

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

COMPANY PETITION NO.657 OF 2016

Kishinchand R.Ludhani)....Petitioner
V/s.

Kamla Landmarc Construction Pvt. Ltd.)....Respondent

Mr.Manish Doshi a/w Mr.Ashwin Poojari I/by Vimadalal and Co. for
petitioner.
None for respondent.

CORAM : K.R.SHRIRAM,J

DATE : 23.8.2018

P.C.:-

1. The petition is filed for winding up of the respondent company-Kamla Landmarc Construction Pvt. Ltd. (the company) on the grounds that the company is unable to pay its debts to petitioner and is commercially insolvent.

2 On 11.9.2017 at the time of admission of the petition, the following order came to be passed :-

“1 By this petition the petitioner seeks winding up of the respondent company under section 433(e), 434(1)(a) and 439 of the Companies Act for failure and neglect to pay a sum of Rs.40,00,000/- under two cheques of Rs.20,00,000/- each. The factual background reveals that vide two Memorandum of Understanding (MOU) dated 11th May, 2012 executed between the parties, the petitioner herein paid over a total sum of Rs.5,04,00,000/- to the respondent company by way of investment.

2 Learned Counsel for the respondent company states that these two MOU's came to be terminated as set out in paragraph 8 of the petition. Upon termination of the MOU, the amount of Rs.5,04,00,000/- was repaid. However, interest amounting to Rs.40,00,000/- was sought to be paid vide two cheques bearing no.077091 and 077092 dated 29th March, 2014 drawn on Corporation Bank. Both the cheques came to be dishonoured when presented for payment. Learned Counsel for the petitioner has relied upon Exhibit-C and Exhibit-D being copies of the two cheques and their dishonour memos.

3 Upon dishonour of the two cheques the petitioner has vide Statutory notice dated 16th June, 2016 demanded payment of a sum of Rs.40,00,000/- along with interest @ 18% p.a. It is further submitted that the said notice contained some typographical errors as a result of which further notice dated 5th August, 2016 was sent as Statutory notice. The notice is seen to be received by the respondent company as evident from the copies of the acknowledgement annexed at Exhibit-K and consignment tracking report at Exhibit-L.

4 Learned Counsel for the petitioner submitted there is no reply to the Statutory notice. Particular of claims of the petitioner are set out at Exhibit-M to the petition. The principal sum of Rs.40,00,000/- is the amount of two cheques interest @ 18% per annum is claimed from 4th April, 2014 to date of the petition. The claim for interest it is submitted, is made under provisions of the Negotiable Instruments Act.

5 The record indicates that the petition came to be presented upon failure of the respondent to comply with the Statutory notice on 8th September, 2016. The petition was accepted on 22nd November, 2016 after which the same was served upon the respondent on or about 25th November, 2016. Exhibit-A to the affidavit of service indicates that from the postal acknowledgement it appears to have been served upon the company since the petitioner's Advocates have received back the

acknowledgement card on or about 25th November, 2016. An affidavit of service has been filed on 31st July, 2017 confirming service of the petition upon the respondent company.

6 Vide order dated 14th August, 2017 this Court had directed the petitioner's Advocate to issue an email to the email address of the company appearing in the records of the Registrar of Companies. Accordingly, it is submitted today that an email was sent on 21st August, 2017 at about 16.04 hrs. Copy of the email is now annexed to the further affidavit of service of one Mr.Sandeep Shripat Dhondge dated 23rd August, 2017. None appears for the company on call.

*7 In the circumstances, it appears that the company has failed and neglected to pay sum of Rs.40,00,000/- being the amount of the dishonoured cheques. It appears that the company is unable to pay its debts as and when they arise in the usual course of business. The petition is therefore liable to be admitted. Accordingly I pass the following order.
.....”*

3 The order was corrected on 25.9.2017 and the corrections read as under :-

“1. Called for speaking to minutes of the order dated 11th September, 2017. In the cause title the Company Petition No.”652” to be replaced with “657”. In paragraph 2 first line the word “respondent” shall be corrected to read as “petitioner”.

2. The original order shall be corrected and the corrected order shall be uploaded in the website.”

4 Petitioner has placed on record an affidavit of one Sandip Shripat Dhondge affirmed on 4.9.2017 confirming advertising the

petition in 'Free Press Journal' and 'Navshakti' on 29.9.2017. There is also another affidavit of Sandip Shripat Dhondge affirmed on 3.2.2018 confirming advertising the petition in Maharashtra Government Gazette for the period 4th to 10th January 2017 at serial no.M-17275.

5 Notice under Rule 28 of the Company Court Rules 1959 has been served. As per the service report filed by the company department dated 9.10.2017 company was represented by an Advocate earlier but on last 3 occasions, nobody has been appearing. No affidavit in reply has been filed and hence none of the averments in the petition are controverted. There is no reply to the statutory notice either. 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.

6 I have perused the petition, heard Mr.Doshi and also considered the documents annexed thereto. I am also satisfied that the company is indebted to petitioner, unable to pay its debts and is commercially insolvent.

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

“(a) That KAMLA LANDMARC CONSTRUCTION PRIVATE LIMITED be ordered to be wound up by and under the directions of this Hon'ble Court under the provisions of Companies Act, 1956 ;

(b) That the Official Liquidator, Hon'ble Court Bombay be appointed as the Liquidator of the said Company to take charge of all its assets,properties, bank accounts, books of account etc. with all powers under the Companies Act, 1956.”

8 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.

9 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.

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

11 Petition disposed accordingly.

Jahagirdar
Kiran
Ganesh

Digitally
signed by
Jahagirdar
Kiran Ganesh
Date:
2018.08.27
19:35:42
+0530

(K.R.SHRIRAM,J)