

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

COMPANY PETITION NO.761 OF 2015

M/s. Siemens Financial Services Pvt. Ltd.Petitioner

Vs.

M/s. Valecha Engineering LimitedRespondent

WITH

COMPANY PETITION NO.861 OF 2015

L and T Finance LimitedPetitioner

Vs.

M/s. Valecha Engineering LimitedRespondent

Ms. Anisha Nair i/b. India Law for petitioner in CP/761/2015.

Ms. S.I. Joshi a/w. Ms. Nikita Pawar i/b. S.I. Joshi and Co. for petitioner in CP/861/2015.

Mr. Prashant Phophale i/b. PMH Law for respondent.

CORAM : K.R.SHRIRAM, J.

DATE : 1st MARCH, 2018

P.C.:

COMPANY PETITION NO.761 OF 2015

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

2 On 7th April, 2017 when the petition was taken up for admission, the following order came to be passed :

By this petition, the petitioner seeks winding up of the respondent company on the ground that the respondent is unable to pay its debts.

2. The petitioner and the respondent had entered into a Master Rental Agreement dated 26th February, 2011 with the Rentworks India Private Limited and Addendum to the Master Rental Agreement wherein Rentworks India Private Ltd. by which the said company had agreed to provide certain equipments to the respondent on hire. By an assignment notice dated 10th April, 2012 the said Rentworks India Private Limited assigned the payments to the petitioner and also collateral/ security in terms of Master Rental Agreement and also the

secured documents. The said Rentworks India Private Limited and the petitioner entered into an agreement. The said parties executed other several documents in favour of the petitioner.

3. It is the case of the petitioner that the respondent committed various defaults of the rental payment of cost, charges and expenses and also interest at the rate of 24% per annum on the incurred monthly rental.

4. Learned counsel appearing for the petitioner invited my attention to various documents annexed to the company petition and would submit that since the respondent committed default in making payment of the rental and other payments, the petitioner issued demand notice upon the respondent on 14th August, 2014 calling upon the respondent to pay a sum of Rs.63,716,735/- with further interest at the rate of 24% per annum and suggested the name of other arbitrator.

5. The respondent issued two cheques to the petitioner in the sum of Rs.15,24,381/- dated 28th September, 2013 and cheque of Rs.16,43,181/- dated 10th April, 2014 which were dishonoured upon presentation by the petitioner.

6. The petitioner thereafter issued a statutory notice upon the respondent which was duly received by the respondent. The respondent however neither made any repayment nor replied to the said notice.

7. Learned counsel appearing for the petitioner invited my attention to the order dated 3rd October, 2016 passed by the learned arbitrator in the arbitral proceedings filed by the petitioner against the respondent thereby directing the respondent to surrender the equipments which were hypothecated in favour of the petitioner within a period of five weeks from the date of the said order and permitted the petitioner to take forcible physical possession of the equipments with the assistance of police if required if the equipments are not surrendered within the time prescribed inspite of the order passed as far back as on 3rd October, 2016. The respondent neither disclosed the location thereof nor surrendered the possession of those equipments.

8. Learned counsel for the petitioner also invited my attention to the order dated 22nd March, 2017 passed by this court in Company Petition No.1190 of 2015 thereby admitting the said company petition and directing the petitioner to advertise the said petition. He submits that there are several such other company petitions filed against the respondent. The respondent is heavily indebted and thus the petition shall be admitted.

9. Mr.Chitale, learned counsel appearing for the respondent on the other hand on instruction states that the respondent is ready and willing to surrender those equipments which were hypothecated and are described in the company petition in compliance with the order

passed by the learned arbitrator on 3rd October, 2016 and would disclose the location thereof to the petitioner. He submits that the petitioner can sell those equipments and release the sale proceeds and adjust the same against the dues of the petitioner.

10. Learned counsel further submits that the respondent is not disputing the principal amount demanded by the petitioner but has some dispute in respect of the interest. He submits that the respondent is ready and willing to pay the principal amount in reasonable installments. He submits that the respondent may commence first installment of repayment of Rs.15 lacs.

11. Learned counsel for the petitioner however on instruction states that in past also, the petitioner had granted extension to the respondent to pay the amount but the respondent committed default even at that stage. The petitioner is not agreeable to accept the installment of Rs.15 lacs. He submits that the claim of the petitioner as on the date of the petition itself comes to the tune of Rs.5,83,32,965/- and the petitioner is entitled to claim further interest at the rate of Rs.24% per annum from 14th March,2015 till payment or realization.

12. A perusal of the record indicates that the execution of the agreement between the parties is not in dispute. Learned counsel appearing for the respondent does not dispute atleast the principal amount which itself is in the sum of Rs.5,83,32,965/-. He also does not dispute that this court has already admitted Company Petition No.1190 of 2015 against the respondent. He however submits that the respondent has proposed to file a company application for recalling the said order dated 22nd March,2017 passed by this court in Company Petition No.1190 of 2015.

13. Since, there is no dispute that there are another 9 or 10 petitions pending against the respondent and the amount claimed in these petitions are also substantial and in view of the fact that there is no reply to the statutory notice and there is no affidavit in reply in the petition, I am of the prima facie view that the respondent is unable to pay its debts and is commercially insolvent. A perusal of the record indicates that the respondent is heavily indebted.

14. I, therefore, pass the following order :-

(a) The company petition is admitted and shall be advertised in two local newspapers viz. (1) "Free Press Journal" (in English) and (2) "Navshakti" (in Marathi) and also in (3) "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 non-compliance with this direction or with the Companies (Court) Rules, 1959.

(b) Company petition is made returnable on 19th June, 2017. The petitioner shall deposit a sum of Rs.10,000/- within three weeks

towards publication charges with the Prothonotary and Senior Master under the intimation to the Company Registrar, failing which the company 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 the petitioner.

(c) The respondent is directed to comply with the order passed by the learned arbitrator on 3rd October, 2016 by surrendering those equipments to the petitioner within two weeks from today. The petitioner would be at liberty to sell those equipments and to appropriate the sale proceeds against the dues of the respondent to the petitioner. It is made clear that the petitioner would be at liberty to sell those equipments by private treaty after giving an opportunity to the respondent to participate in the bid. If the bid submitted by the respondent is higher than any other bid, the said bid shall be accepted.

(d) At this stage, learned counsel appearing for the respondent on instruction states that the petitioner is at liberty to take possession of those equipments from the premises, the address whereof will be informed to the petitioner within two days from today. The respondent would not raise any objection in handing over the possession of those equipments to the petitioner. The petitioner may visit such premises for taking possession thereof.

(e) Insofar as equipments lying at the premises in Mumbai are concerned, the possession thereof shall be surrendered to the petitioner within one week from today.

(f) Insofar as equipments lying in the premises at Mathura are concerned, the same will be handed over within four weeks from today. The aforesaid statements made by the learned counsel for the respondent on instruction are accepted as and by way of undertaking to this court.

(g) If the possession is not handed over by the respondent as undertaken before this court, the petitioner would be at liberty to take forcible possession thereof with the assistance of the police if required.

(h) The petitioner shall intimate the date of the auction by private treaty to the respondent in advance.

(i) At the request of the learned counsel for the respondent, the order of advertising the petition is stayed for a period of two weeks from today. If any appeal is filed by the respondent, the papers and proceedings shall be served upon the petitioner in advance.

3 Time to advertise was extended by an order dated 4th January, 2018.

4 No reply has been filed by the company opposing the petition. Hence none of the averments in the petition has been controverted. There is no reply also given 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 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.

5 Ms. Nair, counsel for petitioner tenders an affidavit of one Narendra Ambre affirmed on 12th February, 2018 confirming advertising the petition in Free Press Journal and Navshakti on 8th January, 2018 and also in the Maharashtra Government Gazette for the period 1-7 February 2018 at serial no.M-17310. Company Department has placed on record a service report dated 29th May, 2017 confirming service of notice under Rule 28 of the Companies (Court) Rules, 1959 upon the company.

6 I have perused the petition, the documents annexed thereto and also heard Ms. Nair, counsel for petitioner. I am also satisfied that the company is indebted to petitioner, is unable to discharge its debts 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) That the company viz. M/s. Valecha Engineering Limited be ordered to be wound up by an under the order and direction of this Hon'ble Court under the provisions of the Companies Act, 1956;

(b) That Official Liquidator of this Hon'ble Court or some other fit and proper person be appointed as Liquidator of M/s. Valecha Engineering Limited with all powers under the provisions of the Companies Act, 1956.

8 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.

9 Company petition accordingly stands disposed.

COMPANY PETITION NO.861 OF 2015

1 Since respondent company - M/s. Valecha Engineering Limited has been ordered to be wound up by an order dated 1st March, 2018 in company petition no.761 of 2015, this petition also stands disposed with liberty to petitioner to lodge their proof of debt with Official Liquidator, who shall consider the same in accordance with law.

2 If the order dated 1st March, 2018 in company petition no.761 of 2015 winding up respondent company – M/s. Valecha Engineering

Limited is recalled or set aside in appeal, liberty is given to petitioner to revive this petition and move once again for necessary orders including winding up of respondent company.

(K.R. SHRIRAM, J.)