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

COMPANY PETITION NO. 675 OF 2014

New India Infra Buildtech Limited ...Petitioner
Versus
M/s. Doshion Water Solutions Pvt. Ltd. ...Respondent
WITH
COMPANY PETITION NO. 871 OF 2014

Rishabh Metals And Chemicals
Private Limited ...Petitioner
Versus
Doshion Water Solutions Private Limited ...Respondent
WITH
COMPANY PETITION NO. 460 OF 2015

Leaseplan India Pvt. Ltd. ...Petitioner
Versus
M/s. Doshion Water Solutions Pvt. Ltd. ...Respondent
WITH
COMPANY PETITION NO. 1026 OF 2015

Gowrishanakar Chemicals Pvt. Ltd. ...Petitioner
Versus
Doshion Water Solutions Pvt. Ltd. ...Respondent
WITH
COMPANY PETITION NO. 121 OF 2016

M/s. Monarch Corporation ...Petitioner
Versus
Doshion Water Solutions Pvt. Ltd. ...Respondent
WITH
COMPANY PETITION NO. 432 OF 2016

Tata Capital Financial Services Ltd. ...Petitioner
Versus
Doshion Water Solutions Pvt. Ltd. ...Respondent
WITH
COMPANY APPLICATION NO. 371 OF 2016

IN
COMPANY PETITION NO. 432 OF 2016

Tata Capital Financial Services Ltd. ...Petitioner
Versus
Doshion Water Solutions Pvt. Ltd. ...Respondent

Mr. Cyrus Ardeshir a/w. Ms. Benedicta Lobo i/b Katariya and Associates for petitioner in CP/432/2016.

Mr. Ranjit Basu for petitioner in CP/675/2014.

Mr. Vedchetan Patil a/w. Ms. Radha Agrawal i/b Boduve Peter Resu for petitioner in CP/871/2014.

Mr. Ashok Singh for petitioner in CP/460/2015.

Mr. Nagaraj U. Hiregange for petitioner in CP/1026/2015.

Mr. Ashish Pyasi a/w. Ms. Pragya Khaitan and Mr. Umang Thahar i/b Dhir and Dhir Associates for petitioner in CP/121/2016.

Mr. Shailesh Kumar for respondent in CP/432/2016.

Mr. Vijay M. Waghela for respondent in CP/675/2014, CP/871/2014, CP/460/2015, CP/1026/2015 and CP/121/2016.

Shri Rakshit Doshi, Director of the company present.

CORAM : K.R.SHRIRAM, J.
DATE : 16TH MARCH 2018

P.C.

COMPANY PETITION NO. 1026 OF 2015

1. This petition is filed for winding up of the company-Doshion Water Solutions Private Limited (the company) on the ground that the company has indebted to petitioner, is unable to discharge its debts and is commercially insolvent.

2. It should be noted that apart from this petition, there are six other company petitions listed filed by different creditors. Company Petition No.432 of 2016 is by one secured creditor which has an arbitral award in its favour for approximately Rs.7 crores.

3. Petitioner, in this case, is an unpaid vendor. Petitioner is engaged in the business of manufacture and sale of activated carbon and other allied services. The company had approached petitioner and placed purchase order bearing No. Local/516 PO date : 06/09/2012 for activated carbon of different sizes for a total amount of Rs. 14,82,293/-. The purchase order provided for 60 days credit. The goods were supplied by petitioner and petitioner raised an invoice bearing No.2012035 dated 22nd September 2012 for Rs.14,53,228/-. The invoice also provided that overdue bills will attract interest at 18% per annum. There is a notation in the invoice “Sale under Form H”. Form ‘H’ is a declaration to be filed by the company with the Central Sales Tax Authority because the goods supplied by petitioner was to be used in goods to be exported by company and the company could claim sales tax exemption. At Exh.'G' to the petition is a copy of Form 'H' filed by the company on or about 19th December 2013 to which is annexed as Annexure ‘A’ a statement/declaration containing transaction details in relation to Form ‘H’. It indicates the name in the column 'purchase dealer to

whom issued' as 'the company' herein and 'petitioner' is shown as seller and the details are Invoice No.2012035 dated 22nd September 2012 for Rs.14,53,228/- issued by petitioner. During the course of hearing, Shri Waghela, counsel for the company, on instructions from Shri Rakshit Doshi, Director of the company who is present in Court, agreed that this Form 'H' was filed by the company and contents thereof are correct.

4. It is the case of petitioner that despite repeated reminders, company did not make the payments though the company from time to time sent emails acknowledging its liability. Copies of the emails could be found at Exh.'F' to Exh. 'F5', respectively. An attempt was made by the company to wriggle out of these emails by stating that Anwar Malik who is the sender of emails was employed in another company 'Fivebro' which is a sister concern/group company of the company and therefore is not binding on the company. It has to be noted that the email ID used by Anwar Malik is 'exim@doshion.com'. There are other addressees also mentioned in these emails, i.e., 'Sanat' (sanat@doshionveolia.com), ritu.patel@ doshionveolia.com. Therefore, it is quite clear that all these persons, who acknowledged the liability of the company, were sending/receiving mails on behalf of the company. Even for a moment, if we discard these emails, the fact that the company has filed Form ‘H’ with the Sales Tax Authority

indicating therein the details of transaction with the invoice raised by petitioner itself confirms the fact the company owes to petitioner the principal amount of Rs. 14,53,228/-.

5. To the statutory notice dated 10th November 2013 that was sent by petitioner through its advocate, reply received is only a holding reply. In the reply dated 5th December 2013, though the company stated “Detail notice reply will be sent within 21 days as we are collecting information and documents from concerned department”, no detailed reply has been sent. 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, 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.

6. In the affidavit in reply to the petition filed by one Hemang A. Jinwala affirmed on 25th September 2017, for the first time and obviously as an afterthought, the company is taking the defence that petitioner has not complied with the strict conditions of the purchase order because

petitioner was to deliver the goods on or before 12th September 2012 and the goods were delivered only on 22nd September 2012 and that too behind the back of the company. It is stated and I find it risible, that the goods were forcefully unloaded by the Transporter at Ahmedabad on 22nd September 2012 which resulted into loss from Foreign Customer. The company's defence is, because the goods were delivered after the cut off date, it resulted into loss. If that is so, then the company, in order to return those goods, may have called upon petitioner to take away the goods because the company had rejected the goods. On the contrary, the company consumed those goods, made money out of the goods and also filed form 'H' claiming sales tax benefits.

The next defence is that Mr. T.N. Swamy who has declared the petition has no authority. Petitioner has annexed to the petition, a certified copy of a Resolution passed on 2nd July 2015 authorizing Mr.T.N. Swamy to commence legal proceedings including filing this company petition. Therefore, this defence of the company also is baseless.

7. The next defence is because petitioner delivered late, the company has a counterclaim against petitioner. This, like the earlier point, is also a bald statement. First of all, this defence is baseless because unless damages are determined by a competent court, the company cannot claim to be

entitled to it. Further, there is no correspondence alleging that petitioner is liable to pay damages and there is no correspondence to even allege against petitioner that the goods were supplied late. In fact, to the rejoinder is annexed a copy of Order Acceptance, dated 11th September 2012, accepted by the company, which provides delivery period to be 'within four weeks of receipt of purchase order'. Four weeks from 11th September 2012 would be 9th October 2012. Admittedly, the goods have been delivered on 22nd September 2012, which is almost 18 days earlier. Therefore, this defence of the company also is baseless.

The next point raised is that the company is having a paid up capital of Rs.14,48,80,000/- and has employees and several Government Contracts compared to the alleged claim of Rs.14,53,228/- in this petition. There is nothing on record to indicate the financial strength of the company. In the seven petitions listed above, the claims exceed Rs.8 crores. Even assuming for the sake of argument, the company financially is very strong, still as already held by the Apex Court in ***IBA Health (India) Pvt .Ltd. Vs. M/s. Info-Drive Systems Sdn.Bhd*** [1] in paragraph nos.24 and 25 that cannot be a defence. Paragraphs 24 and 25 read 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*

1 (2010) 10 Supreme Court Cases 553

> *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 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. Another line of defence raised by Mr. Waghela, during the course of submissions, on instructions from Shri Rakshit Doshi, is that amount is payable to petitioner but according to company the amount was not paid because the company's accounts were frozen by the Income Tax Authority.

9. There is an order dated 16th March 2017 passed in Company Petition

No. 871 of 2014, in which it is noted *".....Only defence raised in the Affidavit in Reply is that the Income Tax Department has issued a notice under Section 226(3) of the Income Tax Act, 1961 on 7th February 2017 and has seized the bank account of the respondent with the Union Bank of India, Ashram Road Branch".* But there is no explanation as to why before 7th February 2017, for more than five years (invoice is dated 22nd September 2012), the company did not make the payment due to petitioner. Even today, except stating that the company has all intentions to pay to all the creditors, there is nothing coming forth from the counsel for the company. Repeatedly, the Court asked the counsel for the company to take instructions from the Director of the Company who is present in Court, to make some concrete statement, but Shri Waghela on instructions, stated that they are unable to make any statement today because the company is unsure as to when it will be able to make payment and did not want to run the risk of giving an undertaking which may be difficult to comply..

10. In the circumstances, it is rather obvious that the company is unable to discharge its debt and is commercially insolvent, and requires to be wound up.

11. The petition has been advertised in two local newspapers, viz., (i)

Free Press Journal (in English); and (ii) Navshakti (in Marathi) in Company Petition No. 460 of 2015. So also in the Maharashtra Government Gazette. In the petition at hand, on 5th December 2017, when the petition was admitted, the Court has noted *"Since, other petitions have been admitted and notice has been advertised in two local newspapers and Maharashtra Government Gazette, I am not directing petitioner in this petition to give notice once again........... Counsel for Respondent waives service of Notice under Rule 28...............*" .

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

> *"(a) That the above named company DOSHION VEOLIA WATER SOLUTIONS PRIVATE LIMITED be wound up under Section 433(e) & 433 (f) of the Companies Act, 1956 under the directions of this Hon'ble Court.*
>
> *(b) That the Official Liquidator, High Court, Bombay may be appointed as the Liquidator of the above named company of all its assets, properties, bank accounts and book-debts with necessary powers under the Companies Act I of 1956."*

13. The official liquidator to take further steps upon receiving a copy of this order authenticated by the Associate of this Court without waiting for any formal notification.

14. Company Petition accordingly stands disposed.

15. Mr.Waghela again stated, on instructions from Mr. Rakshit Doshi, the company has all intentions to pay all creditors. Some of the petitioners' counsel stated the offer their respective clients have received is to accept payment of less than 50% of the principal claimed.

Notwithstanding this order being passed, at the request of Shri Waghela, even though there is nothing to ascertain the company's ability to pay, time upto 31st March 2018 is given to pay to off/secure the claim of the petitioners. The official liquidator will take possession only after 31st March 2018.

COMPANY PETITION NO. 675 OF 2014
WITH
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COMPANY PETITION NO. 121 OF 2016
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COMPANY PETITION NO. 432 OF 2016

16. In view of the order passed today in Company Petition No.1026 of 2015, respondent company - M/s. Doshion Water Solutions Pvt. Ltd. has been ordered to be wound up.

17. Therefore, above petitions also stand disposed with liberty to petitioners to lodge their proof of debt with the Official Liquidator, who shall consider the same in accordance with law.

18. If the order dated 16th March 2018 in Company Petition No.1026 of 2015 winding up respondent company – M/s. Doshion Water Solutions Pvt. Ltd. is recalled or set aside in appeal, liberty is given to other petitioners to revive their petitions and move once again for necessary orders including winding up of respondent company.

COMPANY APPLICATION NO. 371 OF 2016
IN
COMPANY PETITION NO. 432 OF 2016

19. In view of the order passed in Company Petition No.1026 of 2016, the above application does not survive and accordingly stands disposed.

(K.R. SHRIRAM, J.)