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

COMPANY PETITION NO.728 OF 2015

M/s. National Steel Enterprises ….Petitioner

Vs.

M/s. RTG Infrastructure & Realtors Ltd. ....Respondent

WITH

COMPANY PETITION NO.845 OF 2015

M/s. Landmark Realty ….Petitioner

Vs.

M/s. RTG Infrastructure & Realtors Ltd. ....Respondent

Mr. Jeetendra Ranawat ib. Mr. Kamlesh Jain for petitioner in CP728/2015.
Mr. Niraj Shah i/b. Mr. Siddharth Murarka for petitioner in CP/845/2015.
Mr. Sushil Upadhyay i/b. Mr. A.M. Saraogi for respondent in both petitions.

CORAM : K.R.SHRIRAM, J.
DATE : 1st MARCH, 2018

P.C.:

COMPANY PETITION NO.728 OF 2015

1 At the outset, Mr. Ranawat, counsel for petitioner in company petition no.728 of 2015 states that the formal prayer in the petition, viz., Official Liquidator or some other fit and proper person be appointed as Liquidator of respondent company with all powers under the provisions of Companies Act, 1956, has been inadvertently missed out and seeks leave to amend the petition to add the prayer clause. Mr. Upadhyay in fairness states that since it is only a formal amendment, which would consequently follow if the company is being wound up, there should be no objection if the amendment is allowed.

2 Leave to amend granted. Amendment to be carried out forthwith. Re-verification dispensed with.

3 By this petition, petitioner is seeking winding up of respondent company – M/s. RTG Infrastructure & Realtors Ltd. (the Company) under the Companies Act, 1956.

4 On 28th June, 2017 when the petition was taken up for admission, the following order came to be passed :

> *1. By the present petition under Section 433(e) and 434 of the Companies Act, 1956 the petitioner has prayed for winding up of the respondent company namely M/s. RTG Infrastructure and Realtors Ltd. The petitioner company is engaged in the business of supply of TMT bars. As per the orders placed by the respondent company the petitioner sold, supplied and delivered the goods on the construction site of the respondent company and raised invoices in that behalf. The petitioner supplied the goods amounting to Rs.39,80,282/- to the respondent. As per the terms of the contract the petitioner was entitled to charge interest at the rate of 36% per annum on delayed payment by the respondent. The respondent in compliance with its part of obligation issued nine cheques towards the part payment, aggregating to Rs.39,80,282/- which on presentation were dishonoured for the reason "funds insufficient". The petitioner therefore, issued a statutory notice dated 12.12.2014 to the respondent. The respondent by its reply dated 23.12.2014 disputed the receipt of the material and raised a plea that the claim of the petitioner is barred by limitation. The respondent failed to pay the amount due and payable to the petitioner.*
>
> *2. The petitioner thereafter filed the present petition for winding up of the respondent company on 3.2.2015. The petition was accepted on 21.7.2015 and in pursuance of the directions issued by the Company Registrar the petition is served upon the respondent and the petitioner has filed an affidavit of service dated 29.3.2016 to that effect. The respondent has caused its appearance and has filed its reply dated 9.10.2015 to the present petition.*
>
> *3. Heard the learned counsel for the petitioner and the respondent and perused the record. It is to be noted here that in furtherance of the goods supplied by the petitioner to the respondent the petitioner has raised invoices for an amount of Rs.39,80,282/-. The petitioner*

has also issued a debit note dated 20.11.2014 for the said amount. It is also to be noted here that, though the clause in the contract permits the petitioner to leavy/charge interest at the rate of 36% per annum the petitioner has charged the interest at the rate of 24% per annum only on Rs.39,80,282/-(Thirty nine lacs eighty thousand two hundred eight two) which comes to Rs.50,79,500/-(Fifty lacs seventy nine thousand five hundred) aggregating to a total sum of Rs.90,59,782/-(Ninety lacs fifty nine thousand seven hundred eighty two). That the respondent while performing its part of obligation and in discharge of its liability has issued cheques aggregating to Rs.45,00,000/- thereby admitting its liability to pay the dues/debt of the petitioner. The record further discloses that the said cheques were dishonoured on presentation. The last cheque issued by the petitioner was dated 28.11.2014 and the statutory notice is issued on 12.12.2014. Prima facie, it appears to me that the claim of the petitioner is not barred by the law of limitation.

4. Mr. Sarogi, the learned counsel appearing for the respondent has disputed the claim of the petitioner on the ground that the goods alleged to have been delivered to the petitioner were not received by his client. He further submitted that the claim of the petitioner is hopelessly barred by the limitation and even there is dispute about the alleged issuance of cheques. He submitted that the said cheques were also issued beyond the period of limitation. He further submitted that the said cheques were in fact handed over to petitioner on the representation of the petitioner towards security deposit for the future transaction He submitted that there are several disputed questions of facts and the present petition may not be entertained.

5. As stated earlier prima facie it appears to me that the principal amount of debt i.e. Rs.39,80,282/- is not in dispute and the said debt is an admitted liability of the respondent. The record discloses that the respondent has in fact received the said goods, but failed to make payment of the same and according to me the said nine cheques issued by the respondent (which has reference at Page 58 Para 4 of the present petition) were in fact handed over by the respondent to the petitioner towards its fulfillment of the part of obligation for receipt of the goods. In view thereof, I am inclined to relegate the petitioner to the remedy of filing the suit before the competent Court having jurisdiction for recovery of the amount. However, the respondent is hereby directed to deposit the said amount of Rs.39,80,282/- in the registry of this Court within a period of six weeks from today either by way of demand draft or by way of cash.

6. If the respondent company deposits the aforestated sum in this Court within the stipulated period from today, the petition shall stand dismissed and the petitioning creditor will be required to establish its claim in a suit to be filed. The petitioning creditor shall file such a suit within a period of 6 weeks thereafter. The amount so deposited by the respondent company in the registry of this Court shall be transferred to the registry of the Registrar of the concerned Court where the suit is

> *filed.*
>
> *7. If the respondent company fails to deposit the aforestated amount within the stipulated period in the registry of this Court, the petition shall stand automatically admitted without further reference to this Court. In such case the petitioner is directed to comply with the following directions.*
>
> *xxxxxxxxxxxx*

5 No further affidavit in reply has been filed by the company opposing the petition. Admittedly, even the amount of Rs.39,80,282/-, which the company was directed to deposit within six weeks to avoid winding up, has not been deposited.

6 Mr. Upadhyay, counsel for respondent company states that the company has preferred an appeal with notice of motion to condone the delay. To a query raised by the Court, Mr. Upadhyay stated that the company has not done anything to even have the notice of motion for condoning the delay listed for hearing.

7 In company petition no.845 of 2015, this Court was pleased to pass the following order on 21st November, 2017 :

> *1. Petition is filed on the ground that respondent-company is unable to pay its debt, commercially insolvent and hence requires to be wound up.*
>
> *2. Petitioner had supplied various goods, being materials of steel and iron, as required by respondent and raised various invoices. As per the terms of invoice, after the agreed credit days of 60 days as mentioned in the invoice, respondent is liable to pay interest @ 36% per annum. Petitioner had reduced it to 24% per annum.*
>
> *3. It is the case of petitioner that a sum of Rs.2,04,633 is outstanding towards principal and Rs.4,93,888 is outstanding towards interest as on 23rd April 2015. Respondent, by a letter dated 5th March 2015, has confirmed an amount of Rs.6,10,888/- as outstanding to be paid*

to petitioner. It would be useful to reproduce relevant extract of the letter which read as under :-

> *"Sub. : Confirmation of Outstanding Balance.*
>
> *Dear Sir,*
>
> *We hereby Confirm the Outstanding Amount payable to landmark as on 28.02.2015 is Rs.6,10,888 (Rupees Six Lacs Ten Thousand Eight Hundred & Eighty Eight only)*
>
> *For RTG Infrastructure & Realtors Limited*
>
> *Sd/-*
>
> *Authorized Signatory"*

4. Following this, respondent had also issued four cheques; three of which were for Rs.2 lakhs each and the fourth one was for Rs.10,888/- and all the four cheques have been dishonoured on presentation. Petitioner filed proceedings under Section 138 of the Negotiable Instruments Act, 1881 and respondent has been convicted. Of course, it is respondent's case that an Appeal has been filed in the Sessions Court against the order of conviction.

5. As no payments came forth, petitioner caused a notice dated 5th May 2015 to be issued by its Advocates to respondent as required under the provisions of the Companies Act, 1956. Respondent replied to the notice denying liability on the specious grounds that (a) petitioner's claim is barred by limitation; (b) there was no agreement to pay any interest; and (c) entire claim of petitioner has been settled long ago.

6. It should be noted that there are letters dated 5th March 2015, 31st March 2014 and 12th August 2014, copies whereof are annexed to the petition, confirming that respondent was bound and liable to pay interest @ 2% per month on outstanding amounts. Even in letter of 12th August 2014, respondent had admitted that it owes to petitioner a sum of Rs.9,10,888/- which includes interest of Rs.36,414/- @ 2% per annum from April 2014 to July 2014. After this correspondence, is the letter dated 5th March 2015, which is quoted earlier, because in between respondent had paid a sum of Rs.3 lakhs to petitioner. If one has to accept respondent's stand that entire account has been settled and there was no agreement to pay interest, these letters speak otherwise. If stand of respondent was correct, question of addressing a letter dated 5th March 2015 acknowledging liability in the sum of Rs. 6,10,888/- and issue four cheques for that amount does not arise. Therefore, it is rather obvious that the defence raised by respondent is bogus, moonshine and an afterthought. Petition requires to be admitted as the Apex Court in IBA Health (India) (P) Ltd. Vs. Info-Drive Systems Sdn. Bhd. held that if the Court comes to a conclusion that the company has raised a bona-fide defence or a substantial dispute as to liability, the petition should be dismissed. But if the grounds raised are some ingenious *mask invented to deprive a creditor of a just and honest entitlement then the petition should be admitted even if the solvency is not in dispute.*

7. Therefore, the following order is passed :

(a) The company petition is admitted and is made returnable on 26th February 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.10,000/- 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 waives service of the petition under Rule 28 of the Companies (Court) Rules, 1959.

8. At this stage, I am inclined to give an opportunity to respondent to get out of this situation. If respondent deposits, within three weeks from today, a sum of Rs.6,10,888/- with the Prothonotary and Senior Master of this Court then petition will not be advertised and will be placed before this Court for directions on Monday following the date of deposit. The time to deposit Rs.10,000/- will begin after the three weeks given to respondent to deposit is over.

Even in that petition, the company was given time to deposit a small amount of Rs.6,10,888/- within three weeks. Once again, admittedly, this amount has not been deposited.

8 Mr. Upadhyay states that in complaint filed by petitioner under Section 138 of the Negotiable Instruments Act, 1881, the Directors of the company have been convicted but they have preferred an appeal. All these indicate that the company is unable to discharge its debts and is

commercially insolvent.

9 Mr. Ranawat, counsel for petitioner in company petition no.728 of 2015 states that the company had waived notice under Rule 28 of the Companies (Court) Rules, 1959. I find that even in company petition no.845 of 2015 the company had waived notice under Rule 28 of the Companies (Court) Rules, 1959. In both these petitions, petitioners have placed on record affidavits confirming advertising the petition in Free Press Journal and Navshakti and also in the Maharashtra Government Gazette.

10 This Court while admitting the petition has come to a conclusion that the company owes the amounts mentioned in the petition to petitioner and has even acknowledged its debts. The fact that despite liberty being given to the company to deposit the amounts claimed in the petition with the Prothonotary and Senior Master, High Court, Bombay has not been met with, I am satisfied that the company is unable to discharge its debts, is commercially insolvent and requires to be wound up.

11 In the circumstances, company petition no.728 of 2015 is allowed in terms of prayer clause – (a) and (a) (i) which reads as under :

> *(a) the Hon'ble Court may be pleased to wound up respondent company for unable to pay the legitimate dues under Sec. 433 and 434 of the Companies Act, 1956;*
>
> *(a) (i) that Official Liquidator or some other fit and proper person be appointed as Liquidator of respondent company with all powers under the provisions of Companies Act, 1956 or later enactment to take charge of*

respondent company and to conduct its affairs during the course of its winding up.

12 Company petition no.845 of 2015 is also allowed in terms of prayer clauses – (a), (b) and (c) which read as under :

(a) that respondent company, namely M/s. RTG Infrastructure and Realtors Ltd., having its registered office at 3, Gadiya House Chapel Road, Near JEFF Caterer, Off Hill Road, Bandra (West), Mumbai – 400 050 be wound up by and under the orders, direction and supervision of this Hon'ble Court;

(b) that Official Liquidator or some other fit and proper person be appointed as Liquidator of respondent company with all powers under the provisions of Companies Act, 1956 or later enactment to take charge of respondent company and to conduct its affairs during the course of its winding up;

(c) that the necessary leave under Sec.446 be granted to petitioner to continue the suit proceeding and proceeding under the N.I. Act.

13 Petitioner's advocate to forward a copy of this order duly authenticated by the Associate of this Court to Official Liquidator. Official Liquidator to take further steps upon receiving copy of the order without waiting for notification.

14 Both company petitions accordingly stand disposed.

15 Both petitioners are entitled to cost in the sum of Rs.10,000/- each in their respective petitions.

(K.R. SHRIRAM, J.)