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

COMPANY PETITION NO.434 OF 2016

M/s.Liang LIH Machine Co. Ltd.)….Petitioner
V/s.
M/s.Auram Machines (I) Pvt. Ltd.)....Respondent

WITH

COMPANY APPLICATION NO.637 OF 2017

Mr.Ankur Shah i/by Hemant Sethi for petitioner.
Ms.Priya Rambade a/w Mr.Aniket Worlikar i/by Deven Dwarkadas and Partners for respondent/applicant.

CORAM : K.R.SHRIRAM,J
DATE : 15.6.2018

P.C.:-

1 This petition is for winding up of the respondent company Auram Machines (I) Pvt. Ltd. on the grounds that the company is unable to discharge its debts.

2 At the time when the petition was admitted on 10.7.2017, the following order came to be passed :-

> *"1. This petition under Section 433(e), 434 read with Section 439 of the Companies Act, 1956 is filed for winding up of the respondent company, namely, M/s. Auram Machines (I) Pvt. Ltd.*
>
> *2. It is the case of the petitioner that at the request of respondent-company, the petitioner agreed to provide*

loan of USD1,00,000 as External Commercial Borrowings (ECB) to it. An agreement dated 09.07.2011 has been duly executed between the parties. In pursuance of the agreement, the petitioner provided the said ECB of USD1,00,000 to the respondent. The said agreement was subsequently amended on 18.02.2012 and the repayment of installments was rescheduled. The respondent, as per the terms of agreement and in compliance of its part of liability, in fact has repaid a sum of USD30,000 leaving behind the balance of USD70,000. As per the agreement, the petitioner is entitled to charge interest on the delayed payment and it is the case of the petitioner that as of 28.02.2015 the respondent is liable to pay USD70,000 with interest accrued thereon of USD585.80 to the petitioner. As the respondent did not pay the said amount, the petitioner issued statutory notice dated 02.11.2015. The respondent received the same and by its undated reply disputed its liability towards the petitioner.

3. As the respondent did not pay the amount due and payable, the petitioner filed the present petition on 07.06.2016. The petition is accepted on 23.08.2016 and in pursuance of the directions issued by the Company Registrar, the respondent was duly served by the notice of acceptance and affidavit of service dated 14.12.2016 has been filed to that effect. Despite service, none appears for the respondent.

4. I have perused the petition and the documents annexed thereto. The record indicates that by communication dated 01.01.2015, the respondent assured the petitioner that its ECB repayment will be effected by selling the assets of the company and it shall be as per the schedule. It further appears from the record that in reply to the statutory notice, the respondent for the first time raised a dispute about certain issues which are out of the scope of loan agreement i.e. there is passing off of trade-mark 'Auram KTK' and 'KTK' since 2005 and the petitioner is liable to pay damages to the respondent. It has thereafter put up a defence that there is a separate agreement for supply of certain goods

> *which the petitioner has defaulted and therefore the balance amount of repayment of loan of USD70,000 has been debited in the account of the petitioner. Prima facie, it appears that the defence as put up by the respondent is illusory, spurious, speculative and malafide. It further primafacie appears that, the defence of the respondent is not genuine and has been raised with a view to defeat the bonafide and legitimate claim of the petitioner. In view thereof, it prima facie appears that the respondent is unable to pay the debt of the petitioner and is commercially insolvent".*

3 At the outset, counsel appearing for the company stated that the fact that there was an External Commercial Borrowings (ECB) Agreement dated 9.7.2011 and that modified by agreement dated 18.2.2012 and the fact that the company received USD 1,00,000 and the company paid USD 30,000 by December-2014, is not disputed. The counsel stated that the balance amount of USD 70,000 is not payable to petitioner because various disputes have arisen and the company has counter claim against defendant.

4 Despite repeated opportunities given to the counsel for respondent to show the documents relating to so-called counter claim, and counsel stated that no suit even as on date has been filed against the company for the counter claim, no documents are shown. From the submissions that the counsel made, it is also evident that the

alleged counter claim that the company is claiming, which I will demonstrate, is nothing but an after thought, is a claim for damages. It is settled law that unless the claim is crystallized and there is a decree, it cannot be accepted as a defence to an admitted liability. In any event the fact is that the company has till date not filed a suit against petitioner claiming this so-called damages.

5 In my view, the defence taken by the company is illusory and bogus.

6 As per the loan agreement dated 9.7.2011 the company received US$ 100,000 which was to be repaid with interest @ LIBOR + 300 basis points per annum. Interest was to accrue on a daily basis on the outstanding balance of loan from time to time and was payable quarterly as per the schedule. Repayment of principal was payable after the receipt of the entire loan amount. Loan amount was to be repaid in 24 equal quarterly installments.

7 Parties entered into an amendment to the agreement dated 9.7.2011 whereby the repayment of interest and principal clauses came to be amended. It was agreed that repayment of interest will commence one year after the date of actual receipt of loan

amount by the borrower. Interest amount was to be paid from the dates as mentioned in the agreement. Repayment of principal amount will be commenced after the period of one year from the date of actual receipt of loan amount and the installment of repayment will be paid as mentioned therein.

8 By 30.11.2014, the company had repaid part of interest as well as principal amount. The interest paid was US$ 585.80 and the principal of US$ 30,000 was paid. The company did not pay the balance interest as well as US$ 70,000 or any part thereof. The counsel for petitioner Mr.Shah took me through various e-mails which are annexed to the petition from Exh.H to Exh.L.

In the e-mail dated 1.1.2015, the company has stated "Your ECB re payment will be effected by selling our assets (Office) and should be as per schedule".

9 In the e-mail dated 10.2.2015, from the company to petitioner, it is stated "Management has approached bank to get a working capital term loan (WCTL) for a period of three years to be utilised fully for repayment of ECB.......... The management is interested in selling a company office flat. The money available will be partly utilised for ECB repayment and........Request KTK to give

consent for reschedulment for the Repayment (as per RBI rules) uptill any of the above two options becomes effective. So that the company will not become defaulter in the eyes of RBI."

10 In the e-mail dated 25.2.2015 from the company to petitioner it is stated as under :-

"A private bank (HDFC bank Ltd) has principally agreed for such a WCTL....... and will additionally give the working capital term loan of 4 M INR for repayment of ECB........ asking for the permission from KTK for extension of ECB repayment (this additional) period. I have also asked you on telephone but no communication from your side on this........."

11 In the e-mail dated 3.4.2015 from the company to petitioner it is stated as under :-

"This has reference to foreign currency loan of 100000/- (hundred thousand) USD availed from our joint venture partner M/s.Liang Lhi Machinery Co. As per the terms of Agreement, the last instalment of Loan was due for repayment on 25/2/2015........."

"Eventually, the documentation work will be completed and the Company will be in a position to withdraw Working Capital Loan and repay the ECB. In view of this, we request you to kindly extend the repayment period of ECB by another two months, which will enable us to repay the same within the extended repayment period."

12 Subsequently, the company did not avail of the additional INR 4.00 Million working capital and did not pay the balance amount to petitioner. In view thereof, petitioner caused notice dated 2.11.2015 issued through its advocate to the company. In an undated reply, the company admitted that it has borrowed US$ 100,000 but raised bald defences as under :-

(a) Petitioner has stopped supplying components since November-2014 without providing any reasons though petitioner is one of the shareholder of the company since 2005 ;

(b) Petitioner permitted one KTK Machines India Pvt. Ltd. to use the petitioner's KTK brand name and the company had issued a notice to KTK Machines India Pvt. Ltd. alleging breach of intellectual property rights and demanded compensation of Rs.10 Million ;

(c) Petitioner has not supplied some material even after receiving 100% advance payment ;

(d) Company had manufactured certain components which petitioner had not taken delivery ;

(e) Due to various mis-deeds of petitioner complaint has been filed with Pune Commissioner of Police ;

(f) In view of the above, the company has debited amount of Rs.1 crore to petitioner's account and hence the repayment of last installment of US$ 70000 is under dispute and is adjustable against compensation receivable by the company.

13 The counsel was repeatedly asked to show documents to indicate that these claims arose before the admission of liability as per the e-mails mentioned earlier and to show some communication which would lend credence to what the company has alleged in the undated reply to the statutory notice. The counsel was unable to show any communication.

14 Even in the affidavit in reply to which some 350 pages of documents are annexed, there is nothing to indicate that the company has a genuine dispute as far as US$ 70,000 is concerned. The affidavit in reply does not contain any details except bald averment. Mr.Shah submitted that the company has filed a petition under Section 11 of the Arbitration & Conciliation Act 1996 in this court against petitioner and an application under Section 9 of the Arbitration and Conciliation Act 1996 in the District Court at Pune

under a share purchase agreement entered into between petitioner and one Devavrat A.Madhavi who has affirmed the affidavit in reply. Under the said agreement the said Devavrat Madhavi was to purchase 533766 shares that was held by petitioner at Rs.20/- each. Under the agreement the company was only a confirming party and there is no role otherwise of the company. The Share purchase agreement is dated 8.4.2014. There is nothing to indicate any alleged dispute between petitioner and the company under this agreement could be linked to the amount of US$ 70000 payable by the company to petitioner. Even after this agreement was entered into the company has paid more than $ 15000 to petitioner and has also acknowledged its liability repeatedly upto April-2015. Therefore, this defence of the company that it has commenced arbitration proceedings which was totally unrelated or unconnected to the ECB agreement, is nothing but an after thought and moonshine.

15 On record is the affidavit of one Sanjay Bhagwat affirmed on 28.8.2017 confirming advertising the petition in Maharashtra Government Gazette for the period 24-30th August 2017 at serial No.M-17165 and in `Indian Express' and `Loksatta', Pune edition on 12.8.2017. There is a service report dated 16.8.2017 filed by the company department confirming service of notice under Rule 28 upon

the company. Therefore, all these formalities have been completed and there is no impediment in disposing the petition.

16 I made it clear before dictating the order to the counsel for company as to whether the company would deposit a sum of Rs.50 lakhs which at today's conversion rate would be more than US$ 70000 with the Prothonotary & Senior Master, High Court, Bombay. Ms.Rambade for respondent was not even inclined to pay attention to the suggestion of this court and kept saying that they have a counter claim against petitioner.

17 In the circumstances, heard the counsel, perused the petition, affidavit in reply, rejoinder and the documents annexed thereto. In my view, company has no defence to the amount of US$ 70000 + interest payable to petitioner. Counsel was also unable to show any documents to indicate that the company's financial position was solvent.

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

> *"(a) That the winding up of M/s.Auram Machines (India) Private Limited, be ordered by and under the directions of this Hon'ble High Court under the*

> *provisions of the Companies Act, 1956 ;*
>
> *(b) That the Official Liquidator attached to this Hon'ble High Court or some other fit and proper person be appointed as the Liquidator of M/s.Auram Machines (India) Private Limited and all its assets, divisions, businesses, subsidiaries including assets of the subsidiaries, affairs, properties, bank accounts, books of accounts, vouchers, files, documents etc., with all powers under the provisions of the Companies Act, 1956."*

19 Official Liquidator to take further steps upon receiving an authenticated copy of this order from the advocate for petitioner without waiting for any notification appointing him as liquidator. The advocate for petitioner states that authenticated copy will be served within two weeks upon the order being uploaded.

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

21 Petition disposed accordingly.

22 Notwithstanding the above, I would still give a chance to the company to redeem itself by depositing a sum of Rs.50 lakhs with Prothonotary & Senior Master, High Court, Bombay, within 4 weeks from today. If this amount is deposited, on the Monday following the

date of deposit, the petition will be placed for directions. After the completion of 4 weeks, if not deposited liquidation proceedings will commence forthwith.

23 Accordingly, the Company Application No.637 of 2017 also stands disposed.

(K.R.SHRIRAM,J)