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

COMPANY PETITION NO.546 OF 2015

M/s. Gandhar Oil Refinery India Limited ….Petitioner

Vs.

M/s. Universal Construction Machinery & Equipment Ltd. ....Respondent

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Mr. Mahesh Gowda i/b. Mr. Vishal Thadhani for petitioner.
None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 12th JANUARY, 2018

P.C.:

1 This petition is for winding up of respondent company – M/s. Universal Construction Machinery & Equipment Ltd on the ground that respondent is indebted to petitioner, is unable to pay its debts and is commercially insolvent.

2 On 19th April, 2017 when the petition was taken up for admission, this Court was pleased to pass the following order :

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> *2. It is the case of the petitioner that the petitioner had sold, supplied and delivered various plants to the respondent and had issued various invoices, which are annexed to the company petition. The respondent was liable to make the payment under those invoices within 35 days from the date of dispatch of the goods. The petitioner demanded the amounts under those invoices but the respondent committed default. The petitioner accordingly issued a statutory notice on 26th September, 2014 upon the respondent, which was duly received by the respondent. Neither any payment is made, nor any response thereto is given by the respondent. The petitioner thus filed this petition inter-alia praying for winding up of the respondent.*
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> *3. According to the petitioner, the respondent has to pay a sum of Rs.18,86,575.60 along with interest at the rate of 18% p.a. as on 31st December, 2014 and further interest thereon from 1st January, 2015 till payment.*

4. The respondent is served. There is no affidavit in reply filed by the respondent to this company petition.

5. Learned counsel for the petitioner invited my attention to the annexures to the petition and submits that neither there was any response to the statutory notice, nor any reply. He submits that this matter was adjourned from to time for giving an opportunity to the respondent to settle the disputes. No proposal is made for settlement of the disputes out of Court by the respondent till date.

6. Learned counsel for the respondent seeks time once again. By the orders dated 20th March, 2017 and 5th April, 2017, this Court had already made clear that if the matter is not settled, no further adjournment would be granted.

7. A perusal of the annexures in the petition clearly indicates that the petitioner had placed various orders upon the respondent. The respondent has committed default in making payment under those invoices. There is no response to the statutory notice. No payment is made by the respondent in response to the said statutory notice. No affidavit in reply is filed. The averments made in the company petition are thus deemed to have been admitted.

8. In my view the respondent is unable to pay its debts and is commercially insolvent.

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3 Prior thereto, respondent company was given sufficient opportunities to file affidavit in reply, as could be seen from the order dated 6th February, 2017, 20th March, 2017 and 5th April, 2017. When the petition was listed for final hearing on 22nd December, 2017, the following order was passed :

1. Ms. Waradkar appearing for respondent seeks some time to file reply. Mr. Gowda appearing for petitioner strongly opposes any further time being granted and at the same time states that if Court is inclined to grant any time, respondent should be put to terms. Mr. Gowda points out that respondent had entered appearance and the Vakalatnama has been filed on 6th December 2016. Mr.Gowda also points out that notice under Rule 28 of the Companies (Court) Rules, 1959 has been served upon Company on 29th April 2017. Mr. Gowda states that even the petition was advertised in Free Press Journal and Navshakti on 26th July 2017 and therefore, respondent had enough time to file an affidavit in reply and the attempt is only to delay the inevitable. Ms. Waradkar states that an application to recall the order *of admission was sent to respondent for instructions but respondent-company did not revert with instructions on time.*

2. Having heard both the counsels, purely as indulgence, I am inclined to grant two weeks time to respondent to file an affidavit in reply. Affidavit in reply to be filed and copy served on or before 5th January 2018. At the same time, respondent should also be put to terms. Respondent cannot take its own time to file pleadings in Court and delay the proceedings. Respondent was aware about the existence of petition from December 2016, if not earlier, much before the petition was even admitted. Mr.Gowda states that the company petition was served sometime in 2016. Therefore, respondent is directed to pay a sum of Rs. 50,000/- as cost, by way of cheque drawn in favour of advocate on record for petitioner and this amount has to be paid within one week from today as condition precedent to take the affidavit in reply on record. Even if respondent chooses not to file affidavit in reply, this amount of Rs. 50,000/- has to be paid for today's adjournment.

3. Stand over to 11th January 2018 for directions.

4 Mr. Gowda, counsel for petitioner states that respondent company has not paid the cost of Rs.50,000/- as directed by this Court. There is no affidavit in reply also on record and respondent company is not represented today. Therefore, the averments in the petition have not been controverted. It should be noted that even to the statutory notice issued under the provisions of Companies Act, 1956, no reply has been given by the company. It is settled law that where no response to a statutory notice has been made, the court may pass a winding up order on the basis that amount claimed has not been denied by the company and there is a presumption of inability to pay by the company. By virtue of Section 434 of the Companies Act 1956 a presumption of the indebtedness can be legitimately drawn by the court where no reply to the statutory notice is forthcoming.

5 Petitioner has filed an affidavit of one Umesh Sudam Kadam affirmed on 26th July, 2017 confirming advertising the petition in Free Press Journal (in English) and Navshakti (in Marathi) and also in the Maharashtra Government Gazette. The Company Department has also filed a service report dated 31st May, 2017 confirming service of the notice under Rule 28 of the Companies (Court) Rules, 1959 upon the company.

6 I have heard Mr. Gowda and also considered the pleadings and the documents annexed to the petition. I am also satisfied that respondent is unable to discharge its debts, is commercially insolvent and requires to be wound up.

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

> (a) that the Company “M/s. Universal Construction Machinery & Equipment Ltd.” be ordered and directed to be wound up by and under the orders and directions of this Hon'ble Court;
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> (b) that the Official Liquidator of this Hon'ble Court or some other fit and proper person be appointed as Liquidator of the Company with all powers under the Companies Act, 1956.

8 Official Liquidator to take steps immediately without waiting for notification.

9 Company petition accordingly stands disposed.

(K.R. SHRIRAM, J.)