

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

COMPANY PETITION NO.1129 OF 2015

Ajanta Pharma Limited)....Petitioner
V/s.

Naturon Healthcare Ltd.)....Respondent

Ms.Jyoti Sanap i/by V.Deshpande and Co. for petitioner.

Ms.Shaista Pathan i/by Y & A Legal for respondent.

CORAM : K.R.SHRIRAM,J

DATE : 22.3.2018

P.C.:-

1 The petition is seeking winding up of the company Naturon Healthcare Ltd. (the said company) on the grounds that the company is unable to discharge its debts and is commercially insolvent.

2 On 18.12.2017 the court was pleased to pass the following order :-

“1 On 12.12.2017, the advocate appearing for respondent informed the court that he will take instructions from respondent as to whether they are inclined to settle the matter and file consent terms on 18.12.2017 or will go on with the matter. Therefore, the matter was stood over to today. Today, Ms.Pathan advocate instructed by Y & A Legal appears and states that they have been instructed today to appear in the matter and undertakes to file Vakalatnama. Ms.Pathan also stated that another company has filed a petition before the NCLT, Mumbai for dissolution of respondent-company and requests the matter be stood over to a date after the petition before NCLT is heard.

2 In normal circumstances, Court would have shown some leniency but in this case it was rather obvious that the attempt of the company is to scuttle the present proceedings. On 12.12.2017 the advocate for respondent does not inform the court about the alleged proceedings pending before the NCLT. Instead counsel stated that he will take instructions as to whether respondent will settle the matter and file consent terms and on his request, matter was stood over to today.

3 Today, respondent instead of filing consent terms, or going on with the matter, changed their lawyer as a strategy to make the court adjourn the matter on the ground that the new lawyer requires time to consider the papers. The strategy was quite evident, at any cost scuttle the present petition. Therefore, the court declined to grant any adjournment. It should be noted that the petition was lodged on 17.8.2015. Affidavit in reply has been filed on 28.7.2017 and rejoinder has been filed on 12.9.2017. Respondent knew the matter will be listed today and even the cause list was released on 15.12.2017. There was enough time for new advocate after the cause list was released to go through the pleadings and argue the matter. I am also satisfied that the conduct of respondent is dishonest.

4 Petitioner has filed this petition on the ground that respondent is unable to discharge its debts, is commercially insolvent and therefore, should be ordered to be wound up.

5 Petitioner is a manufacturer of Pharmaceutical products, so also respondent. Respondent also trades in pharmaceutical products and in the course of its business, approached petitioner for sale and supply of Male Erectile Dysfunction (MED) range of products under the brand name of Kamagra in tablet and jelly form. Respondent from time to time placed 12 purchaser orders/vouchers for sale and supply of MED range of products. Copies of those purchase orders are annexed to the petition. Respondent supplied and raised 12 invoices for a total sum of Rs.1,00,41,936/-, copies of the invoices are also annexed to the petition.

6 It is the case of petitioner that despite repeated reminders and despite repeated assurances from respondent, respondent failed and neglected to pay sum of Rs.1,00,41,936/- or any other amount. It is also alleged in the petition that by an email dated 20.4.2015, respondent agreed to discharge their liability by paying the outstanding amount in 3 installments and it will be useful to reproduce the said e-mail.

“From:sadanand
[<mailto:sadanand@natueonhealthcare.com>**]**
Sent : Monday, April 20, 2015 1: 14 PM
To : `Rajivan Iyer'
CC : `Sagar Gadhave', `Nandkishore Agrawal'
Subject : RE : Overdue Payment – Naturan Healthcare Ltd.

Dear Rajivanji,
 Regret delay reply as I briefed you due to some technical issue with my clients banks..... our payment got delayed at our end.... however I'am managing the same and would advise you following schedule :

- 1) 33,79,870 on or before 17-April 2015/on or before 30th April
- 2) 39,13,440 on or before 25-April 2015-Overdue in Feb 15/on or before 15th May
- 3) 25,00,380 on or before 05-May 2015/ on or before 25th May

Above scheduled are confirm and will be adhered without any further delay. I'am always grateful for your cooperation and support and working towards ending this irregularity and hopefully will give you result soon.

Thanks/Sadanand Pandey”

7 As no payments were made, petitioner through their advocate caused a statutory notice dated 22.6.2015 issued to respondent. There is no reply admittedly. Therefore, this petition came to be lodged on 17.8.2015.

Respondent has filed an affidavit of one Sadanand C.Pandey, director of respondent, affirmed on 28.7.2017.

8 *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.*

9 *The defences raised are as under :-*

(a) Petitioner has filed the commercial Suit No.233 of 2017 before this court and therefore, debts claimed by petitioner is disputed and hence this petition is not maintainable ;

(b) The claim amount is not an enforceable debt. The account between the company is yet to be settled and there are several transactions between the parties and there are history of payments made by respondent from time to time ;

(c) Since respondent has also started manufacturing the products which petitioner had supplied, petitioner due to loss in business and considering respondent as rival/competitor, is creating dispute to harass respondent ;

(d) Respondent never admitted to the claim amount in any manner whatsoever and the copy of the e-mail dated 28.4.2015 annexed to the petition is actually an e-mail by petitioner to respondent and not by respondent to petitioner.

Respondent is correct regarding the e-mail annexed to the petition but in the rejoinder, the correct email has been produced and respondent has not denied the same.

(e) As per the ledger accounts maintained by respondent, it is evident that the last bill as stated by petitioner to be dated 3.3.2015 is not correct because there is transaction between the parties till January-2016 and invoice/bill raised thereto. A copy of ledger account along with invoice bill is annexed.

10 *In my view, the defences raised by the company*

smacks of dishonesty, are bogus and moonshine.

11 So far as 1st defence is concerned that petitioner has filed commercial suit and hence this petition is not maintainable, this court in ***L & T Finance Limited Vs. International Hometex Limited***, has held that the mere fact that the creditor has instituted proceeding for the recovery of its dues, would not establish that the debt is disputed. Any creditor whose debt has not been paid, has to take recourse to the normal remedies available under the law for the recovery of its dues and mere institution of proceedings for the recovery of dues by a creditor does not establish that the debt is disputed. The court also observed that the question as to whether the debt is disputed, is a matter which has to be evaluated by the company court in the event a petition for winding up is filed. It will be useful to reproduce paragraph-4 of the said judgment.

“4. The Division Bench relied upon the judgment of the Supreme Court in *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.* : 1999 (4) Bom.C.R. (S.C.) 245 : 1999 DGLS (Soft) 641 : 1999 (5) S.C.C. 688 where the Supreme Court held that a claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect that the company has become commercially insolvent and the power to order winding up is contained in the Companies Act and is conferred upon the Company Court. The view of a learned Single Judge of the Andhra Pradesh High Court in *Shapoorji Pallonji Finance Ltd. v. Shree Rayalaseema Alkalies and Allied Chemicals Ltd.* : (2005) 127 Comp. Cases 526 (A.P.) only reiterates the position that if a debt is disputed and if it requires adjudication, then a proceeding under Section 433 would not lie. However, the mere fact that the creditor has instituted a proceeding for the recovery of its dues would not establish that the debt is disputed. Any creditor whose debt has not been paid, has to take recourse to the normal remedies available under the law for the recovery of its dues by filing a suit and whereas in the present case there is an arbitration clause, by initiating arbitral proceedings. But the mere institution of proceedings for the recovery of dues by a creditor does not establish that the debt is disputed. The

1 2010(1) Bom.C.R.196

question as to whether the debt is disputed is a matter which has to be evaluated by the Company Court in the event that a petition for winding up is filed. In the present case, the fact that there is no reply to the statutory notice for winding up is an admitted position. The fiction under Section 434 of the [Companies Act, 1956](#) therefore comes into operation. That apart, in the reply that was filed on behalf of the company on 27th April, 2009 to the petition under Section 9 of the Arbitration and Conciliation Act, 1996 the company has clearly admitted that it 'could not make payment of the lease rent on account of the temporary liquidity problems faced by them', (paragraph 11). In paragraph 8 of the reply which has been filed to the petition for winding up similarly it has also been admitted on behalf of the company that the manufacturing activity of the company is not functioning at present due to unavoidable circumstances.”

12 So far as the 3rd defence that respondent having started manufacturing the same product supplied by petitioner and the petitioner is therefore, treating respondent as a rival/competitor due to loss of business and to harass respondent, this allegation is nothing but a bald statement made in the affidavit in reply. In any event that cannot take away the fact, as could be seen later, that respondent has admitted its liability to petitioner.

13 So far as the 2nd and 5th defences that there has been several transactions between the parties and there is history of payments made by the company from time to time, I have considered the ledger accounts relied upon by respondent and it only reveals that the ledger accounts relied upon by respondent are incorrect and manipulated. At page 74 (Exh.A) is the 1st ledger account of respondent in which it says that respondent owes to petitioner a sum of Rs.1,23,50,807/- as on 31.3.2013. For the year ending 31.3.2014 (pages-75-76) it shows a credit balance of Rs.23,73,774.25/- in favour of respondent. For the year ending 31.3.2015 it again shows credit balance of Rs.24,06,850.40/- (pages-113-114). At page 136 is the ledger account for the period 1.4.2015 to 31.3.2017 in which respondent is showing that a sum of Rs.28,94,149.60/- is payable by respondent to petitioner.

14 Now let us consider an email which is at Exh.A to the rejoinder, in which respondent writes to petitioner as under :-

“From:sadanand
[\[mailto:sadanand@natueonhealthcare.com\]](mailto:sadanand@natueonhealthcare.com)
Sent : Friday, April 10, 2015 12: 28 PM
To : `Sagar Gadhave'
CC : `Rajiwani Iyer', `Nandkishore Agrawal'
Subject : RE : Overdue Payment – Naturan Healthcare Ltd.

Dear Sagar,

We are shorting out the payment issue very soon by L/c/RTGS/....however plz wait till Monday to give you exact position.
Thanks for your cooperation and support.

Thanks/Sadanand Pandey”

15 In response to a reminder dated 13.4.2015 sent by petitioner to respondent, respondent replies by an email dated 14.4.2015 which is as under :-

“From:sadanand
[\[mailto:sadanand@natueonhealthcare.com\]](mailto:sadanand@natueonhealthcare.com)
Sent : Tuesday, April 14, 2015 12: 17 PM
To : `Rajiwani Iyer'
CC : `Sagar Gadhave', `Nandkishore Agrawal'
Subject : RE : Overdue Payment – Naturan Healthcare Ltd.

Dear Rajivan,

I sincerely regret for this delay of the due payment as discussed a while ago this is due to some banking issue with our client. This is expected to resolve within 203 days time as per communication with the client.

I request you to kindly allow me time till 20-04-2015 to confirm the payment schedule. I am trying my best to resolve the issue ASAP. Please bear with us till then.

Thanks for your cooperation and support.

Thanks/Sadanand Pandey”

16 Thereafter on 20.4.2015 respondent has sent an email, copy whereof is at Exh.E to the rejoinder and the same has been quoted above in paragraph-6.

17 If according to respondent, petitioner has to pay respondent sum of Rs.28,94,149.60/- and as stated in paragraph-8 r/w paragraph 11(c) of affidavit in reply of the same Sadanand Pandey, who has addressed all these emails, that the company had never admitted to the claim amount in any manner whatsoever, then where was the need to send the email as quoted above. It should also be noted that in paragraph 11(c) of affidavit in reply, the affiant Sadanand Pandey has denied that he has sent any email dated 20.4.2015 whereas petitioner has produced email dated 20.4.2015 in the rejoinder to which there is no sur-rejoinder filed and copy of the rejoinder was served on 15.12.2017. This would also answer the defence of respondent that no amount was payable to petitioner.

18 Though the amount admitted by respondent in its email dated 20.4.2015 is only Rs.97,93,690/- as against the invoices of Rs.1,00,41,936/- still this petition is maintainable and I gather support from the judgment of the Division Bench of this court in **¹Tata Finance Ltd. Vs. Kanoria Sugar & General Manufacturing Company Ltd.**

19 In the circumstances, I am satisfied that the defences raised by defendant are dis-honest, bogus and moonshine.

20 I am therefore, satisfied that the company is unable to pay its debts and the company deserves to be wound up. In the circumstances, in my view, the petition requires to be admitted and the following order is passed :-

ORDER

(i) The Company Petition is admitted and made returnable on 26.2.2018 ;

1 2002(3) Bom. C.R. 173

(ii) Petitioner is directed to advertise the petition in two local newspapers, viz. 'Free Press Journal' (in English) and 'Nav-Shakti' (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 non-compliance with this direction or with the Companies (Court) Rules, 1959 ;

(iii) Petitioner shall also deposit an amount of Rs.10,000/- 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 and by Registered Post AD by the Advocate for petitioner ;

(v) Counsel for respondent waives notice under Rule 28 of Company (Courts) Rules, 1959.

21 Notwithstanding the above order, I am still inclined to give one opportunity to respondent to avoid winding up. Respondent shall deposit a sum of Rs.1,00,41,936/- with Prothonotary and Senior Master within three weeks from today. If this amount is deposited, on the Monday following the date of deposit, petition will be placed for directions. If the amount of Rs.1,00,41,936/- is not deposited, the time to pay the amount of Rs.10,000 with Prothonotary & Senior Master for advertisement within two weeks for advertisement shall commence from the date of expiry of three weeks.

3 After the order of admission was passed, the company has not made any payment or filed any further affidavit to oppose the petition.

4 Petitioner has filed affidavit of one Mahesh Girkar affirmed on 7.2.2018 confirming advertisement of the petition in 'Free Press Journal' and 'Navshakti' on 31.1.2018 and another affidavit affirmed on 16.3.2018 confirming advertisement of the petition in Maharashtra Government Gazette for the period 8.2.2014 to 14.2.2014 at Serial No.M-17326.

5 Ms.Pathan appearing for the company on a query raised by the court confirmed that no further affidavit after 18.12.2017 has been filed by the company to make out a case why the admitted petition should be dismissed. Ms.Pathan also stated that though some of the creditors had filed a petition for winding up before the NCLT against the company, that petition has been dismissed.

6 In the circumstances, as there is nothing on record to disturb the prima facie view expressed in the order dated 18.12.2017, I am satisfied that the company is unable to discharge its debts and is commercially insolvent. Hence, petition is allowed in terms of prayer clauses-(a) and (b) which read as under :-

“(a) that the Respondent Company i.e., Naturon Healthcare Ltd., be ordered to be wound up by and under the orders and 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 be appointed as the Liquidator of the Respondent Company i.e. Naturon Healthcare Ltd., together with all its assets, business affairs, property, books of accounts, bank accounts, vouchers, files, documents, machinery, furniture and fixtures etc. with all powers under the provisions of the Companies Act, 1956.”

7 Official Liquidator to take further steps on receiving authenticated copy of this order from the advocate for petitioner without waiting for any Notification.

8 Prothonotary & Senior Master, High Court, Bombay to refund the advertisement charges deposited by petitioner subject to adjustment if any.

9 Petition stands disposed.

(K.R.SHRIRAM,J)