IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORIGINAL JURISDICTION)

Friday, the 25th day of April 2014

THE HON'BLE MR.JUSTICE R.SUDHAKAR

COMP.PETN.NO.52 OF 2014

In the matter of Companies Act 1956
and
In the matter of winding up of ETA Engineering Private Limited, incorporated under the provisions of the Companies Act, 1956 and having its Registered Office at No.5, Moores Road, Chennai-600 006, Tamil Nadu.
And
In the matter of Sections 433, 434 and 439 of the Companies Act, 1956.

M/s.Texmaco Rail & Engineering Limited,
Belgharia, Kolkata-700 056,
West Bengal, India
Represented by Mr.R.K.Jain,
Manager (Law) .. Petitioner

Vs.

ETA Engineering Private Limited,
No.5, Moores Road,
Chennai-600 006,
Tamil Nadu. .. Respondent

The Company Petition praying this Court:

a) To order winding up of the Respondent under the provisions of the Companies Act, 1956;

b) To appoint the Official Liquidator, High Court, Madras, as the liquidator of the Respondent Company to take charge of the assets, properties, stock in trade and books of accounts of the Respondent Company.

c) That costs of this petition be ordered.

The Company Petition coming on this day before this Court for hearing the court made the following order:

The petitioner in this case entered into a contract with the respondent for supply of rakes of BLC wagons/rail wagons based on a purchase order dated 7.6.08. It is not in dispute that the purchase order was for 8 rakes of which 3 rakes were supplied for a value of Rs.30.83 Crores. The supplies were effected based on invoices raised by the respondent company on 2.1.10, 25.5.10 and 24.6.10. Despite repeated requests and demands by the petitioner for payment of the amounts for the rakes supplied, covered by the above invoices, the respondent, it appears, acknowledged liability on very many occasions, but failed to make the payment. To support the plea of admitted liability right from the period of invoice and delivery, the petitioner relies upon letter dated 2.9.10 (page - 301 of the typed set), which has been acknowledged by the respondent on 30.9.10 (page-302 of the typed set), where they have acknowledged the debt and sought time for making payment by 2 to 3 months. Another letter dated 28.12.10 (page-205 of the typed set) was issued by the petitioner, which is acknowledged by the respondent on 20.1.11 (page-307 of the typed set). A series of e-mail correspondence dated 28.11.11, 8.3.12 and 22.8.12 (pages

- 316, 319 and 339) goes to show that the debt has been acknowledged and has not been paid despite repeated requests.

2. In the meanwhile, it appears that the petitioner and the respondent entered into a restructuring plan formally proposed by the respondent, whereby the respondent wanted the logistics business to be hived off to a separate entity. In this regard, a Novation and Transfer Agreement dated 16.5.12 was entered into (page-320 of the typed set of the petitioner), which again reflects acknowledgement of the outstanding amount due by the respondent to the petitioner. The restructuring agreement dated 16.5.12 could not be implemented and, therefore, on 15.3.13, two agreements were signed. The first one is a Recission Agreement dated 15.3.13 (Page - 347 of the typed set), whereby the agreement dated 16.5.12 was rescinded. On the same day, a fresh Novation Agreement for Assumed Contracts (for short 'NAAC' - page - 351 of the typed set) was signed, in and by which the three parties to the contract, viz., the petitioner, who was termed as the 'Service Provider', the respondent, who was termed as 'ETA' and Vikram Logistics & Maritime Services Pvt. Ltd., who was termed as 'VLMS' as successor and assigns. The terms of the NACC are set out for better clarity :-

"1. NOVATION

1.1 The parties hereto agree that from the *close of business hours of the closing date, the contract stands novated to VLMS and VLMS is entitled to all the rights, interests and benefits of ETA, and is responsible to perform and duly discharge all the obligations and liabilities of ETA arising under or pursuant to the contract. From and after the close of business hours of the closing date, any and all references to ETA in the contract shall be read as if they were references to VLMS. Except as provided in this agreement, the contract shall continue to be in force and effect according to its terms.*

1.2 ETA shall continue to be responsible for any and all liabilities under the contract prior to the close of business hours of the closing date and hereby agrees to indemnify, defend and hold harmless VLMS and the Service Provider in respect from and against any claims, liabilities, demands, suits, actions, causes of actions, losses, costs, damages, liabilities and expenses including reasonable attorneys' fees, directly or indirectly incurred, paid or accrued in connection with or resulting from or arising out of its acts, omissions or breach of representations, warranties and covenants relating to the period prior to the close of business hours of the closing date. ETA hereby confirms that it has obtained all necessary *consents including consents from its lenders and creditors to novate the contract.*

1.3 The Service Provider acknowledges and confirms that (i) the contract remains, and will remain in full force and effect as a legal, valid and binding obligation, enforceable in accordance with its terms except as amended hereby, (ii) consents is given to the transaction to the extent the Service Provider's consent is required under the contract, and (iii) subject to ETA fulfilling all its obligations under the contract the Service Provider is hereby unconditionally and irrevocably released and discharged from all claims, liabilities, demands, suits, actions, causes of actions, losses, costs, damages, liabilities and expenses including reasonable attorneys' fees, directly or indirectly incurred, paid or accrued in connection with or resulting from or arising out of the contract with effect from the close of business hours of the closing date.

2. GOVERNING LAW

This shall be governed and construed in accordance with laws of India and below the courts at New Delhi shall have the sole and exclusive jurisdiction to entertain any disputes that may arise hereunder.

3. FURTHER ASSURANCES

By executing this Novation and transfer agreement the service provider acknowledges that --

a. It is consenting to the Novation of the Agreement to VLMS without in any manner discharging ETA of its obligations.

b. VLMS and/or ETA will comply with the terms and conditions of the purchase order if not already complied with.

4. INDEMNITY

ETA hereby agrees to indemnify the service provider from and against any claims, liabilities, demands, suits, actions, causes of actions, losses, costs, damages, liabilities and expenses including reasonable attorneys' fees, directly or indirectly incurred, paid or accrued in connection with or resulting from or arising out of any breach of any covenants or representations made in this agreement or the contract."

One Karunakaran Sathianathan signed as CEO for ETA Engineering, the respondent herein as well as the Managing Director of VLMS and Mr.A.K.Vijay, Sr. Vice President-Commercial signed for the petitioner.

3. In and by the above agreement, the entire business and liabilities of the respondent ETA stood transferred as 'Slump

Sale' to VLMS. In this agreement, the liability of ETA stood transferred to VLMS, however, with assurance and indemnifying clause as stated above. In view of the continuing default, statutory notice was issued by the petitioner on 20.11.13 to ETA (page-366 of the typed set). There was no response to the same. However, there is an e-mail admission by the respondent on 2.12.13 (page – 385 of the typed set). The statutory notice under Section 433 (e) of the Companies Act dated 20.11.13 issued to the respondent has also been issued to VLMS, Bangalore. It is the case of the petitioner that neither the respondent nor VLMS responded to the notice issued by the petitioner. Therefore, there is clear admission of liability on behalf of the two contracting parties. The petitioner, therefore, has filed the present petition under Section 433 (e) of the Companies Act stating that besides clear admission of liability, the respondent is in a precarious financial position borne out by the annual report dated 31.3.12 showing net loss of about Rs.70 Crores. There is serious erosion of the net worth of the company and, therefore a clear case of inability to pay the debt is made out and the petition for winding up the respondent company was moved along with an application for interim injunction restraining the respondent from alienating or

encumbering or creating third party rights, interests or charge over the assets of the respondent company. This Court, vide order dated 27.2.14 granted an order of interim injunction, which is in force till date.

4. In response a reply has been filed by the respondent refuting the liability and primarily opposing the winding up petition on the following grounds :-

(i) the petition filed is not in consonance with Rule 21 of the Companies Court Rules, 1959;

(ii) the petitioner had filed a petition for winding up of VLMS in the High Court of Karnataka on the very same cause of action and that has been suppressed before this Court and, therefore, this petition should be dismissed;

(iii) the issue raised by the petitioner could be an interpretation of NAAC dated 15.3.13 and that cannot be done in a winding up petition; and

(iv) the respondent company is a profit making company.

5. Mr. Arvind P.Datar, learned senior counsel appearing for the petitioner submitted that the acknowledgement of debt prior to the agreement dated 15.3.13 is clear and present. Even in the agreement dated 15.3.13, the debt has been transferred, no

doubt, to VLMS, but there is a very clear clause, in agreement signed by the petitioner, wherein there is a clear understanding that the respondent's obligation under the contract on the debt that was due as on 15.3.13 still continues with ETA and clause (b) clearly provides that VLMS and/or ETA will comply with the terms and conditions of the purchase order, if not already complied with. It is a clear stand of the petitioner that they have reserved their right to proceed against both ETA as well as VLMS and there is no clause in the agreement excluding ETA from the purview of legal action in a case of acknowledged debt.

6. Heard Mr.Arvind P.Datar, learned senior counsel appearing for the petitioner and Mr.Jose John, learned counsel appearing for the respondent.

7. Prima facie, from the admission of debt prior to the agreement dated 15.3.13 and going through the terms of the NAAC dated 15.3.13, coupled with the statutory notice dated 20.11.13, which has not been denied by the respondent, it is clear that the respondent is a beneficiary of goods sold and delivered for value and debt, which is acknowledged and the liability having been accepted, despite the agreement dated 15.3.13 to pay the debt, a clear case of inability to pay has been established by the petitioner.

8. The contention raised by the learned counsel for the

respondent that the company is in a sound financial position and, therefore, it should not be wound up, cannot be countenanced in view of the decision of the Hon'ble Supreme Court in ***IBA Health (I) (P) Ltd. - Vs – Info-Drive Systems SDN. BHD (2010 (10) SCC 553)***, wherein the Supreme Court, in para-24 of the said judgment considered the scope of a company being commercially solvent and held as under :-

> *"24. Appellant company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434 (1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if*

demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1) (a) that the company is unable to pay it debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption."

9. Rule 21 and Form 3 of the Companies Court Rules was relied upon by the learned counsel for the respondent to show that the petition is a defective petition. For better appreciation, Rule 21 is extracted hereunder :-

"21. Affidavit verifying petition-Every petition shall be verified by an affidavit made by the petitioner or by one of the petitioners, where there are more than one, and in the case the petition is presented by a body corporate, by a director, secretary or other principal officer thereof; such affidavit shall be filed alongwith the petition and shall be in Form No.3.

Provided that the Judge or Registrar may, for sufficient reason, grant leave to any other person duly authorised by the petitioner to make and file the affidavit.

(16). Under Rule 21 in the case of a petition

presented by a body corporate, by a director, secretary or other principal officer, such affidavit shall be filed along with the petition and shall be in

Form No.3

(See rule 21)

(Heading as in Form No.1)

Company Petition No................. of 19 ....

I, A.B., son of .... aged .... residing at.. do solemnly affirm and say as follows:

1. I am a director/secretary/ .... of .... Ltd., the petitioner in the above matter (and am duly authorised by the said petitioner to make this affidavit on its behalf.

(Note- This paragraph is to be included in cases where the petitioner is the company.)

2. The statements made in paragraphs .... of the petition herein now shown to me and marked with the letter `A are true to my knowledge, and the statements made in paragraphs....... are based on information, and I believe them to be true.

Solemnly affirmed etc.

**Note - To be included when the affidavit is sworn to by any person other than a director, agent or secretary or other officer of he company."*

10. A careful reading of Rule 21 clearly shows that the plea advanced by the learned counsel for the respondent does not

merit consideration for the reason that the Board Resolution of the company has been annexed in the typed set of papers, which reads as hereunder :-

> *"FURTHER RESOLVED that S/Shri A.K.Vijay, Secretary, P.C.Kejriwal, Vice President (Commercial) and R.K.Jain, Manager (Law) be and is hereby authorised severally to appear and/or take, institute or file any action or petition including petition for winding up, suit, appeal, revision, review application, evidence, vakalatnama, or any other legal proceeding of whatsoever nature in any court of justice in the interest of the Company and to do all such acts, deeds and/or things, for and/or on behalf of the company from time to time as may be required for the purpose of giving effect to the aforesaid resolutions."*

11. It is clear from the Board Resolution that R.K.Jain, Manager (Law) has been authorised to file company petition and it is clear from the affidavit filed in support of this petition that the said petition has been signed by the above said individual. However, according to the learned counsel for the respondent, the person, who signed the petition does not fall within the definition of "Principal Officer". This plea is fallacious. The definition of "Principal Officer" as is evident from ***P.Ramanatha Aiyar's 'The Major Law Lexicon'*** at page 5325

reads as under :-

> “'*PRINCIPAL OFFICER', used with reference to a company or any association of persons means --*
>
> *(a) the secretary and treasurer, manager, managing agent, managing director or agent of the company or association; or*

In page 5326 of the aforesaid book, the word 'principal officer' is defined as hereunder:-

> *“A 'principal officer' of a corporation is one whose oversight or agency exists either over the whole or some particular department of the general business of the corporation; as a president, who has ordinarily a general oversight over its entire business, a secretary over its records or a treasurer over its moneys.”*

12. The term 'Manager' has been defined under Sub-section 24 of Section 2 and the term 'Officer' has been defined under Sub-section (3) of Section 2 of the Companies Act, which read as hereunder :-

> *(24) "Manager" means an individual (not being the managing agent) who, subject to the superintendence, control and direction of the Board of directors, has the management of the whole, or substantially the whole, of the affairs of a company and includes a director or any other person occupying the position of a*

manger, by whatever name called, and whether under a contract of service or not.

(30) "Officer" includes any director, managing agent, secretaries and treasurers, manager or secretary; where the managing agent or the secretaries and treasurers are a firm, also includes any partner in the firm; and where the managing agent or the secretaries and treasurers are a body corporate, also includes any director, managing agent, secretaries and treasurers or manager of the body corporate; but, save in sections 477, 478, 539, 543, 545, 621, 625 and 633 does not include an auditor."

13. From a plain reading of Sub-section (24) of Section 2 of the Companies Act, 1956, it is clear that the said term is an inclusive definition and, therefore, Manager (Law) of the petitioner company, who has signed the petition is duly authorised by the Board and, therefore, he would come within the definition of 'officer' within the meaning of Rule 21. I find no reason to accept the respondent's plea that Manager, as defined in sub-section 24 of Section 2, would exclude Manager (Law). Therefore, this plea is also rejected.

14. The learned counsel for the respondent, for supporting the above plea, placed reliance upon the judgment in

M/s.Multimetals Ltd. - Vs – M/s.Suryatronics Pvt. Ltd. (AIR 1997

AP 13), the said decision is not applicable to the facts of the present case, as in the abovesaid case, the affidavit has been signed by an officer, i.e., Marketing Manager, who does not appear to have been authorised to do so by a Board resolution. However, in the case on hand, the affidavit has been filed by an officer, who has been authorised by the board.

15. Further reliance placed on the judgment in ***Tayal Potteries & Anr. - Vs – Macroplast Pvt. Ltd. (103 Comp Cases 404)*** by the learned counsel for the respondent is also of no use to the respondent's case, as in the said judgment it is observed that the person who signed the affidavit was not duly authorised to file the affidavit in support of the company petition. Hence, Rule 21 is not complied. The petitioner, however, rightly relied upon the judgment of the Division Bench of the Rajasthan High Court in ***Sand Plast – Vs – ITC Bhadrachalam Finance & Investment Ltd. (2002 (111) Comp Cases 471 (Raj.)).***

16. The plea of the learned counsel for the respondent is that the case of the petitioner involves interpretation of the NAAC and, therefore, there is a clear case of dispute. The interpretation as urged by the learned counsel for the respondent is as to whether the liability would stand as against VLMS or the respondent. Here is a clear case of goods sold and delivered and debt acknowledged prior to 15.3.13 by the

respondent. The question is whether the respondent herein, viz., ETA, or the transferee VLMS is liable. The agreement of transfer slump sale by the respondent to VLMS does not in any way affect the rights of the petitioner, governed by the terms of NAAC. Clause (3) of the NAAC agreement very clearly provides that the parties agree that the respondent - ETA's obligation is not discharged and an indemnity is also provided by the respondent and there is nothing in the agreement, which discharges ETA of its obligations. In such view of the matter, I do not find any justification to non-suit the petitioner on the ground that they have filed a petition before the High Court of Karnataka as against VLMS.

17. In view of the reasons as stated above, all the plea taken by the respondents appears to be a mirage. In view of the clear admission of liability by acknowledgement of debts on various dates as stated above and the NAAC dated 15.3.13, the non-response to the statutory notice, goes to show that the petitioner has made out a prima facie case for admission.

18. Accordingly, this Court, for the aforesaid reasons, is satisfied that a prima facie case has been made out for proceeding against the respondent under Section 433 (e) of the Companies Act. Hence,

ADMIT.

(i) Notice on the Court Notice Board.

(ii) Notice to the Registrar of Companies, Madras.

(iii) Affixture of notice at the premises of the Registered Office of the respondent company.

(iv) The petitioner is directed to publish the company petition in one issue of Tamil Daily "Malai Murasu" and in one issue of English Daily "New Indian Express" and in the Tamil Nadu Government Gazette fixing the date of hearing on 16.6.2014.

(v) The petitioner is directed to publish the company petition giving at least fourteen days clear advance notice.

(vi) The Official Liquidator, High Court, Madras, is appointed as Provisional Liquidator and is directed to take charge of the assets of the respondent company. The ex-Directors of the respondent company are directed to file their statement of affairs before the Official Liquidator within a period of 21 days. The company shall deposit a sum of Rs.10,000/=

towards initial expenses before the Official Liquidator in this matter.

19. Call the company petition on 16th June, 2014.

sd/.R.S.J

25.04.2014

//Certified to be a true copy//
Dated this the day of 2014.

R.s/16.05.2014 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.