

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

COMPANY PETITION NO.142 OF 2016

The TNN Development Ltd.)....Petitioner
V/s.

Mitchem Solvents Pvt. Ltd.)....Respondent

Mr.Shyam Kapadia a/w Mr.Niket Jani i/by M/s.Dhruve Liladhar and
Co. for petitioner.

Mr.V.P.Shastri for respondent.

CORAM : K.R.SHRIRAM,J

DATE : 19.4.2018

P.C.:-

1 The petition is filed for winding up of respondent company-Mitchem Solvents Pvt. Ltd. on the grounds that the company is unable to pay its debts and is commercially insolvent.

2 On 30.1.2018 the following order came to be passed at the time of admission :-

“1 The petition is for an order seeking winding up of the company Mitchem Solvents Private Limited on the ground that the company is indebted to petitioner, is unable to discharge its debt and is commercially insolvent.

2 Petitioner is a company based in China. Pursuant to a Sales Contract dated 23rd July 2014, petitioner agreed to sell 70 MT of PVC Resin SG5 (goods) to the company at US\$ 1045/MT CIF Nhava Sheva. The total value was US\$ 73,150.00. The payment Terms was D/A 90 days. It is the case of petitioner that they supplied goods and respondent accepted the same but failed and neglected to make the

payment. Annexed to the petition at Exh.'D' and Exh.'E' are print outs of emails dated 22nd January 2015 and 31st March 2015, respectively, from the company to petitioner assuring petitioner that they will make payment of US\$ 73,150.00 but because the company is going through difficult times and the bank has also stopped facility overnight, some time be granted to the company to make the payments.

3 As no payments came forth, petitioner caused a notice dated 13th August 2015 issued through its advocates to the company under Section 433 and 434 of the Companies Act, 1956. A similar notice was sent to another office address of the company on 5th September 2015. Admittedly, there is no reply to the statutory notice. I say 'admittedly' because in the affidavit in reply, company admits having received a statutory notice but there is no reference to any reply. As company did not make any payment, this petition came to be filed.

4 In the affidavit in reply dated 12th July 2017, almost three years after the sales contract and almost two years after statutory notice was issued and received, the following defences have been taken :

(a) The contract provides an arbitration clause and therefore, disputes should be referred to arbitration and this Court cannot entertain this petition;

(b) Interest charged is at 18% per annum whereas the contract does not provide for any interest;

(c) Inspection of documents has not been given. In the affidavit in rejoinder filed by petitioner, there is a copy of a letter dated 30th June 2017 read with letter dated August, 2017 in which it is confirmed that all original documents have been shown and inspection given on 10th August 2017;

(d) Petitioner has not sold or supplied any goods to company and company has not received any bills;

(e) Petitioner never delivered any goods; and

(f) Emails dated 22nd January 2015 and 31st March 2013 relied upon by petitioner, were not addressed by the company.

5 So far as the first defence of arbitration is concerned, the Apex Court in the matter of Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd. in paragraphs 4 and 5 has dealt with this issue which read as under :

“4 Subsection (I) of Section 8 provides that where the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

5 The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between 1 AIR 1999 SC 2354 the parties would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred A to the arbitration and, therefore, the High Court, in our opinion was right in rejecting the application.”

6 So far as the 2nd, 4th, 5th and 6th defences are concerned, these are nothing but after thoughts, bogus and moonshine. In paragraph 10 of the affidavit in reply, the company admits having received the statutory notice. Statutory notice, copy whereof is at Exh.'F' to the petition, at paragraph 3, expressly provides for petitioner having

sold, supplied and delivered goods mentioned in the two invoices referred therein. In paragraph 4 refers to reminders being given, paragraphs 5 and 6 refer to the two emails wherein company has admitted its liability and sought time to make further payments. No reply was sent to the statutory notice though admittedly company has received the same. Least the company could have produced in evidence is a communication from the company to petitioner raising a grievance that when no goods have been supplied where is the question of any payment let alone interest. In fact to the affidavit in rejoinder is annexed a copy of an email dated 30th April 2015 from the company to petitioner's agent in which they have once again admitted the liability and sought time to make payments. There is defence/denial to these email from the company.

7 In the circumstances, prima facie it does appear that goods have been supplied and the company is indebted to petitioner for the sum of US\$ 73,150/and from the emails sent by the company, it is confirmed that the company is unable to discharge its debt and is commercially insolvent. In fact, in the affidavit in reply, there is not even an averment to show that the company is commercially solvent and/or copies of the profit and loss balance sheet is annexed to show solvency of the company.

8 In the circumstances, I am satisfied that the company is unable to pay its debt, is commercially insolvent and requires to be wound up. Therefore, the following order is passed :-

(a) The company petition is admitted and is made returnable on 12th April 2018.

(b) Petitioner is directed to advertise the petition in two local newspapers, viz., (i) Free Press Journal (in English); and (ii) 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 Company (Court) Rules, 1959.

(c) Petitioner shall deposit Rs.15,000/- toward publication charges with the Prothonotary and Senior Master, under intimation to the Company Registrar, within a period of two weeks, failing which petition shall stand dismissed for non prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to petitioner.

(d) Respondent company waives notice under Rule 28 of the Companies (Court) Rules, 1959.

9 Notwithstanding the above order, I would still give a chance to respondent company to come out of this situation of being wound up by paying the amount of US\$ 73,150/or rupee equivalent thereto with the Prothonotary and Senior Master, High Court, Bombay within four weeks from today. Petitioner to advertise the petition after four weeks period is over.

10 A copy of this order shall forthwith be served on the Company by hand delivery and also by email, Registered Post AD and by courier by the advocate for petitioner.”

3 Admittedly, the amount of US\$ 73,150/- or rupees equivalent has not been deposited by the company. Counsel for petitioner tenders affidavit of one Ravindra B.Rikame affirmed on 9.4.2018 confirming publication of the petition in 'Free Press Journal' and 'Navshakti' on 7.3.2018 and also in Maharashtra Government Gazette for the period 15-21st March 2018 at Serial No.M-17366. Notice under Rule 28 of the Company (courts) Rules

1959 has been waived at the time of admission of the petition.

4 There is no further affidavit filed by the company after the petition was admitted. There was an affidavit in reply to the petition at pre admission stage and by a detailed order after considering the defences raised, Company Petition was admitted.

5 Today, when the court asked counsel for the company as to what further the company has to oppose the petition, counsel stated that he has no further instructions and there is nothing more than what has been stated in the affidavit. Since all the defences raised in the affidavit in reply have already been considered and dealt with before admission, I see no reason to revisit the affidavit in reply.

6 In the circumstances, petition is allowed in terms of prayer clauses-(a) and (b) which read as under :-

“(a) that Mitchem Solvents Pvt. Ltd. be ordered to be wound up by and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956 ;

(b) that the Official Liquidator, High Court, Bombay be appointed as the Liquidator of the said Company with all powers under the Companies Act, 1956.

7 The advocate for petitioner shall furnish a copy of this order, duly authenticated by the Associate of this court with the office of Official Liquidator. The Official Liquidator shall forthwith act thereupon without waiting for any notification appointing him as liquidator.

8 Petition disposed accordingly.

(K.R.SHRIRAM,J)