nobody can aspire to wind up the company as a matter of course. The court has wide power and discretion. It is held that inability to pay debts is required to be judged from various sets of facts and circumstances. It is held that inability to pay debts in all cases, ipso facto, could not be construed as an appropriate case for winding up. In my prima facie view, the liquidity problem faced by the respondent is temporary. Efforts are being made for restructuring the respondent by major secured creditors.

21. The respondent has also offered reasonable amount to the petitioner which is not accepted by the petitioner. The petitioner is insisting for payment of the entire principal amount with interest @24% p.a. till the date of filing petition and thereafter @12% p.a. till payment.

22. In so far as the judgment of the Supreme Court in the case of ***TVC Skyshop Limited Vs. Reliance Communication and Infrastructure Limited (supra)*** relied upon by the learned counsel for the petitioner is concerned, Supreme Court in the said judgment did not interfere with the order of the High Court in which the charge of interest at the agreed rate

of 30% p.a. was not interfered with. In this case, the petitioner has claimed interest @24% p.a. also from the date of filing the petition till payment. Winding up proceedings, however, cannot be considered as recovery proceedings.

23. In these circumstances, I am of the view that since the major creditors have already held a meeting for restructuring the respondent company and in view of the fact that the respondent has several projects in hand, interest of justice would be met with if the respondent is directed to deposit the principal amount of Rs.34,68,704/- in this Court within three months from today to test the bona fides of the respondent.

24. I therefore pass the following order :-

(i) The respondent is directed to deposit the principal amount of Rs.34,68,704/- with the Prothonotary and Senior Master of this Court within three months from today with intimation in writing to the petitioner;

(ii) It is made clear that if the said amount is deposited by the respondent in this Court, the company petition to stand dismissed without further reference to the Court;

(iii) Upon such deposit, the Prothonotary and Senior Master shall invest the said amount in a Fixed Deposit of a nationalized bank initially for a period of one year and thereafter for like period after obtaining permission of this Court;

(iv) If any default is committed by the respondent in depositing the said amount within the time prescribed aforesaid, the petition to stand revived and shall stand admitted and shall be made returnable after ten weeks and in that event, (a) the petitioner shall 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 the notice shall not invalidate such advertisement and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959; (b) the learned counsel appearing for the respondent-company waives service of the company petition under Rule 28 of the Companies (Court) Rules, 1959; and (c) the petitioner shall also deposit an amount of Rs.10,000/- with the Prothonotary and Senior Master of this Court towards the publication charges, with intimation to the Company Registrar within two weeks from the date of admission of the petition failing which, the petition to stand dismissed for non-prosecution without further reference to the Court. After the advertisements are issued, balance, if any, shall be returned to the petitioner;

(v) If any suit or any other recovery proceeding is filed by the petitioner, in the event of the respondent depositing the amount, such amount shall be credited to the account of the said proceedings. If such recovery proceeding is not filed by the petitioner within four weeks from the date of deposit of the amount by the respondent, the respondent would be at liberty to apply for withdrawal of the said amount before this Court. It is made clear that this Court has not expressed any views on limitation in filing such proceeding if filed by the petitioner and the said issue is kept open.

25. Company petition is disposed of in aforesaid terms. In view of the disposal of the company petition, the company application does not survive and is accordingly disposed of. Applicant in company application would be at liberty to file an appropriate and independent proceeding. No order as to costs.

R.D.DHANUKA, J.