

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

COMPANY PETITION NO.321 OF 2016

M/s.Bhuvaneshwari Vyapar Pvt. Ltd.)....Petitioner
V/s.

Shri Someshwara Spun (P) Ltd.)....Respondent

Ms.Devika R.Sahu I/by Ashok M.Saraogi 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-Someshwara Spun (P) Ltd. (the company) on the grounds that the company is unable to pay its debts to petitioner and is commercially insolvent.

2 On 5.2.2018 at the time of admission of the petition, the following order came to be passed :-

“1 This petition is filed for the winding up of respondent company-Someshwara Spun (P) Ltd. on the ground that the company is unable to discharge its debts and is commercially insolvent.

2 Petitioner had advanced a sum of Rs.40,00,000/- as loan to the company. The company was to repay the amount with 24% interest p.a. on quarterly basis. The company has confirmed that for the period 1.4.2014 to 31.8.2014 the company was bound and liable to pay sum of Rs.56,17,872/-. The company did not make the

payment and therefore, petitioner gave a notice dated 24.9.2014 to the company to which there was no reply. Petitioner filed a Company Petition No.291 of 2015 which was withdrawn with liberty to file fresh petition as per order dated 7.4.2015. Petitioner issued a fresh notice under the Companies Act 1956 through their advocate, copy whereof is at Exhibit-F to the petition. The postal department has confirmed that this notice has been delivered to the company by its letter dated 14.9.2015. The company did not reply to the statutory notice. Hence the petition.

3 On record is an affidavit of service of one Santosh Kumbhar affirmed on 29.7.2016 confirming service of the petition on 26.7.2016. No affidavit in reply is filed. None of the averments in the petition, therefore, have been controverted. 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.

4 Having considered the petition and the documents annexed thereto and having heard the counsel, I am satisfied that the company is indebted to petitioner, is unable to discharge its debts and hence is commercially insolvent. Therefore, the following order.
.....”

3 No affidavit-in-reply has been filed and hence the averments in the petition are uncontroverted.

4 On record is the affidavit of one Santosh Kumbhar affirmed on 8.5.2018 confirming advertising the petition in 'Free Press Journal' and 'Navshakti' on 27.2.2018. There is also an affidavit of Santosh Kumbhar affirmed on 15.5.2018 confirming advertising the petition in Maharashtra Government Gazette for the period 10th to 16th May 2018 at serial no.M-1848.

5 Notice has been sent under Rule 28 of the Company Court Rules 1959. As per the service report dated 20.2.2018 filed by the Company Department the notice came back undelivered with the endorsement "NOT KNOWN". Therefore, by an order dated 13.7.2018 read with order dated 10.8.2018 the court directed petitioner to give notice to the company that the petition will be taken up today for hearing. Petitioner has filed affidavit of one Santosh Kumbhar affirmed on 20.2.2018 in which it is stated that the notice that was sent by hand delivery, could not be delivered because on the address which is shown in the Company Master Data maintained by the Ministry of Corporate Affairs, the company was not found at the address. In fact, notice was sent at the same address and the notice has come back with the endorsement "NOT KNOWN". E-mail, notice has been delivered. So also notice sent by courier.

In view thereof, I would proceed on the basis that the Notice under Rule 28 of the Company Court Rules 1959 has been served.

6 As recorded above, no affidavit in reply has been filed opposing the petition. Ms.Sahu states that there was 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.

7 I have perused the petition, heard Ms.Sahu 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.

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

“(a) that the Company of Shri Someshwara Spun (P) Ltd., be wound up by an under the orders and directions of this Hon'ble Court under the provisions of Companies Act, 1956 ;

(b) The Official Liquidator attached to the Hon'ble Court or some other fit and proper person be appointed as Lliquidator of the company and all its assets, divisions, business, subsidiaries of the company including the assets of the subsidiaries, business affairs, property, Bank accounts, book of accounts, vouchers, documents etd. With all powers under the provisions of Companies Act, 1956.”

9 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.

10 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. Alll 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.

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

12 Petition disposed accordingly.

Jahagirdar
Kiran
Ganesh

Digitally
signed by
Jahagirdar
Kiran
Ganesh
Date:
2018.08.27
19:45:55
+0530

(K.R.SHRIRAM,J)