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

COMPANY PETITION NO.390 OF 2016

M/s. Technotube Engineering Company ….Petitioner

Vs.

M/s. VKS Projects Limited ….Respondent

Mr. Dhiren Akbari for petitioner.
Ms. Heena Shaikh i/b. Ms. Rohini Amin for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 3rd MAY, 2018

P.C.:

1 This petition is for winding up of respondent company - M/s. VKS Projects Limited (the company) under the provisions of the Companies Act, 1956 on the ground that the company is unable to discharge its debts and is commercially insolvent.

2 On 27th February, 2018 while admitting the petition, the Court was pleased to pass the following order :

> *1. This petition is filed for winding up of the company VKS Projects Limited (the said company) on the grounds that the company is unable to discharge its debts and commercially insolvent.*
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> *2. It is the case of petitioner that pursuant to a purchase order dated 28.3.2013, the company agreed to purchase from petitioner various quantities of SS, CS & GI pipes of a total value of Rs.16,16,861/-. Petitioner supplied the goods and raised an invoice dated 26.3.2013. By a letter dated 16.4.2013 petitioner submitted the invoice and also test certificate for the goods supplied. It is stated that the company issued a cheque for Rs.17,49,266/- which came to be dishonoured due to payment being stopped by the company. Thereafter, by a letter dated 17.9.2013 the company assured petitioner that the company shall clear all outstanding payments against material supplied in the sum of Rs.12,50,000/- by end of October2013. It should be noted that sum of Rs.5,00,000/- was paid by the company on or about 26.7.2013. As the payments did not come forth, petitioner caused a*

notice dated 2.12.2013 to be issued to the company in accordance with the provisions of Companies Act 1956. There was no response and hence, the petition came to be filed.

3. The company has chosen not to reply to the statutory notice. 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.

4. The company has filed an affidavit in reply of Dr.V.K.Sukumaran affirmed on 6.9.2017. The company does not dispute the fact that it had issued a cheque for Rs.17,49,266/- but according to the company the purchase order required a Post Dated Cheque for 100% of the value to be given and the company had issued stop payment instructions because during the inspection, the materials to be supplied by petitioner were found to be defective in dimension, quality and usual appearance and according to the company the material as mentioned in the invoice was never supplied. It should be noted that there is not a single correspondence annexed to the affidavit in reply and counsel for the company could not even point out. If what company says is to be accepted, certainly there would have been some communication from the company to petitioner informing petitioner that goods have not been supplied and therefore, post dated cheque should be returned.

5. So far as the payment of Rs.5,00,000/- to petitioner, it is stated in the affidavit in reply that since petitioner was in financial difficulty, looking to the long business relationship with petitioner, the company paid the said amount so that petitioner could arrange the material for inspection again. Again there is no communication from the company to petitioner.

6. The next point is that when the petition was filed, Reference of the company was pending before the Board of Industrial & Financial Reconstruction (BIFR) and as petitioner had not taken leave of the BIFR before filing this petition, this petition is not maintainable and has to be dismissed. Again there is no evidence whatsoever. At the same time, it should also be noted that to the affidavit in reply is annexed a copy of the Suit bearing (Lodging) No.9299 of 2017 filed by the company in the Bombay City Civil Court, at Bombay, for various reliefs mentioned therein. One of the documents annexed to the said Suit is confirmation of account for the period 1.4.2013 to 31.3.2014 issued by the company to petitioner in which the company has confirmed that an amount of Rs.12,49,265.52/- is payable by the company to petitioner.

> *7. Therefore, in my view, the defences raised by the company are all after thoughts, moonshine, bogus and unsustainable. The petition requires to be admitted. Hence, the following order is passed :*
>
> *ORDER*
>
> *(i) The Company Petition is admitted and made returnable on 3.5.2018 ;*
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> *(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 noncompliance 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) A copy of this order shall forthwith be served on the Company by hand delivery/Registered Post AD/email/speed post by the Advocate for petitioner ;*
>
> *(v) Counsel for respondent waives notice under Rule 28 of Company (Courts) Rules, 1959.*
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> *8. Notwithstanding the above order, I am still inclined to give one opportunity to company to avoid winding up. Respondent shall deposit a sum of Rs.12,49,266/- with Prothonotary & Senior Master, High Court, Bombay, within two weeks from today. If the said amount is deposited, the petition will stand disposed with liberty to petitioner to take such appropriate proceedings as advised. If the amount is not deposited, then petitioner may go ahead and advertise the petition. The time prescribed in paragraph7(ii) will commence after two weeks period is over.*

3 Mr. Akbari, counsel for petitioner states that despite opportunity given by this Court in its order dated 27th February 2018, the company has not deposited the amount of Rs.12,49,266/-. It should be noted that no new case has been made out by the company by filing any further affidavit in

reply.

4 Petitioner has filed an affidavit of one Bipin Gandhi affirmed on 2nd May, 2018 confirming advertising the petition in Free Press Journal and Navshakti on 1st April, 2018 and also in the Maharashtra Government Gazette for the period 19th - 25th April, 2018 at serial no.M-1814. Notice under Rule 28 of the Companies (Court) Rules, 1959 has been waived at the time of admission.

5 The defence of the company raised in the affidavit in reply has already been dealt with in the order passed on 27th February, 2018 while admitting the petition. The defence raised by the company has been dismissed as afterthoughts, moonshine, bogus and unsustainable.

6 I have considered the petition, the documents annexed thereto and also heard Mr. Akbari, counsel for petitioner. I am also satisfied that the company is indebted to petitioner, is unable to discharge its debts, is commercially insolvent and requires to be wound up.

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

> *(a) Pass appropriate orders directing respondent company be wound up under the provisions of Section 433 (e), 434 (1) (a) and 439 of the Companies Act, 1956 for its inability, neglect and failure to pay and discharge its admitted debs and liabilities;*

(b) Appoint Official Liquidator, High Court of Judicature at Bombay as Liquidator of respondent company with all powers under the Companies Act, 1956/2013 including the power to take possession of all the assets, books of account, stock in trade, cash on hand, movable properties including furniture and fixtures as well as all immovable properties.

8 Official Liquidator to take further steps in accordance with law without waiting for any notification upon receiving an authenticated copy of this order, which Mr. Akbari states, will be forwarded within two weeks of the order getting uploaded. The counsel for petitioner is also directed to forward a copy of this order to National Company Law Tribunal for information.

9 Company petition accordingly stands disposed.

(K.R. SHRIRAM, J.)