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

COMPANY PETITION NO.774 OF 2015

Checkmate Services Pvt. Ltd.)....Petitioner
V/s.
Essar Agrotech Ltd.)....Respondent

Mr.Dharam Jumani a/w Ms.Debashree Mandpe i/by Ganesh and Co. for petitioner.
Mr.Ravikiran Tribhuvan i/by Omkar C.Geedh for respondent.

CORAM : K.R.SHRIRAM,J
DATE : 5.1.2018

P.C.:-

1 This petition is filed for winding up of respondent-company Essar Agrotech Ltd. on the ground that respondent company is indebted to petitioner, unable to discharge its debts and is commercially insolvent.

2 When the petition was taken up for admission on 20.4.2017, this court was pleased to pass the following order :-

> *"1. Learned counsel appearing for the Petitioner states that the petition is served upon the Respondent. Petitioner has filed affidavit of service dated 25.8.2015. The said Affidavit of service is taken on record. However, none appears for the Respondent.*
>
> *2. By this Petition, the Petitioner seeks winding up of the Respondent on the ground that the Respondent is unable to pay its debts. The Petitioner had entered into two Agreements with the Respondent both dated 4.9.2012 for*

providing security services to the Respondent on the terms and conditions recorded in the two Agreements. The Petitioner provided the security services to the Respondent under the said two agreements and raised various invoices during the period from 1.9.2012 to 31.8.2013 in the sum of Rs.49,78,176/-.

3. Learned counsel for the Petitioner invited my attention to the invoices annexed to the petition. My attention is also invited to the emails dated 24.5.2014 annexed at page 44 and 45 of the Company Petition received from the Respondent to the Petitioner stating that the Respondent would start paying the dues of the Petitioner from June 2014. By an email dated 20.11.2013 the Respondent informed the Petitioner that it will start paying dues of the Petitioner from December 2013 onwards. He further submits that inspite of acknowledgment of the liability and assurances of the respondent, no amount was paid by the Respondent to the Petitioner.

4. The Petitioner through its Advocate issued a statutory notice dated 21.8.2014 to the Respondent. The said notice was duly served upon the Respondent at its Registered office address. The Respondents vide its Advocate's reply dated 13.9.2014 admitted execution of the two Agreements entered into between the parties. In the said reply, the Respondent however, contended that the total invoices raised by the Petitioner till date was Rs.2,67,38,765/and the Respondent had made total payment of Rs.2,26,79,272/to the Petitioner. It was further alleged that the outstanding amount after the aforesaid payment was Rs.40,52,348/which was on account of various nonfurnishing of the documents in support of the invoices raised by the Petitioner.

5. The Petitioner vide its Advocate reply dated 11.11.2014 denied the said allegations made by the Respondent under their letter dated 13.9.2014. and further denied that any details were not furnished by the Petitioner to the Respondent. The Petitioner once again called upon the Respondent to pay the dues of the Petitioner.

6. As per the Company/LLP Master Data issued by the Registrar of Companies the last Annual General Meeting of the Respondent was held on 30.9.2013 and the last date of Balance Sheet filed was on 31.3.2013. A perusal of the record clearly indicates that the execution of the two Agreements was not in issue. Though the Respondent gave reply to the statutory notice vide its Advocate letter dated 13.9.2014 the Respondents has admitted that sum of Rs.40,52,348/only is outstanding. However, the said amount is not paid on account of nonfurnishing of alleged documents. All these allegations of the Respondent have been denied by the Petitioner by its Advocate s letter dated 11.11.2014. A perusal of the two emails to which my attention was drawn by the learned counsel for the Petitioner and more particularly of 24.5.2014 and 28.11.2013 clearly indicates that the stand taken by the Respondent in the reply to the statutory notice is contrary to those two emails thereby admitting the liability of the Respondent for the entire amount and assurances to make the payment to the Petitioner.

7. No affidavit in reply is filed by the Respondent to this Petition. Today, none appears for the Respondent when the matter is called out. Averments made in the Petition are deemed to have been admitted.

8. A perusal of the documents annexed to the Petition would itself show that the Respondent has admitted its liability and has failed to pay the dues of the Petitioner. In my view, the Respondent is heavily indebted and is unable to pay its debts and is commercially insolvent.

9..........”

3 Petitioner has filed affidavit of one Tejas V.Nakti, affirmed on 9.5.2017 confirming publication in Maharashtra Govt. Gazette, `Free Press Journal' and in `Navshakti'. Service report filed by the

company department dated 29.5.2017 also confirms that notice under Rule 28 of the Company (courts) Rules has been served by R.P.A.D upon respondent-company.

4 After the petition was admitted, respondent company entered appearance through advocate Omkar Geedh on 22.6.2017. No affidavit in reply has been filed. The averments in the petition therefore, are uncontroverted and will have to be considered as admitted.

5 When the matter was listed yesterday i.e., on 4.1.2018, at the request of respondent's Advocate, it was stood over to today. Today, respondent's counsel made a statement that the respondent admit that amounts are owed to petitioner but according to respondent the amount is not Rs.49,78,176 but Rs.40,52,348/- only. This has been considered by this court at the time of admission of the petition and rejected. The counsel was asked whether the company will make the payment to petitioner and the counsel replied in the affirmative but said that payment will be made over in 12 months period.

6 Mr.Jumani for petitioner strongly opposed the suggestion

and rightly so because the invoices for which these amounts were payable, were raised between 1.10.2012 and 1-2.9.2013. Mr.Jumani pointed out that as recorded in the order dated 20.4.2017, respondent company has vide its e-mail dated 20.11.2013 and 24.5.2014 admitted its liability for the amount claimed in the petition but still for almost 4 & ½ years, have chosen not to pay.

Therefore, to give a chance to respondent company, this court even suggested that 50% amount to be paid today and balance 50% amount to be paid within one week from today. Mr.Tribhuvan appearing for respondent company stated it was not possible.

7 The Apex Court in [1]***IBA Health (India) Pvt .Ltd. Vs. M/s.Info-Drive Systems Sdn.Bhd*** has held in paragraph nos.24 and 25 as under :-

> *"24. The 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 lliability, 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*

1 (2010) 10 Supreme Court Cases 553

is undisputedly owing, thenit 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 opportunity on the liquidation application to rebut that presumption ;

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 characterised as a stand alone ground."

8 It is an indisputable fact that the amount as claimed by the petitioner of Rs.49,78,176/- is due and payable by the company to petitioner. In any event, as per the company, sum of Rs.40,52,348/- is due and payable. The company not having discharged its debts and it is not the company's case either that company is financially solvent, the fact that the company has chosen not to pay this amount for more than 4 & ½ years and counsel is still seeking 12 months to pay the

admitted amount, clearly indicates that company is commercially insolvent.

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

> *"(a) that the Respondent Company namely Essar Agrotech Limited, having its registered office at Essar House, 11 KK Marg, Mahalaxmi, Mumbai-400 034 be ordered to 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) the Official Liquidator, High Court, Mumbai or some other fit and proper person be appointed as the Liquidator of all the business, assets, properties, income and books of accounts of the Respondent Company with all powers under the provisions of the Companies Act, 1956"*

10 Official Liquidator to take steps immediately without waiting for Notification.

11 Petition accordingly, stands disposed.

(K.R.SHRIRAM,J)