

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

COMPANY PETITION NO. 656 OF 2013

Posco-India Pune Processing Centre
Private Limited .. Petitioner
Vs.
M/s. Rojee-Tasha Stampings
Private Limited .. Respondent

**WITH
COMPANY PETITION NO. 97 OF 2014**

Posco-India Pune Processing Centre
Private Limited .. Petitioner
Vs.
Poona Tools Pvt. Ltd. .. Respondent

**WITH
COMPANY PETITION NO. 98 OF 2014**

Posco-India Pune Processing Centre
Private Limited .. Petitioner
Vs.
Automotive Metal Stampings
Private Limited .. Respondent

**WITH
COMPANY PETITION NO. 99 OF 2014**

Posco-India Pune Processing Centre
Private Limited .. Petitioner
Vs.
Ganage Pressings Private Limited .. Respondent

Mr. Shyam Kapadia a/w. Mr. Darshan R. Mehta and Ms. Krithika Anand i/b
Dhruve Liladhar and Co. petitioner (in all petitions).

Mr. V.P. Sawant a/w. Mr. Nikhil Patil i/b Prabhakar M. Jadhav for respondent
in all petitions.

**CORAM : K.R.SHRIRAM, J.
DATE : 11TH JANUARY 2018**

P.C.

1 These petitions are seeking winding up of each of the companies in each of the petitions on the ground that the companies are unable to discharge its debt and are commercially insolvent.

2 The reason why all these four petitions have been clubbed together is because the four companies belong to the same group, i.e., Ganage Group, each of the four companies owe substantial amount of monies to petitioner and the four petitions were listed together and a common consent order was passed on 25th June 2014. The facts in all the four company petitions are identical except that amounts differ. Therefore, I am only going through briefly stating the facts in company petition No. 656 of 2013.

3 Petitioner is engaged, *inter-alia*, in the supply of steel products. The company had approached petitioner with an offer to purchase petitioner's products and entered into multiple sales contracts cum confirmations with petitioner. Petitioner sold, supplied and delivered the goods to respondent-company and raised various invoices. In company petition No. 656 of 2014, petitioner has raised 21 invoices on the company for a total sum of Rs.1,52,29,090.56. The company made an on account payment of Rs.7,86,539.60 leaving an outstanding amount of Rs.1,44,42,550.90.

Despite repeated emails, no amount was paid. Statutory notice dated 26th April 2013 was sent but no reply was given by the company. Hence, petition came to be filed. On 25th June 2014, the following order was passed :-

Heard the Learned Advocates appearing for the Parties and the following order is passed by consent :

i. *The Respondent Company has agreed to pay to the Petitioner an amount of Rs. 6.07 Crores in full and final settlement of the claims of the Petitioner in the above four Company Petitions in 18 instalments starting from 30th July, 2014 as under :*

<i>Sr. Nos.</i>	<i>Date</i>	<i>Amount</i>
1	30 th July, 2014	10,00,000
2	10 th August, 2014	33,72,222
3	10 th September, 2014	33,72,222
4	10 th October, 2014	33,72,222
5	10 th November, 2014	33,72,222
6	10 th December, 2014	33,72,222
7	10 th January, 2015	33,72,222
8	10 th February, 2015	33,72,222
9	10 th March, 2015	33,72,222
10	10 th April, 2015	33,72,222
11	10 th May, 2015	33,72,222
12	10 th June, 2015	33,72,222
13	10 th July, 2015	33,72,222
14	10 th August, 2015	33,72,222
15	10 th September, 2015	33,72,222
16	10 th October, 2015	33,72,222
17	10 th November, 2015	33,72,222
18	10 th December, 2015	57,44,444
—	Total	6,07,00,000

ii. *In the event of the Respondent Company failing to pay any of the above instalment, the Company Petitions shall revive without reference to this Court, stand admitted, made*

returnable within six weeks from the date of default and advertised in two local newspapers i.e. Free Press Journal (in English) and Navshakti (in Marathi) and in the Maharashtra Government Gazette. The Petitioner shall deposit an amount of Rs.10,000/- with the Prothonotary and Senior Master of this Court towards publication charges, within two weeks from the date of default, with intimation to the Company Registrar failing which the Petitions shall stand dismissed for non-prosecution.

iii. In the event of any default the Official Liquidator shall forthwith stand appointed as Provisional Liquidator of the Company. He shall immediately take charge of the books, records as well as the movable and immovable properties of the Company.

iv. In the event of default and consequent Admission of the Company Petitions, Notice under Rule 28 of the Companies (Court) Rules, 1959 shall also stand waived on behalf of the Company.

v. The above Company Petitions are accordingly disposed of.

4 As respondent company committed default, petitioner filed an affidavit of one Jin Deok Park sworn on 12th February 2015 in which it is stated that the company defaulted on the amounts payable and out of the total amount of Rs. 6,07,00,000/-, which though it agreed to pay, as stated in the order dated 25th June 2014, only a sum of Rs.12 lakhs was paid.

5 In view of the self operative order, the petition came to be admitted and advertised. Notice under Rule 28 of the Companies (Court) Rules, 1959 stood waived by the consent order. Petitioner has also filed an

affidavit of one Sandip Rikame affirmed on 19th January 2016 confirming advertisement the admission of the petition in Free Press Journal and Navshakti on 15th January 2015 and also in Maharashtra Government Gazette in the issue dated 5 to 11 March 2015 at Sr. No. 660.

6 After additional affidavit of petitioner was filed, respondent-company filed an affidavit of one Rohit R. Ganage affirmed on 15th September 2017 opposing the petition. The defences raised are as under :-

- (a) Petitioner has suppressed the fact that the petitioners insurance company Ksure, Korea has paid the claim of petitioner and therefore by suppressing this fact, petitioner is attempting unjust enrichment.
- (b) Petitioner having received the amount from the Insurance Company under the insurance claim, there was no longer a debt outstanding and that petitioner is not a creditor of the company and therefore this petition would not lie at the instance of petitioner;
- (c) Petitioner is not a creditor within the meaning of Section 433 and 434 of the Companies Act for a debt;
- (d) The fact that petitioner had already received the amounts under the invoices on the basis of which the petition has been filed,

albeit from its insurance claim went unnoticed when these four petitions were filed and respondent company could not bring it to the notice of the Court at the appropriate time.

- (e) Respondent, therefore, should be released from the statements and undertakings made to this Court in consent terms of Rs.6,07,00,000/-.

All the five points of defence can be dealt together.

7 Similar points of defence were considered by this Court in an unreported order dated 22nd December 2014 (S.J. Kathawalla, J.) in Company Petition No. 294 of 2014 (*Jiangsu Skyrun Wuxi Co. Ltd. Vs. Syrma Technology Pvt. Ltd.*). I am in respectful agreement with the conclusions and findings of the learned Judge.

8 This Court has held that in a case where an assured has received payments from the Insurance Company, assured is still entitled to proceed against the third party and its obligation is only to make good the amount paid by the insurer after having accounted for its own claim, i.e., to ensure that the assured is not paid in excess of its claim. A third party cannot be seen to take the defence that the claimant has already been paid out by the insurer and, consequently, avoid making payment on that ground.

9 In the case of **Morley Vs. Moore**¹, the Court of Appeal considered a situation where an insurer had paid the assured in respect of certain injury caused to the vehicle of the assured, and specifically instructed the assured not to pursue any action against the third party (on account of the 'knock-for-knock' arrangement between the insurer and the third party's insurer). The assured was held fully entitled to pursue his claim against the third party notwithstanding his having received a substantial sum from the insurer and the insurer's direct instructions not to pursue the matter. The relevant parts of the judgment are reproduced below:

“Assuming that the Plaintiff still has his two rights: first to recover the 281. 2s. 8d. from the insurance company on his policy, and, secondly, to recover that same 281. 2s. 8d. as damages from the wrongdoer, the simple solution of this matter is for the insurance company to do that which they are entitled to do – namely, to ask him to hand them that sum. That is a perfectly simple solution, but I cannot see that the fact that they choose to forgo their right to receive this sum from their assured imposes any obligation upon him. The insurance company may choose to make the assured a present of the 281. 2s. 8d., but that does not affect his legal right. I think the sum and substance of it is this: that this case is not in a class which resembles in any particular the case of Hirachand Punamchand V. Temple. There is lacking, amongst other things, what I think is the essence of that case – namely that as between themselves and the father, by a bargain which was superimposed upon and subsequent to the original contract between the money lenders and the son, the money lenders obliged themselves to accept the money in settlement, and, although it was held there was no accord and satisfaction, the Court held that they had thereby disabled themselves from suing the original debtor. Here there are no facts resembling those facts, and for that reason I decline to apply a case, decided with reference to an entirely different set of facts, in circumstance to which hitherto nobody has ever suggested that it was applicable.

1 1936 (2) KB 359

I only want to add one other thing. I hope that the result of this judgment will be that Plaintiffs will realize that they still have whatever may be their full rights accompanied by whatever duties result from the exercise of those rights, notwithstanding arrangements made beyond the scenes between the insurance companies."

10 Further, In the case of ***Yorkshire Insurance Vs. Nisbet Shipping Co.***

Ltd.², which has been considered by various Indian authorities, it was held as under:

*"In my view, this case turns upon what is meant by the word "subrogated" in this context. The doctrine of subrogation is not restricted to the law of insurance. Although often referred to as an "equity" it is not an exclusively equitable doctrine. It was applied by the common law courts in insurance cases long before the fusion of law and equity, although the powers of the common law courts might in some cases require to be supplemented by those of a court of equity in order to give full effect to the doctrine; for example, by compelling an assured to allow his name to be used by the insurer for the purpose of enforcing the assured's remedies against third parties in respect of the subject matter of the loss. In his classic judgment in *Castellain v. Preston*, Brett L.J. was dealing with an unvalued policy, but for the purpose of analysing the principle I can at the present stage ignore the complication which arises when the policy is a valued one. Brett L.J. based the application of the doctrine of subrogation to policies of insurance upon the fundamental principle "that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified."*

The expression "subrogation" in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy to an agreement whereby the assured in the case of a loss against which the policy has been made shall be fully indemnified, and never more than fully indemnified.

² (1962) 2 Q.B. 330

Two consequences flow from this: first, "subrogation" is I concerned solely with the mutual rights and liabilities of the parties to the contract of insurance. It confers no rights and imposes no liabilities upon third parties who are strangers to that contract, It vests in the insurer who has paid a loss no direct rights or remedies against anyone other than the assured. He cannot sue such parties in his own name (see Simpson v. Thomson; he is bound by any release given by the assured to a third party (see West of England Fire Insurance Co v. Isaacs. The insurer's rights against the assured cannot be affected by any subsequent contract, or dealing between the assured and a third party. (Boag v. Standard Marine Insurance Co. Ltd. ; West of England Fire Insurance Co. v. Isaacs."

Therefore, the Company's submission that the present proceeding is not maintainable on the basis that petitioner had already received money in lieu of its claim against the Company from the insurance company is, in my view, without any basis in law and accordingly rejected.

11 In ***PVD Plast Mould Industries Ltd. Vs. ING BHF Bank Aktiengesellschaft***³, a Division Bench of the Gujarat High Court which had an opportunity to consider a similar situation in respect of a company petition for winding up, and the Court held that the company cannot say that once the insurance company has paid the money to the principal creditor, then the company is not answerable to anybody. The company is still liable. The relevant part of the said judgment reads as under :-

"In the present matter, it is to be seen that the loan was taken by the company somewhere in the year 1993 and the company which claims to be running profit making assetful company, did not discharge its liability within the statutory period despite the demand notice and the insurance company had to discharge the

3 2008(144) Company Cases 484, Gujarat

liability. The endeavour of Mr. Soparkar was to convince us that if the creditor company has already received 95 per cent of the loan amount and the insurance company has not lodged its claim against the appellant company, the court must not exercise its discretion in favour of the admission of the winding up matter. The argument is one of frustration. We are unable to understand the logic behind the said argument. It is not the case of the appellant that certain goods were insured and in lieu of the goods, the money has been paid by the insurance company to the principal creditor. In fact, the loan amount/loan transaction was insured. The Petitioner cannot say that once the insurance company has paid the money to the principal creditor, then the appellant company is not answerable to anybody. The appellant company is still liable and applying the principle of subrogation, the insurance company can always recover the money from the appellant and in any case, if the money is received by the creditor company then, to the extent of the receipts, the creditor company would refund the money to the insurance company. That would be a matter between the insurance company and the creditor company. The debtor is not entitled to take any benefits out of the said transaction.”

12 Therefore, as held by His Lordship Hon'ble Shri Justice S.J.Kathawalla in Company Petition No. 294 of 2014 with whom I am in respectful concurrence, petitioner is indeed entitled to file the above company petitions against the company and the petitions as filed are maintainable in law. The only obligation that falls upon petitioner is in respect of receipt of sums from respondent which may be in excess of petitioner's claim to which extent the insurance company would be entitled to seek recovery of such sums from petitioner. This, however, would be the subject matter of separate proceedings between the insurance company and petitioner and does not merit any further consideration at the stage of admission of this present Company Petition. The submissions that the claim

under petition was not a 'debt' and petitioner is not a creditor of the company but the claim is for 'damages' and there was no ascertained liability which can be proved only in a Civil Court, in my view, is not tenable and requires to be rejected. There is no question of the claim being in respect of damages or being un-ascertained in any manner whatsoever. On the contrary, the amount claimed, I am satisfied, are admittedly ascertained and due and payable by the company to petitioner. There is no dispute in respect of the admitted outstanding of Rs.6,07,00,000/- payable by respondent.

13 It should also be noted that respondent has, in fact, made a false statement in the affidavit in reply that it came to know only in July/August having received the insurance money. The email annexed at 'Exh.1' to the affidavit in reply is a forwarded CC from D. M Pawar of Ganage Group (email ID : pawar@ganagegroup.com) sent to his advocate on 28th July 2015. The said D.M. Pawar has forwarded an email that he has received from one Sambhaji Shahapure on 28th July 2018 and from the email, it is seen that the said Mr. Shahapure has received the email from one Abhishek Aggarwal from Ksure on 14th June 2012 that Ksure has paid the insurance claim of petitioner. Despite being aware of the claim being settled by the insurance company, respondent-company submitted to the consent order

dated 25th June 2014 and thereafter to come and told the Court by way of a consent order that respondent-company came to know only in July/August 2015 that insurance company Ksure has settled the claim of petitioner company, is ex-facie a false statement.

The falsity of respondent's case that it came to know in July/August 2015 is also belied by the fact that respondent had even sent an email dated 30th July 2014 to Ksure with copy to petitioner, print out of the said email is at Exh.'B' to the affidavit in rejoinder and that has not been denied by the company and therefore, it is quite obvious that they are making false statements.

14 It should also be noted that respondent company did not even reply to the statutory notice that was sent by petitioner to respondent 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 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.

15 It should also be noted that in the affidavit in reply, there is not even a mention that the company is commercially solvent. On the contrary, there is an email dated 30th July 2014 (Exh.'B') from respondent-company to petitioner and also to Abhishek Aggrawal of Ksure that the company has been declared as non-performing Asset and its bank account has also been frozen.

16 In the circumstances, I am satisfied each of the companies are unable to discharge their debts, are commercially insolvent and require to be wound up. Company petitions allowed in terms of prayer clauses (a) and (b) which read as under :-

COMPANY PETITION NO. 656 OF 2013

(a) that M/s. Rojee – Tasha Stampings Private Limited be ordered to be wound up by and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956.

(b) that the Official liquidator, High Court, Bombay be appointed as the Liquidator of the said Company with all powers under the Companies Act, 1956.

COMPANY PETITION NO. 97 OF 2014

(a) that M/s. Poona Tools Pvt. Ltd. be ordered to be wound up by and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956.

(b) that the Official liquidator, High Court, Bombay be appointed as the Liquidator of the said Company with all powers under the Companies Act, 1956.

COMPANY PETITION NO. 98 OF 2014

(a) that M/s. Automotive Metal Stampings Private Limited be ordered to be wound up by and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956.

(b) that the Official liquidator, High Court, Bombay be appointed as the Liquidator of the said Company with all powers under the Companies Act, 1956.

COMPANY PETITION NO. 99 OF 2014

(a) that M/s. Ganage Pressings Private Limited be ordered to be wound up by and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956.

(b) that the Official liquidator, High Court, Bombay be appointed as the Liquidator of the said Company with all powers under the Companies Act, 1956.

17 Petitioner's advocate to forward an authenticated copy of this order to the official liquidator who shall take immediate steps without waiting for any notification.

18 The above company petitions accordingly disposed.

(K.R. SHRIRAM, J.)