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

COMPANY PETITION NO.314 OF 2016

M/s.Gagan Ferrotech Ltd.)….Petitioner
V/s.
M/s.Taurian Iron & Steel Company Pvt.Ltd)....Respondent

Ms.Neha Mehta for petitioner.
Mr.Ashish Kamat a/w Mr.Akshay Puranik and Ms.Priyanka Deshmukh i/by Crawford Bayley and Co. for respondent.

CORAM : K.R.SHRIRAM,J
DATE : 13.7.2018

P.C.:-

1. The petition is filed for winding up of the respondent company-Taurian Iron & Steel Company Pvt. Ltd. (the said company) on the grounds that the company is unable to pay its debts, commercially insolvent and should be wound up.

2 The company is a supplier of Iron ore and has a plant at Barajamda, Jharkhand.

3 On 5.7.2017 at the time of admission, 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 upof the respondent-Company namely M/s Taurian Iron & Steel Co. Pvt. Ltd.*

2] The petitioner placed purchase order dated 10.4.2014 with the respondent-Company for supply of iron ore and made 100% advance payment in favour of the respondent-Company i.e. Rs.4,03,66,594/-(Four Crores Three Lakhs Sixty Six Thousand Five Hundred Ninety Four rupees only). The respondent did not supply the said goods to the petitioner and therefore the petitioner made series of correspondence with the petitioner calling upon the respondent, either to supply the said item as agreed between the parties or refund the amount. It is the case of the petitioner that they are entitled to levy interest @ 18% per annum for non receipt of the goods within the stipulated period. The respondent acknowledged and confirmed the debts by its letter dated 1.4.2015. Though the respondent- company acknowledged the debts, did not repay the amount to the petitioner and therefore the petitioner issued a statutory notice dated 1.2.2016 to the respondent. The respondent received the said notice, however, failed to comply with or reply it.

3] The Petitioner therefore filed the present petition on 1.3.2016 in this Court seeking winding up of the respondent-Company. The petition is accepted on 28.6.2016 and in pursuance of the directions issued by the Company Registrar, the petitioner served a notice of acceptance and has filed affidavit of service dated 5.7.2016 to that effect. Despite notice none appeared for the respondent.

4] I have perused the petition. The respondent-Company by its letter dated 1.4.2015 has confirmed accounts and acknowledged the debts to be paid to the petitioner. 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:

4. When the petition was admitted, nobody had appeared for the company or any reply opposing the petition was filed. It should be also noted that reply to the statutory notice has not been given admittedly by the company. After the petition was admitted and notice was issued, the company has filed an affidavit in reply of one Sumit Bajla affirmed on 8.2.2018.

5 By a letter dated 16.5.2014, petitioner had inquired about supply of iron ore to the company and also indicated that petitioner will require two rakes of iron ore. In response, by an email dated 20.5.2014 to which was attached a letter dated 20.5.2014, the company gave its quotation of offer price and other terms and conditions. The terms and conditions required that 100% payment in advance by RTGS was to be made and since the material was offered on as is where is basis, it was open for petitioner to have its own quality assessment done. Once the material was loaded, no complaint with regard to quality was to be entertained. The company also gave a quotation for shifting of material from company's plant to Barajamda railway siding and loading the same into wagon. The payment was to be made again by 100% advance by DD or cheque or through RTGS. The payments admittedly have been received by the company, both for the cargo as well as the shifting and loading. It is petitioner's case that

petitioner has paid the company a sum of Rs.4,03,66,594/- and these payments have been made on 27.5.2014 (Rs.60,00,000/-) and on 27.6.2014 (Rs.3,43,20,000/-). It is the case of petitioner that as the goods were not supplied, by a letter dated 11.7.2014, it was brought to the notice of the company that it is more than a month since sum in excess of Rs.4 crores has been paid and no supply has been received and therefore, the company may either cancel the purchase order and arrange refund of the amounts paid or indicate to petitioner when company will be in a position to supply the materials and revised the rates to compensate petitioner against financial loss against the advance made. The letter dated 11.7.2014 reads as under :-

> *"GFL/TISCPL/IO/2014-15/July/01*
> *Date : 11/07/2014*
>
> *To*
>
> *M/s.Taurian Iron & Steel Co. Pvt. Ltd.*
> *302-A Poonam Chambers*
> *Dr.Annie Besant Road, Worli,*
> *Mumbai-400018.*
>
> *Dear Sir,*
>
> *Kind Attn : Mr.Shamendra Dalmia/Mr.Dharmendra Singh*
>
> *Sub : Our P O no GFL/TISCPL/IO/PO/2014-15/02 dated 26.05.2014.*
>
> *With reference to the subject PO we wish to inform that it has been almost over a month and we have not received a*

single rake of Iron Ore against this PO.

You will appreciate that Iron Ore being a crucial raw-material for our industry, timely movement of same to our plant is very crucial. Moreover, we have remitted almost over a sum of Rs.4 crores against the subject PO.

We request you to either cancel the PO and arrange for refund of our remittance, or, let us know by when you will be in position to supply the materials and revise the rate to compensate us for the financial loss against the advance made.

Your early response to our above submission is solicited.

Thanking you,

Yours truly,

For Gagan Ferrotedch Ltd.

Anup Agarwal"

6 Mr.Kamat for the company tried to explain that it was not the company who was not ready and willing to supply but it was petitioner who wanted the rates to be revised and as the company refused to revise rates, wanted the company to cancel the purchase order and return the amount and this stand of the company, Mr.Kamat tried to explain by pointing out to last but one paragraph of the letter dated 11.7.2014. In fact, in paragraph 5.6 to the affidavit in reply which is a response to paragraph-18 of the petition where this letter dated 11.7.2014 (Exh.M) is referred to, a bald statement is made that

it is petitioner who failed and neglected to take delivery of the goods despite the fact that the company was ready and willing to make the goods. I am stating it is a bald statement because there is not a shred of any evidence in the affidavit in reply to support the stand of the company. The company is conveniently sitting over Rs.4 crores for 4 years, since June-2014. Apart from the letter dated 11.7.2014 to which also there is no reply, petitioner addressed letters dated 18.8.2014, 7.1.2015, and 28.10.2015, to which there is no reply whatsoever. If what the company states was correct that the goods were ready to be delivered but petitioner has not come forward to take delivery, the least the company could have done is put that on record. In fact, I cannot even imagine a party who has paid more than Rs.4 crores will not take steps to take delivery of the goods. It is absolutely absurd for the company to even suggest that.

7 It should also be mentioned that at Exh.P to the petition is a confirmation of account sent by the company to petitioner for the period 1.4.2014 to 31.3.2015 seeking petitioner to confirm that only an amount of Rs.4,03,66,594/- was lying with the company which amount belonged to petitioner. This confirmation of account is dated 1.4.2016. There is no reference mentioned anywhere that petitioner has not come forward to take delivery. In the affidavit in reply a

strange defence is taken that the statement of account only reflects entries in the company's book which are there because monies are received in advance and that does not detract from the fact that the company is not liable to make payment to petitioner. Again an absurd stand by the company. I must, however, add that this point was not argued by Mr.Kamat.

8 Petitioner through their Advocate's letter dated 1.2.2016 issued a statutory notice to the company to which admittedly, 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 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.

9 Even when the petition was served upon the company still the company chose not to enter appearance or file an affidavit. The petition was lodged on 8.3.2016, accepted on 28.6.2016, admitted on

5.7.2017 and the affidavit in reply is affirmed on 8.2.2018 (more than 2 years after statutory notice dated 1.2.2016 was sent and almost 4 years after the money was received) and filed in the registry on 17.5.2018. Mr.Kamat pointed out that petitioner did not come forward to inspect the goods. Again there is no correspondence. At the same time, it should be noted that the terms and conditions sent by the company on 20.5.2014, at clause-7, states that the material offered is on as is where is basis and if the petitioner wishes it may have a quality assessment of the stock done at petitioner's cost. Nothing came in the way of the company supplying the goods on as is where is basis. Petitioner has also paid cost of moving the goods from the company's plant to Barajamda railway siding and loading the same into the wagon. The company has not once even sent a notice to petitioner that they are ready to move the goods and seek details as to when the rakes will be placed at the railway siding. It is therefore clear that the company wanted to just enjoy the money given by petitioner and the defences raised in the affidavit in reply are nothing but moonshine and after thought. In fact the conduct of the company smacks of utter dishonesty.

10 Admittedly, the company has received amount in excess of Rs.4 crores in June-2014, more than 4 years ago. The company has

also admitted in its confirmation of account that this amount has been received. The company, however, has not placed on record the financial statements to prove its solvency. Nevertheless, financial solvency won't come to the aid of a company if the debt is indisputably owing.

The Apex Court in [1]***IBA Health (India) Private Limited Vs. Info-Drive Systems SDN, BHD.***, in paragraph nos.24 and 25 has held as under :-

> *COMMERCIALLY SOLVENT*
>
> *24. Appellant company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434 (1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay it debts, the law should take its own course and the company of course will have an 15 opportunity on the liquidation application to rebut that presumption.*

1 (2010) 10 Supreme Court Cases 553

> *25. An examination of the company's solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the company's liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterized as a stand alone ground.*

11 The debt in this case is undisputably owing. In the circumstances, I am satisfied that the company is required to be wound up.

12 Petitioner has placed on record an affidavit of one Vishwas Jori affirmed on 25.7.2017 confirming advertising the petition in `Free Press Journal' and `Navshakti' on 25.7.2017.

13 Ms.Mehta for petitioner tenders receipt issued by the Maharashtra Government Press for the amount paid for advertising the petition in the Maharashtra Govt. Gazette. While admitting the petition, the court has noted “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". Petitioner may file copy of the Gazette notification as and when received.

14 There is a service report dated 22.8.2017 filed by the company department confirming delivery of the notice sent under Rule 28 of the Company Court Rules 1959. Therefore, there is no impediment for the court to go ahead with this petition.

15 In view of the above observations, the petition is allowed in terms of prayer clauses-(a) and (b) which read as under :-

> *"(a) That the Respondent Company, namely Taurian Iron & Steel Company Pvt. Ltd., be wound up by and under the directions, supervision and control of this Hon'ble Court under the provisions of the Companies Act, 1956 ;*
>
> *(b) That an Official Liquidator, High Court, Bombay or such other person as this Hon'ble Court deems fit be appointed as the Liquidator/Provisional Liquidator of the Respondent Company, together with all its assets, business, affairs, books of accounts, papers, vouchers and all other documents and records with all powers under the provisions of the Companies Act, 1956."*

16 The advocate for petitioner shall furnish a copy of this order, duly authenticated by the Associate of this court within two weeks to the office of Official Liquidator. The Official Liquidator shall forthwith act thereupon without waiting for any notification appointing him as liquidator. Upon receipt of the authenticated copy from the petitioner's advocate, the 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 the 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 the 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.

17 Registry to return the amount of Rs.10,000/- deposited by petitioner subject to deductions, if any.

19 Notwithstanding the above order, I am inclined to grant time upto 31.7.2018 for the company to deposit sum of Rs.5.50 crores (Rupees Five crores Fifty lakhs only) with the Prothonotary & Senior Master, High Court, Bombay. I have arrived at this figure on the basis

that the company has retained sum of Rs.4,03,66,594/- for more than 4 years and even if 10% interest is taken into account, it would be around Rs.40,00,000/- p.a. and for 4 years, it will be about Rs.1,62,00,000/- totaling to about Rs.5,65,00,000/-. If interest is not directed to be deposited, it will amount to a premium on dishonesty. If this amount is deposited, petition will be listed for directions before the court on the 1st Friday following the date of deposit. If the amount is not deposited, the Official Liquidator shall take steps forthwith for liquidating the company's assets after 31.7.2018.

Jahagirdar Kiran Ganesh Digitally signed by Jahagirdar Kiran Ganesh Date: 2018.07.20 13:05:08 +0530

(K.R.SHRIRAM,J)