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

COMPANY PETITION NO.366 OF 2016

Carico Handelsgesellschaft m.b.H. ….Petitioner

Vs.

M/s. Uday Structurals and Engineers Pvt. Ltd. ….Respondent

Mr. Karl Tamboly a/w. Mr. Jehaan Mehta, Ms. Komal Joshi, Ms. Aditi Bajaj and Ms. Tulsi Bhatia i/b. ALMT Legal for petitioner.
Mr. Ashish Suryavanshi for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 9th APRIL, 2018

P.C.:

1 The petition is filed for winding up of the company – M/s. Uday Structurals and Engineers Pvt. Ltd. (the Company) under the provisions of Companies Act, 1956.

2 Petitioner and the company were having business relationship over a period of time. Payments were also being made from time to time. The dispute relates to the last order placed by the company upon petitioner for supplying three consignments of H20 Girder Solid Web Beams (the said goods) totally valued at Euro 64,171.50.

3 By an email dated 3rd December, 2013, the company requested petitioner to supply atleast three containers of the said goods. The email provided "*5. Payment would be made about 30 days from the receipt of containers at Mumbai Nhava Sheva Port*". After this email of 3rd December,

2013, petitioner sent an email dated 4th December, 2013 to the company forwarding the proforma invoice dated 4th December, 2013. The company responded by its email dated 5th December, 2013 making some corrections in the name of the company and material description.

4 The enclosures to the proforma invoice also mentioned "*terms of payment : full payment of invoice amount 30 days after arrival of the each container at the port of Nava Sheva*". This has been signed both by petitioner and the company. The payment terms were very relevant when it comes to the reply filed by the company in opposing the petition.

5 The three consignments were received admittedly by the company on or about 11th December, 2013, 7th January, 2014 and 17th January, 2014, respectively. As the payments were not made, petitioner sent requests to the company. By an email dated 29th October, 2014, petitioner informed the company that almost one year would come to an end after the very first consignment was sent and there was no sign of payment. Petitioner also informed the company that if the company was not able to even send partial payment of Euros 5,000 per month, it would indicate that the company is close to bankruptcy. The company replied by an email dated 30th October, 2014 informing petitioner that the company has gone through a very challenging past one year, where liquidity was a major issue but assured petitioner that conditions were improving and the

following day, the company would remit as a token of start of payment atleast Euros 5,000 and clear the balance in shortest possible time frame. The company also thanked petitioner for standing by the company during the company's difficult time. Despite this email, admittedly, no payment has been made to petitioner. Therefore, petitioner caused a notice of demand issued through its advocates' letter dated 20th November, 2014 demanding a sum of Euro 64,171.50 to which there was no reply. However, there was exchange of messages over WhatsApp between petitioner's representative and managing director of respondent company. A print out of the exchange has been annexed at Exhibit "M" to the petition.

6 In the affidavit in reply, though the company taken a stand that the contents of Exhibit "M" do not amount to admission of liability, the company has not denied the exchange of messages as reproduced in Exhibit "M" to the petition. Exhibit "M" shows a message at 8:33 on 8th March, 2015 from Uday Patil (Counsel for company stated he was the Managing Director of the company) and it reads as under :

> *"Hello Dr. Herbert. Good morning. Tomorrow we will start transferring your payment. Hopefully during this month we should transfer a large piece of your balance payment. Rgds."*

7 Still no payment was made and therefore, petitioner caused a statutory notice dated 24th June, 2015 issued through its advocates under Section 434 of the Companies Act,1956. Petitioner also claimed interest at

8% p.a. on Euro 64,171.50. There is no reply to the statutory notice. Hence the petition came to be lodged on 24th February, 2016.

8 An affidavit in reply opposing the petition affirmed on 4th August, 2017 has been filed by one Uday Patil, Director of the company, in which the defence taken, in addition to the defence that the company is financially strong, is that during the beginning of the month of August, 2011, the company had advanced Euro 1,07,000 equivalent to INR 68,31,950/- and three supplies that were made, one in December, 2013 and two in January, 2014 were against the advances made in the year 2011. It is also stated that the audited balance sheet of the company for the year ending 31st March, 2014 shows a sum of Rs.75,43,439/- as advance to petitioner. The company has annexed a statement to the affidavit in reply and according to the company, a sum of Rs.1,31,193/- is payable by petitioner to the company.

9 I have heard the counsel for the parties and also considered the pleadings and the documents annexed to the petition. The counsel for the company emphasised on the balance sheet for the year ending 31st March, 2014 and reiterated that the balance sheet indicates that an advance of Rs.75,43,439/- had been given to petitioner as on 31st March, 2014. To a query raised by this Court that if the company's balance sheet indicates that an amount in excess of Rs.75 lakhs has been given to petitioner as advance

as on 31st March, 2014, then where was the need for the Managing Director of the company to keep sending messages to petitioner that he would make payments of Euros 5,000 as a token of their intention to pay the entire amount of Euro 64,171.50 and why did the contract, which is of December, 2013, provide that payments will be made within 30 days of receipt of each of the consignment, the counsel for company stated that what is there on record is there and he cannot say anything beyond that. In other words, he had no answer.

10 The contract is of 3rd December, 2013 in which the company has agreed to make full payment of invoice amount 30 days after arrival of each of the container at the port of Nhava Sheva. In the affidavit in reply, the company has admitted having received the entire consignment. In its email dated 30th October, 2014 almost one year after the first consignment was delivered and 10 months after the last consignment was delivered, the company has agreed to transfer as a token of start of repayment atleast Euros 5,000 and try to clear the balance in shortest possible time frame. In the WhatsApp message, which has not been denied, sent on 8th March, 2015, the Director of the company, who has also affirmed the affidavit in reply, has told the representative of petitioner that the following day the company will start transferring payment and hopefully during the said month, i.e., March, 2015 transfer a large part of petitioner's balance

payment.

11 To the statutory notice, there is no reply. 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 admitted for hearing at the threshold stage itself. Admission of the petition at its first hearing is possible because, 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.

12 For the first time in the affidavit in reply filed almost four years after the contract was entered into and three to two years after agreeing to make payments, the company is raising a defence of having paid the value of the three consignments in advance in August, 2011. If what the company states is correct, the contract and the communication attached to the petition would not have stated what it stated. Secondly, for a consignment, which was delivered in December, 2013 and January, 2014, it defies sensibility to accept that the advance was made in August, 2011. There is no grievance raised also in the reply to the petition that petitioner delayed in supplying the material against the advance made. If the advance had been

made, as alleged in the reply to the petition, we would have expected the company to inform the petitioner that no amount was payable because the entire consignment has been paid for in August, 2011 itself and would have called upon petitioner to refund the excess amount. There is no such communication. Coming to the balance sheet, it is for the company to explain how it says on 31st March, 2014 an advance of Rs.75,43,439/- was shown in its records. Unilateral entry in company's balance sheet that an advance has been given to a third party does not mean that the third party has to pay that amount. It is not like company admitting its liability to a third party in its balance sheet.

13 In the circumstances, considering the contents of the affidavit in reply, in my view, these are nothing but afterthoughts and moonshine. In my view, there is a debt, the company is unable to discharge its debts and petition requires to be admitted. Hence the following order is passed :

ORDER

(i) The company petition is admitted and made returnable on 21st June, 2018;

(ii) Petitioner is directed to advertise the petition within two weeks in two local newspapers, viz. 'Free Press Journal' (in English) and 'Navshakti' (in Marathi) and also in 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 Companies (Court) Rules, 1959;

(iii) Petitioner shall also deposit an amount of Rs.15,000/-with the Prothonotary and Senior Master of this Court towards publication charges, within a period of two weeks from the date of this order, with intimation to the Company Registrar failing which the 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;

(iv) Counsel for respondent waives notice under Rule 28 of the Companies (Court) Rules, 1959.

14 Notwithstanding the above, I would still give a chance to the company to get out of the situation by depositing an amount in Indian rupees equivalent to Euro 64,171.50 with the Prothonotary and Senior Master, High Court, Bombay within four weeks from today. If the amount is deposited, then the petition will stand dismissed without further reference to this Court. If the amount is not deposited, then the two weeks period to advertise, etc. will commence on the expiry of the four weeks period.

(K.R. SHRIRAM, J.)