

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

COMPANY PETITION NO.369 OF 2015

M/s. Alliance LogisticsPetitioner

Vs.

M/s. Surendra Engineering Corporation Ltd. & Ors.Respondents

Mr. Rashmin Khandekar a/w. Mr. Deepak Singh i/b. Mr. Kartik K. Tiwari for petitioner.

None for respondents.

CORAM : K.R.SHRIRAM, J.

DATE : 16th FEBRUARY, 2018

P.C.:

1 By this petition, petitioner is seeking winding up of 1st respondent company – M/s. Surendra Engineering Corporation Ltd. (the Company) under the Companies Act, 1956.

2 On 5th May, 2016 while admitting the petition, this Court was pleased to pass the following order :

. Heard Learned Counsel for the parties.

2. This is a Company Petition for winding up of the 1st Respondent-Company. There is also a Contempt Petition, which is moved simultaneously, alleging willful disobedience of undertakings given to the Court, which have been recorded in several orders passed by this Court. These orders do indicate that despite several undertakings, which have been recorded in orders dated 12 October 2015, 23 November 2015 and 23 February 2016, there is no payment of dues of the Petitioner. This Court has also found that prima facie there is a case for proceeding in its contempt jurisdiction against the Respondent-Company. Accordingly, a Rule and Notice are issued in the companion Contempt Petition.

3. There is also a provisional Liquidator appointed of the 1st Respondent-Company.

4. All this shows that there is an imminent case for admission of the Company Petition. Accordingly, the following order is passed :

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3 It will be useful to reproduce orders dated 12th October, 2015, 23rd November, 2015 and 23rd February, 2016. Order dated 12th October, 2015 reads as under :

Learned Counsel for the Respondents, on instructions of Respondent No.2, who is a Director of Respondent No.1, undertakes to the Court, that an amount of Rs. 3 crores shall be paid by the Respondent Company to the Petitioner in partial discharge of its claim latest by 20 November 2015. Learned Counsel for the Petitioner, in turn, on instructions of the Proprietor of the Petitioner undertakes to the Court that upon receipt of this amount within a period of fifteen days, the Petitioner shall submit documents, a list whereof is referred to in an email addressed by the Respondent to the Petitioner on 3 October 2015. After receipt of these documents, the entire balance liability, the quantum whereof is still subject to the discussions between the parties and which may if the discussions are unsuccessful have to be determined by this Court, shall be paid by the Respondent to the Petitioner. Stand over to 23 November 2015.

Order dated 23rd November, 2015 reads as under :

1. The petitioner has a claim of Rs.6.95 crores against the respondent company. Time was taken from time to time on the ground that settlement talks are on. On 14.9.2015 it was told to the Court that the parties have arrived at settlement terms to the effect that upon the petitioner submitting the documents which are required by the principals of the respondent-company for clearing the payments, the respondent shall settle the entire liability within two months. These directions were to be reduced by the parties in writing and presented to the Court on the next date. The counsel for the respondents also submitted that he had the requisite instructions from respondent no.2 who is the Managing Director of respondent no.1- company and shall be furnishing an appropriate undertaking to pay the amount on the next occasion. The matter was stood over to 5.10.2015 and later to 12.10.2015. On 12.10.2015 the learned Counsel appearing for the respondents on instructions from respondent no.2 who is a Director of respondent no.1 gave an undertakings to the Court that an amount of Rs.3 crores shall be paid by the respondent company to the petitioner in partial discharge of its claim latest by 20.11.2015. Based on that undertaking, the counsel appearing for the petitioner in turn, on instructions from the Proprietor of the petitioner gave an undertaking to the court that within 15 days of receipt of this amount, the petitioner shall submit documents, a list whereof is referred to in an e-mail addressed by the respondents to the petitioner on 3.10.2015. It was also submitted that after receipt of the documents the entire

balance liability, the quantum whereof is still subject to the discussions between the parties and which may if the discussions are unsuccessful has to be determined by this court, shall be paid by the respondent company to the petitioner. The matter was stood over to today.

2. Today the counsel appearing for the petitioner states that the respondents have committed a breach of the undertaking given to this court on 12.10.2015 in as much as no amount has been paid. The counsel appearing for the respondents states that they will need time till January-2016. The counsel appearing for the petitioner strongly objects to any time being granted and submits that an undertaking was given which has been breached and an attempt is being made only to extend time and presses for ad-interim reliefs in terms of prayer clauses-(b) and (c).

3. In my view, the petitioner is justified in pressing for the ad-interim reliefs in as much as though the final amount is yet to be determined, indisputably a sum of Rs.3 crores is certainly payable. The respondents have also committed breach of the undertaking given to this court.

4. In view thereof, it is quite evident that the respondents are unable to pay its debts. Be that as it may, should the respondents wish to settle the matter, certainly they should be given an opportunity and it is open for the respondents to make the payment but in the meantime, the petitioner's apprehension that the respondents may create 3rd party rights of their assets, is justified.

5. In the circumstances, ad-interim relief in terms of prayer clauses-(b) and (c) are granted. Prayer clauses-(b) and (c) read as under :-

“(b) that pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to appoint the Official Liquidator, High Court, Bombay as the provisional liquidator of the Respondent Company and to take charge of the control of the Respondent company its affairs, assets, books of accounts etc.;

(c) that pending admission of the petition, this Hon'ble Court be pleased to pass an order of injunction restraining the Respondent Company its directors, officers, employees, servants, agents from directly or indirectly alienating transferring, selling, encumbering, dealing with, disposing off and/or creating third party rights on any of the assets or movable or immovable properties of the Company.”

Order dated 23rd February, 2016 reads as under :

1. Mr.Daver, counsel appearing for respondent nos.1 and 2 states that they will file an affidavit in reply and serve a copy thereof upon the petitioner within two weeks from today.

2. In the meanwhile, Mr.Daver, on instructions from respondent no.2, who is present in Court, states that respondent no.2 understands that the undertaking as recorded in the order dated 12.10.2015 was given

by the company and also on his behalf and the grievance of Mr.Khandeparkar that respondent no.2 should not take a stand that the undertakings is given without his instructions is unfounded. Mr.Daver states that respondent no.2 will abide by the undertaking given to the Court.

3. Mr.Daver, further undertakes on behalf of respondent no.2 that respondent no.2 will pay a sum of Rs.1 crore to the petitioner on or before 3.03.2016. It is made clear that this undertaking is being considered as an undertaking in addition to the undertaking already given to the Court and breach of this fresh undertaking, will be considered as another instance of contempt of Court.

4. On the next date, respondent no.2 shall remain present in Court. Alongwith the affidavit in reply, respondent no.2 shall also file copies of Bank Statements of last 12 months in respect of all bank accounts standing in (a) his name singly and/or jointly with other party and (b) the name of respondent no.1.

5. Stand over to 7.03.2016.

6. In the meanwhile, the petitioner to remove office objections and get the petition numbered.

4 On 14th July, 2016 in contempt petition no.6 of 2016, this Court was pleased to pass the following order :

1. This Contempt Petition has been filed seeking a declaration that the Respondents/Contemnors have rendered themselves liable for punishment, having committed contempt by willfully violating the undertakings given to this Court, recorded in the order dated 12th October 2015.

2. When this Contempt Petition came up for admission, this Court, by its order dated 16th March 2016, was prima facie satisfied that contempt had been committed by the Respondents and therefore issued rule as well as Notice under Rule 9(1) of the Contempt of Courts (Bombay High Court) Rules 1994. This Notice was served upon Respondent No.1 Company as well as Respondent No.2 who is present in Court today. This Contempt Petition has now come up before me for hearing and final disposal.

3. After the issuance of the show cause notice, Respondent Nos.1 and 2 have filed an affidavit tendering an unconditional apology to this Court and stating that they have absolutely no intention to flout any undertaking given to this Court. As far as breaching the undertaking given to this Court is concerned, the learned counsel appearing on behalf of the Respondent Nos.1 and 2 has not disputed the same.

4. On going through the record, I find that on 12th October 2015, an undertaking was given to this Court that an amount of Rs.3 crores shall be paid by the Respondent Company to the Petitioner in partial discharge of its claim, latest by 28th November 2015. Thereafter, in this very Contempt Petition, on 23rd February 2016, a further undertaking was given on behalf of Respondent No.2 that Respondent No.2 will pay a sum of Rs.1 crore to the Petitioner on or before 3rd March 2016. This order also recorded that this undertaking to pay Rs.1 crore was in addition to the undertaking already given to the Court earlier and breach of this undertaking would be considered as an additional instance of Contempt of Court. Even this undertaking was breached and no payment was made to the Petitioner.

5. It is in this light that this Court by its order dated 16th March 2016 was of the prima facie view that the Respondents are guilty of breaching the undertakings given to this Court. Today when I inquired from the Respondents as to how much time would require to make the payment, the learned counsel for Respondent No.1 and Respondent No.2, on instructions from Respondent No.2, stated that Respondent No.1 and Respondent No.2 undertake once again to pay a sum of Rs.1 crore to the Petitioner on or before 20th August 2016. It is made clear that this undertaking is in addition to all earlier undertakings given by the Respondent No.2 for and on behalf of himself as well as Respondent No.1. If this undertaking is breached, it will be considered as another instance of Contempt of Court.

6. In order to ensure compliance of this undertaking, this Contempt Petition is stood over to 25th August 2016. It is made clear that if the amount of Rs.1 crore is not tendered to the Petitioner on or before 20th August 2016, this Contempt Petition shall be heard finally.

5 Therefore, once again an opportunity was given to the company to make the payments. Mr. Khandekar, counsel for petitioner states that not a penny has been received in the last two years or more.

6 Petitioner has filed an affidavit of one Prashant Girkar affirmed on 2nd February, 2018 confirming advertising the petition in Free Press Journal and Navshakti on 2nd February, 2018 and the returnable date is shown as 15th February, 2018 and also in the Maharashtra Government Gazette for the period 1-7 February, 2018 at serial no.M-17315. The

Company Department has filed a service report dated 21st June, 2016 stating that the notice under Rule 28 of the Companies (Court) Rules, 1959 has been delivered.

7 In view of the various orders quoted above, it is quite obvious that the company is indebted to petitioner, is unable to discharge its debts, is commercially insolvent and requires to be wound up.

8 In the circumstances, company petition is allowed in terms of prayer clause – 16.1 (a) which reads as under :

16.1. That respondent company be wound up as by and under the directions, supervision and control of this Hon'ble Court as per the provisions of Section 433 (e) (f), 434 of the Companies Act, 1956 of the Companies Act, 1956;

(a) that this Hon'ble Court be pleased to appoint an Official Liquidator, High Court or some other fit person as the Official Liquidator of respondent company with all powers under the provisions of the Companies Act, 1956 and be directed to take immediate charge and control of respondent company including all its assets, books and accounts and movable and immovable properties.

9 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.

10 Company petition accordingly stands disposed. All interim applications also stand disposed.

(K.R. SHRIRAM, J.)