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

COMPANY PETITION NO.1186 OF 2015

M/s. Fionee Apparels ….Petitioner

Vs.

Newlook Retails Pvt. Ltd. ….Respondent

Mr. Niraj Shah I/b. Mr. Siddharth Murarka for petitioner.
None for respondent

CORAM : K.R.SHRIRAM, J.
DATE : 3rd MAY, 2018

P.C.:

1 This petition is for winding up of respondent company - Newlook Retails Pvt. Ltd. (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 21st June, 2017 while admitting the petition, the Court was pleased to pass the following order :

> *1. This is a petition for winding up of the respondent-company under Section 433 and 434 of the Company Act, 1946 on the ground that the respondent-company is unable to pay the dues of the petitioner.*
>
> *The petitioner is a proprietary concern and is engaged in the business of supply of ready-made garments. The petitioner supplied various goods to the respondent-company from time to time and raised invoices in that behalf. It was mutually agreed between the parties that there will be a credit facility up to 30 days to the respondent from the date of acceptance of delivery of goods and the petitioner will be entitled to claim interest @ 24% per annum for delayed payment. The respondent has acknowledged the delivery of goods to the tune of Rs.14,38,718/- upto 31.03.2013. The petitioner has thereafter also supplied goods to the respondent to the tune of Rs.3,09,114/- and the respondent has further acknowledged the same. Thus, the respondent was liable to pay a total sum of Rs.17,47,832/- to the petitioner. As the respondent failed and/or neglected to pay the said amount to the*

petitioner, the petitioner issued statutory demand notice dated 13.07.2015 to the respondent. As the statutory notice returned back with an endorsement "left the premises", the petitioner sent an email dated 13.07.2015 at the email ID of the respondent submitted to the Registrar of Companies by the respondent. The respondent neither complied the requisition mentioned in the email nor replied it.

2. The petitioner, therefore, filed the present petition on 31.08.2015 for winding up of the respondent-company. The present petition was accepted on 01.12.2015 and in pursuance of the directions issued by the Company Registrar, the petitioner issued notice to the respondent by Registered AD post and also by email at the address and email which is available on the record of the Registrar of Companies. The envelope containing notice and the copy of the petition has been returned back by the Postal Department with endorsement that "the addressee does not reside at the address and hence returned". It appears from the record that the email sent at the address of the respondent is not returned and therefore in the submission of the learned counsel for the petitioner it amounts to delivery. An affidavit of service dated 30.12.2015 to that effect has been filed.

3. I have perused the petition. It, prima facie, appears that the respondent is unable to pay the debt of the petitioner and is commercially insolvent.

xxxxxxxxxxxxx

3 The company has not filed any affidavit in reply opposing the petition. Therefore, none of the averments in the petition are controverted. There is no reply even 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 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.

4 On record is an affidavit of one Prakash Bane affirmed on 5th October, 2017 confirming advertising the petition in Free Press Journal and Navshakti on 12th July, 2017 and also in the Maharashtra Government Gazette for the period 20th - 26th July, 2017 at serial no.M-17115. Infact on the last occasion, i.e., 13th April, 2018 when the petition was listed, the registry was once again directed to serve notice to the company because the service report dated 25th July, 2017 states that the notice that was sent under Rule 28 of the Companies (Court) Rules, 1959 was returned undelivered with the endorsement “Not residing on the given address - Hence returned”. The Company Department has placed a fresh service report dated 21st April, 2018 in which it is stated that the notice sent, pursuant to order dated 13th April, 2018, has also come back undelivered with the endorsement “Left address”.

5 Mr. Shah, counsel for petitioner tenders an extract of the Company Master Data, which Mr. Shah states was taken on 13th April, 2018, in which the registered address shown is the same address as shown in the most recent notice sent by the Company Department. The extract is taken on record and marked “X” for identification. Therefore, I would proceed on the basis that notice under Rule 28 has also been served on the company and the company is not interested in contesting the petition.

6 Mr. Shah, counsel for petitioner states that petitioner is intending to file a civil suit. Mr. Shah states that in the petition it has been mentioned that petitioner may initiating to file a civil suit and prayer clause - (c) also provides for leave under Section 446 be granted. Mr. Shah, therefore, prays to avoid multiplicity of proceedings, petitioner be permitted to prosecute the said suit without being insisted upon to take out a separate company application. I find substance in what Mr. Shah states. It would also save substantial judicial time if the Court considers, given the facts and circumstances of this case, and not be insistent for a formal application.

7 I have considered the petition, the documents annexed thereto and also heard Mr. Shah, counsel for petitioner. I am also satisfied that the company is indebted to petitioner, is unable to discharge its debts, is commercially insolvent and requires to be wound up.

8 In the circumstances, company petition is allowed in terms of prayer clauses – (a), (b) and (c) which read as under :

> *(a) that respondent company, namely Newlook Retails Pvt. Ltd. having its registered office at Shop No.6, Enkay Square Building, Plot No.21, Sector – 6, Kopar Khairane, Mumbai, Maharashtra – 400 079 be wound up by and under the orders, direction and supervision of this Hon'ble Court;*
>
> *(b) that Official Liquidator or some other fit and proper person be appointed as Liquidator of respondent company with all powers under the provisions of Companies Act, 1956 or later enactment to take charge of respondent company and to conduct its affairs during the course of its winding up;*

(c) that the necessary leave under Section 446 be granted to petitioner to continue the suit proceeding.

9 Official Liquidator to take further steps in accordance with law without waiting for any notification upon receiving an authenticated copy of this order, which Mr. Shah states, will be forwarded within two weeks of the order getting uploaded. The counsel for petitioner is also directed to forward a copy of this order to National Company Law Tribunal for information.

10 Company petition accordingly stands disposed.

(K.R. SHRIRAM, J.)