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

COMPANY PETITION NO.907 OF 2005

Rasendra Chemexport Private Limited ....Petitioner

Vs.

Emtex Industries (I) Limited ....Respondent

Ms. Urmi Devani I/b. Mr. M.J. Devani for petitioner.
None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 2nd AUGUST 2018

P.C.:

1 This petition is for winding up of respondent company - Emtex Industries (I) Limited (the company) under the provisions of the Companies Act, 1956 on the ground that the company is unable to discharge its debts and is commercially insolvent.

2 On 16th April 2018 while admitting the petition, the Court was pleased to pass the following order :

> *1. The petition is filed for winding up of the company Emtex Industries (I) Limited on the grounds that the company is unable to pay its debts and is financially and commercially insolvent.*
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> *2. Petitioner is an unpaid vendor. It is stated in the petition that as per the orders and instructions received from the company, petitioner sold, supplied and delivered sodium hydro sulphide, sodium formaldehyde hydroxylate etc. to the company as covered under six invoices. The details of the invoices are mentioned in paragraph 5 of the petition and copies are annexed to Exh.A to Exh.A5 to the petition. Copies of the delivery challans are also annexed to the petition at Exh.B to Exh.B5. It is stated that respondent accepted the goods without any dispute, demand or complaint. It is also stated that on or about 20.3.2003, the company issued Sales Tax `C' form covering 7 invoices included the 6 which are subject matter of this petition. Copy of the `C' form is annexed at Exh.C to the petition.*

3. As no payments came forth, petitioner caused a Notice dated 16.12.2005 issued through its Advocate as required under Section 434 of the Companies Act 1956 demanding sum of Rs.4,61,340.44 together with interest thereon @ 24% p.a. The amount claimed in the petition is less than what was claimed in the demand notice.

4. There is no reply as stated in the petition.

5. After the petition was filed, the company had filed a Reference before the Board of Industrial & Financial Reconstruction (BIFR). 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.

6. In the order dated 6.9.2017 the Prothonotary and Senior Master has recorded the statement made by Mr.Uday Sankar Samudral aadvocate for respondent that the Reference before BIFR has abated. On 19.3.2018 Mr.Samudrala requested for further time to file affidavit in reply and as last chance, time was granted upto 24.3.2018. The company was also directed to pay sum of Rs.25,000/- as cost to petitioner for the adjournment. Mr.Devani for petitioner states that this cost has not been paid and no reply has been served upon him. Even in the record & proceedings I do not find any reply of the company opposing the petition.

7. There is no reply 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 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.

8. There is no reply to the petition as well and therefore, none of the averments in the petition are controverted. Moreover, I have also considered the petition and the documents annexed thereto. From the documents, it does appear that the goods have been supplied by petitioner to the company and the company has acknowledged receipt of the goods by issuing `C' form. From the averments in the

> *petition that the company has not made the payments for the goods supplied and the `C' form covers 7 invoices, 6 of which formed subject matter of the petition, I am satisfied that there is a debt payable by the company to petitioner. Petitioner is unable to discharge its debts and is commercially insolvent. This is further confirmed in view of the fact that the company despite being given an opportunity, has chosen not to file affidavit in reply and has not even paid the cost as imposed by this Court.*
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3 On record is an affidavit of one Milind Nagotkar affirmed on 31st July 2018 confirming advertising the petition in Free Press Journal and Navshakti on 10th July 2018 and also in the Maharashtra Government Gazette for the period 26th July – 1st August 2018 at serial no.M-18121. The Company Department has filed a service report dated 27th June 2018 confirming service of notice under Rule 28 of the Companies (Court) Rules, 1959 upon the company.

4 There is no affidavit in reply on record opposing the petition and therefore, none of the averments in the petition are controverted. As noted in the admission order dated 16th April 2018, the company had not even replied to the statutory notice.

5 I have once again considered the petition and the documents annexed thereto. As none of the averments are controverted and despite being given an opportunity to file affidavit in reply, no reply has been filed, it is quite clear that the company is unable to discharge its debts, is commercially insolvent and requires to be wound up.

6 In the circumstances, company petition is allowed in terms of prayer clause – (a) which reads as under :

> *(a) That Emtex Industries (India) Limited be directed to be wound up by an order and under the directions of this Hon'ble Court and under the provisions of the Companies Act, 1956 and that the Official Liquidator, High Court Mumbai be appointed as the Liquidator thereof.*

7 Official Liquidator, within two weeks, to take steps upon receiving an authenticated copy of this order from the advocate for petitioner without waiting for any notification. The counsel for petitioner is also directed to forward a copy of this order to National Company Law Tribunal for information.

8 Upon receipt of the authenticated copy from petitioner's advocate, 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 statement of affairs as required under Section 454 of the Companies Act 1956, failing which 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.

9 Company petition accordingly stands disposed.

10 Prothonotary and Senior Master, High Court, Bombay to refund the amount of Rs.15,000/- deposited by petitioner towards advertisement, subject to deductions, if any.

Gauri Amit Gaekwad Digitally signed by Gauri Amit Gaekwad Date: 2018.08.03 12:23:35 +0530

(K.R.SHRIRAM, J.)