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

COMPANY PETITION NO. 334 OF 2010

SBI Global Factors Ltd.
(Formerly known as M/s. Global
Trade Finance Ltd.) ….Petitioner

Vs.

Bhukhanvala Power Tools Private Limited ….Respondent

Mr.Dhawal Patil I/b M/s. K. Ashar and Co. for petitioner.
None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 6TH JULY, 2018

P.C.:

1 The petition is seeking winding up of the respondent company Bhukhanvala Power Tools Private Limited (the company) on the ground that the company is unable to discharge its debt and is commercially insolvent.

2 On 12th March 2018, at the time of admission, the following order came to be passed :-

> *1 By this petition, petitioner is seeking winding up of respondent company – Bhukhanvala Power Tools Pvt. Ltd. (the Company) under the Companies Act, 1956 on the grounds that the company is unable to discharge its debts and is commercially insolvent.*
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> *2 According to petitioner as on 30th June, 2010 a sum of Rs.6,60,09,257.31/ with interest thereon at 18% with monthly rest is payable. Petitioner had sanctioned Trade Finance Facility to the company vide Sanction Letter dated 7th April, 2007 and the same has been amended from time to*

time. The Trade Finance Facility was secured by first charge on receivable basis which is created in favour of petitioner. The initial amount of sanction was for Rs.10 Crores. This was increased to Rs.15 Crores. At every stage, the company has signed various documents including Receivable Management Agreement, Demand Promissory Note, Letter of Undertaking, Certificate for Borrowing Limits, Letter of Confirmation and Certification etc.

3 The company defaulted in payment and petitioner kept sending reminders about the irregularities in import as well as domestic factoring facility in their accounts. Despite several reminders, the company took no substantial initiative to make payment and continued defaulting. Annexed to the petition at Exhibit "Y" is the copy of a letter written by the group of company of the company viz., Bhukhanvala Tools Pvt. Ltd. dated 31st December, 2008 in which, according to petitioner, the company has admitted liability. Averment to that effect could be found in paragraph 32 of the petition. In the affidavit in reply, the averment of petitioner has not been denied.

4 As no payments came forth, petitioner caused notice dated 23rd June, 2009 issued through their advocates under Section 433 read with Section 434 of the Companies Act, 1956. Mr. Patil, counsel for petitioner states that no reply was given by the company. 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.

5 It is also stated that the cheques which were given by the company came to be dishonoured and petitioner has commenced proceedings against the company under Section 138 of the Negotiable Instruments Act, 1881. Hence the petition came to be filed.

6 In the affidavit in reply filed by one Suchit Katwala affirmed on 18th March, 2011, the company has admitted *that it owes money to petitioner and it is ready and willing to pay but due to certain extraneous reasons beyond the control of the company, the company has not been able to make the payments. On 23rd February, 2018 one Ram Upadhyay appeared for the company and given an undertaking to file Vakalatnama. Mr. Patil states that petitioner has not been given any notice about Mr. Upadhyay filing any Vakalatnama. The company is not represented today.*

7 Mr. Patil tenders a photocopy of letter dated 12th April, 2011 from the company in which the company has admitted its liability and proposed a settlement. In the said letter, the company has also stated "Your good selves will appreciate that the company has eroded its entire Net Worth but is making its utmost endeavour to repay the lenders to the maximum extent possible ". A copy of the said letter is taken on record and marked 'X' for identification.

8 To a query asked by this Court as to whether any reference was filed by the company to BIFR, Mr. Patil had stated that there was no such reference. The Associate of this Court points out that there is correspondence between the registry of this Court and BIFR to indicate that the company had filed reference to BIFR. Infact when the Court asked why did it take eight years for petition to come up for admission and perhaps there was a reference to BIFR which was filed, Mr. Patil answered in the negative. Mr. Patil states that he understood the query of the Court to mean whether any BIFR reference is currently pending.

9 Section 4 (b) of amended Sick Industrial Companies (Special Provisions) Repeal Act, 2003 provided that on such date as may be notified by the Central Government, any appeal preferred to AAIFR or any reference made or inquiry pending to or before BIFR shall stand abated provided that a company in respect of which such appeal or reference or inquiry that stands abated may make reference to the NCLT under the Insolvency and Bankruptcy Code, 2016 (IBC) within 180 days from the commencement of the IBC in accordance with the provisions of the IBC. The notified date is 1st December, 2016 and 180 days expired on or about 31st May, 2017. There is nothing on record to show that any such reference has been made to the NCLT.

10 In the circumstances, it is rather obvious that the company is unable to discharge its debts and is commercially insolvent. Infact in the letter dated 12th April, 2011 the company has *confessed that its entire net worth has eroded. Mr. Patil states that even after that letter dated 12th April,2011, the company has not paid any amount to petitioner..............”*

3 After the order was passed, petitioner forwarded a copy of the said order to the company. Petitioner has filed an affidavit of one Pramod Jadhav, affirmed on 5th July 2018 confirming service of the order dated 12th March 2018 upon the company. Petitioner has also filed an affidavit of one Ketaki Bamne, affirmed on 6th July 2018 confirming advertising the petition in Free Press Journal and Navshakti on 6th July 2018 and also in the Maharashtra Government Gazette for the period June 21-27, at Sr.No.M-1885. Also on record is an affidavit of one Mangesh More, affirmed on 5th July 2018 stating that on 28th May 2018, when the amended company petition was served upon the company, the same came back with the endorsement *‘Unclaimed’*. Shri Patil states that the address to which the amended petition was sent, is the same address as shown in the MCA website. Shri Patil has also placed on record another affidavit of one Pramod Jadhav, affirmed on 5th July 2018 in which it is stated that the notice that was sent to the company under Rule 28 of the Companies (Court) Rules, 1956 was received by the company on 20th June 2018. It is also stated that along with the notice under Rule 28, a photocopy of the amended petition along with ex-parte notice was also sent, still nobody is present for the company. No affidavit in reply has been filed post order of

admission.

4 It has to be noted that the company has admitted that it owes money to petitioner and it is ready and willing to pay the due but due to reasons beyond the control of the company, the company is unable to pay its debts. The company has also stated in the a letter dated 12th April 2011, that its entire networth has eroded.

5 In these circumstances, I am satisfied that the company is unable to discharge its debt, is commercially insolvent and requires to be wound up. Hence, the petition is allowed in terms of prayer clauses (a) and (b) which read as under :-

> *"(a) That the Company, viz., BHUKHANVALA POWER TOOLS PRIVATE LIMITED be ordered to be wound up by and under the orders and directions of this Hon'ble Court under the Companies Act, 1956.*
>
> *(b) That the Official Liquidator of this Hon'ble Court or some other fit and proper person be appointed as the Liquidator of BHUKHANVALA POWER TOOLS PRIVATE LIMITED with all powers under the provisions of the Companies Act, 1956."*

6. Petitioner's advocate, within two weeks, to forward an authenticated copy of this order to the official liquidator who shall take immediate steps without waiting for any notification. The counsel for petitioner also to forward a copy of this order to the National Company Law Tribunal,

Mumbai for information.

7. Upon receipt of the authenticated copy from petitioner's advocate, the official liquidator shall forthwith cause notice to all concerned directors calling upon them to file their respective statement of affairs strictly in consonance with the provision of law. All directors of respondent company, now in liquidation, are hereby directed to file their respective statements of affairs as required under Section 454 of the Companies Act, 1956, failing which, the official liquidator shall proceed further and lodge criminal complaint against the erring directors, without seeking prior sanction of this Court for initiation of criminal prosecution.

8. The company petition accordingly disposed.

(K.R. SHRIRAM, J.)