

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

COMPANY PETITION NO.318 OF 2016

Samsung C and T Corporation India Pvt. Ltd.Petitioner

Vs.

Eskay-Bee International Pvt. Ltd.Respondent

Mr. Rupesh Geete I/b. M/s. Legasis Partners for petitioner.

Mr. Sunny Jain for respondent [No Vakalatnama filed].

CORAM : K.R.SHRIRAM, J.

DATE : 10th AUGUST 2018

P.C.:

1 Petitioner seeks to wind up respondent company - Eskay-Bee International Pvt. Ltd. on the grounds that the company is unable to discharge its debts and is commercially insolvent.

2 At the time of admission of the petition on 5th July 2017, the following order came to be passed :

1] By the present petition under Section 433(e), 434 read with 439 of the Companies Act, 1956, the petitioner has prayed for winding up of the respondent-Company namely Eskay-Bee International Pvt. Ltd.

2] The petitioner-Company is engaged in the business of supply of polymers of worldwide reputation. The respondent-company approached the petitioner for supply of the said goods as raw-material for their products to be manufactured in India during the period from July-2012 to August 2012. Upon representation made by the respondent, the petitioner entered into several High Sea Sales Agreements and Sales Contract for High Sea Sales with the respondent. The respondent also issued purchase confirmation letters in pursuance of the said agreements. Pursuant to the said contract, the petitioner supplied goods to the respondent and issued invoices in that behalf to the tune of Rs.7,25,52,007/- (Seven Crores Twenty Five Lakhs Fifty Two Thousand and seven). In discharge of its part liability, the respondent made payment of Rs.70,75,000/- leaving behind the balance of Rs.6,65,50,804/-. The respondent also issued cheques towards balance amount in favour of the petitioner, however, the said

cheques were dishonoured on presentation. As the respondent failed to pay the said amount, the petitioner issued a statutory notice dated 6.11.2015 to the respondent-Company and also to its Directors at the addresses submitted by the respondent-company with the Registrar of the Companies. The respondent received the said notice, however, failed to comply with or reply it.

3] The Petitioner therefore filed the present petition on 27.1.2016 seeking winding up of the respondent-Company. The petition is accepted on 26.6.2016 and in pursuance of the directions issued by the Company Registrar, the petitioner served a notice of acceptance upon the respondent and has filed affidavit of service dated 22.8.2016 to that effect.

4] I have perused the petition and prima facie it appears that the respondent-Company is unable to pay the debts of the petitioner and is commercially insolvent.

Hence, the following Order:

xxxxxxxxxxxxxx

3 At the time of admission, nobody had appeared for the company though served. Petition thereafter was listed on 23rd August 2017 when none appeared for the company. Similarly on 26th April 2018. On 13th July 2018 advocate Mr. Sunny Jain appeared for the company and sought time to file a reply. On 13th July 2018 the following order came to be passed :

1. Mr.Sunny Jain for respondent states that he has been approached by the respondent company only yesterday evening to take up the matter. Petition was accepted on 26.7.2016, admitted on 5.7.2017 and notice under Rule 28 has been also delivered. At no point of time, did the company appear and no affidavit in reply has been filed. To a query posed by the court as to why nobody appeared and no reply has been filed, the advocate had only one answer : "I have been approached by the client only yesterday evening". Advocate does not explain as to why the company did not engage any advocate, earlier. Mr.Jain states that earlier advocate was appearing but he does not know who the advocate was. Cause list also does not indicate any name for respondent.

2. Mr.Jadhav for petitioner states that no communication has come from any advocate that the advocate was appearing for the company.

There is no explanation as to why no reply was filed earlier. Therefore, it is rather obvious that when the petition has been listed for final hearing, the company has suddenly woken up. Therefore, today we cannot proceed with the matter. Notwithstanding the same, I would still grant the company an opportunity to file a reply but subject to company being put to terms.

Affidavit in reply to be filed and copy served by 18.7.2018.

Rejoinder if any, to be filed and copy served by 23.7.2018 and petition be listed on 26.7.2018 for final hearing.

3. For today's adjournment, company to pay sum of Rs.25,000/- as cost to advocate on record for petitioner by issuing cheque in favour of advocate on record and sum of Rs.25,000/- as donation to Maharashtra Legal Aid Services Authority. Both these amounts to be paid on or before 17.7.2018. It is clarified that if company choses not to file reply, these amounts will still have to be paid and even these amounts are not paid, the affidavit in reply will not be taken on record and company will also not be heard on the next date. Stand over to 26.7.2018.

4 Today, Mr. Jain states that he is yet to file Vakalatnama. Mr. Jain also states that no reply has been filed and he wants further time. Mr. Jain states that his oral instructions are that the goods for which petitioner is alleging non payment, was never supplied. Between 13th July 2018 and today, four weeks have passed. Therefore, I am not inclined to grant any further time. I would proceed on the basis that none of the averments in the petition have been controverted. I must also note that even to the statutory notice, it does not appear that any reply has been filed. Mr. Geete states that no reply was ever received. 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. Where no response has been made to the statutory notice, the respondent-

company runs a risk of winding up petition being allowed. 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 On record is an affidavit of one Dilip Palawankar affirmed on 10th May 2018 confirming advertising the petition in Free Press Journal and Navshakti on 9th May 2018. Mr. Geete tenders an extract of Maharashtra Government Gazette for the period 17th - 23rd May 2018 where at serial no.M-1853 the petition has been advertised. The same is taken on record and marked “X” for identification. The Company Department has placed on record a service report dated 25th June 2018 confirming service of notice under Rule 28 of the Companies (Court) Rules 1959.

6 I have also perused the petition and the documents annexed thereto and I am also satisfied that the goods have been supplied, liability has been acknowledged and the company is unable to discharge its debts and is commercially insolvent.

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

(a) direct the winding up of M/s. Eskay-Bee International Private Limited under the relevant provisions of the Companies Act, 1956;

(b) direct the Official Liquidator attached to this Hon'ble Court or some other fit and proper person be appointed as the Liquidator of the company and all its assets, divisions, businesses, subsidiaries including assets of the subsidiaries, affairs, properties, bank accounts, books of accounts, vouchers, files, documents, etc. with all powers under the provisions of the Companies Act, 1956.

8 The company, its directors, managers, servants, agents, employees are all directed not to deal with or create any third party rights or encumber any of the assets of the company. They shall not operate even the bank accounts of the company.

9 Official Liquidator, within two weeks, to take steps upon receiving an authenticated copy of this order from the advocate for petitioner without waiting for any notification. The counsel for petitioner is also directed to forward a copy of this order to National Company Law Tribunal for information.

10 Upon receipt of the authenticated copy from petitioner's advocate, Official Liquidator shall forthwith cause notice to all concerned Directors calling upon them to file their respective statement of affairs strictly in consonance with the provision of law. All Directors of respondent company, now in liquidation, are hereby directed to file their respective statement of affairs as required under Section 454 of the Companies Act 1956, failing which Official Liquidator shall proceed further and lodge criminal complaint against the erring Directors, without seeking prior

sanction of this Court for initiation of criminal prosecution.

11 Company petition accordingly stands disposed.

12 Mr. Jain states that today itself he will communicate to the company that the company has been ordered to be wound up and they shall not deal with any of the assets or even conduct the business in that name.

13 All to act on an authenticated copy of this order.

Gauri Amit
Gaekwad

Digitally signed by
Gauri Amit Gaekwad
Date: 2018.08.14
16:17:36 +0530

(K.R. SHRIRAM, J.)