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

COMPANY PETITION NO.322 OF 2015

Praj Industries Limited ….Petitioner

Vs.

Morya Grain Distilleries Private Limited ....Respondent

Mr. Bharat Gadhavi i/b. Tejesh Dande and Associates for petitioner.
Mr. Paras N. Vira for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 22nd FEBRUARY, 2018

P.C.:

1 By this petition, petitioner is seeking winding up of respondent company – Morya Grain Distilleries Private Limited (the Company) under the Companies Act, 1956.

2 On 6th November, 2017 the petition came to be admitted and the following order was passed :

> *1. The petitioner and respondent had entered into an Agreement dated 16th June 2008 for design, engineering, supply and supervision of erection and commissioning of grain based distilleries plant suitable to produce 33 KLPD Alcohol at Plot No. A-96, MIDC, Paithan, District Aurangabad.*
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> *2. As per the Agreement, the total contract price was Rs. 14,10,00,000/- which was exclusive of C.S.T and excise duty. As per the contract, respondent paid a sum of Rs. 4,23,00,000/- as advance and made further payment of Rs.10,63,17,081/-. The total amount paid, therefore, sums upto Rs.14,86,17,081/-. In addition thereto, respondent retained 10% of the contract value of Rs.14,10,00,000/- as retention money. Petitioner had raised over 563 invoices for a total sum of Rs.16,46,40,539.35. Therefore, total amount payable by respondent to petitioner was Rs.1,41,00,000/- plus Rs.19,23,458.04 which totals to Rs.1,60,23,458/-. Respondent, by a communication dated 14th March 2013, has confirmed the balance payable as per the respondent's books as on 28th February 2013 to be Rs.19,23,458.04 and retention amount of Rs.1,41,00,000/-.*

3. As this amount was not paid, respondent issued a statutory notice dated 3rd July 2013 through their Advocate. Though in the affidavit in reply, respondent had denied having received this statutory notice, after the petition was filed, petitioner has filed an additional affidavit of one Dattatraya V. Nimbolkar affirmed on 13th April 2015 to which acknowledgement slip of statutory notice has been annexed. Based on this, the petition is also accepted.

4. Respondent, in its reply, has raised following defences :-
(a) Petitioner's claim is on the basis that they have paid a sum of Rs.2,26,40,539/- as taxes and duties which were required to be paid by respondent to petitioner but petitioner has not provided the supporting documents pertaining to payments of taxes and dues; (b) There are disputed questions of facts and therefore it requires adjudication by the Civil Court.; (c) Clause 22 provides for arbitration; (d) respondent is commercially solvent; (e) the balance confirmation letter dated 14th March 2013, copy whereof is at Exh."E" to the petition, is forged and fabricated; and (f) such statutory notice was not received.

5. Going in the reverse order, statutory notice, I have already dealt with earlier and petitioner has filed an affidavit confirming service of statutory notice. So far as balance confirmation being forged, this is the first time in the affidavit in reply that respondent has taken up this ground. In the statutory notice, there is a reference to this balance confirmation and statutory notice is dated 3rd August 2014 and in paragraph 7 there is an express reference to their letter dated 13th March 2013. It must be noted that in an additional affidavit of one Dattatraya V. Nimbolkar affirmed on 4th May 2017, there is a copy of a communication dated 10th August 2013 by one Jatin Shah, Director of respondent with an endorsement : "This is a computer generated letter and hence signature is not required." assuring to settle outstanding dues as early as possible. There is also an email dated 8th August 2013, copy whereof is annexed at Exh. 'N' to the additional affidavit in which respondent has contended that they have acute shortage of funds and hence they were unable to meet their liability. In effect, these communications are after the letter dated 14th March 2013 acknowledging liability. Therefore, this defence, it is rather obvious is an afterthought.

6. So far as arbitration clause is concerned, it is settled law that insolvency and winding up matters are non-arbitrable. So far as disputed questions of facts are concerned, there is nothing raised in the affidavit in reply what these disputed questions of facts are. So far as production of evidence for taxes paid is concerned, respondent has not denied having received invoices but there is not a shred of communication on record to show respondent ever having informed petitioner that they have not received these documents to support the taxes and duties. There is no communication calling upon petitioner to provide copies of documents to support taxes having been paid. In an affidavit of one Sanjay Bhaskar Patankar affirmed on 7th August

2017, petitioner has expressly stated that they have provided all the documents and also provided documents in support thereof but no affidavit denying this affidavit has been filed. Therefore, this defence also is nothing but an afterthought.

7. In the circumstances, in my view, it is rather obvious that the company is unable to pay its debts, commercially insolvent and requires to be wound up. The following order, therefore, is passed :

(i) Petition is admitted and made returnable on 5th February 2018.

(ii) Petitioner is directed to advertise the petition in two local newspapers viz., (i) Free Press Journal (in English) and (ii) Navshakti (in Marathi) as also in (iii) 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 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 is sued, the balance, if any, shall be refunded to petitioner.

8. At this point of time, I am inclined to give one more opportunity to respondent. If respondent deposits a sum of Rs.1,60,23,458/- within six weeks from today with the Prothonotary and Senior Master, High Court, Bombay, this petition will stand dismissed. This amount to be retained by the Court and invested in fixed deposit with a nationalised bank for a period of minimum one year. In case of failure to deposit, the order in paragraph 7 will get triggered without notice to the company on the expiry of the six weeks period.

9. 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.

It should be noted that even on that date, nobody appeared for respondent.

3 Petitioner has filed an affidavit of one advocate Vishal B. Navale affirmed on 22nd February, 2018 in which it is stated that when he

went to the company's registered office on 17th February, 2018 to serve a copy of the order of admission, the office was found locked. The said advocate Vishal B. Navale has filed another affidavit affirmed on 15th February, 2018 in which he has stated that in view of the liberty granted by this Court, when he personally visited the registered office to serve the notice under Rule 28 of the Companies (Court) Rules, 1959, the registered office was found locked. On record is an affidavit of one Aniruddha Phadke affirmed on 20th January, 2018 confirming advertising the petition in Free Press Journal and Navshakti on 29th December, 2017 and also in the Maharashtra Government Gazette for the period 4-10 January, 2018 at serial no.M-17281. The Company Department has filed a service report dated 13th February, 2018 in which it is stated that the notice under Rule 28 of the Companies (Court) Rules, 1959 that was served upon the company came back undelivered with the endorsement "Unclaimed, Returned to Sender".

4 To the affidavit of advocate Vishal B. Navale affirmed on 15th February, 2018 referred earlier, is annexed an extract of the Company Master Data taken on 14th February, 2018 from the website of Ministry of Corporate Affairs in which the registered address is shown as "*81, Prabhat Center, CBD Belapur, Sector 1-A, Navi Mumbai, Maharashtra - 400 614 IN*". This is the same address to which the Registry has forwarded the notice

under Rule 28 and this is the same address to which the advocate Vishal B. Navale has gone to serve the notice. Therefore, I would accept that notice under Rule 28 is deemed to have been served on the company.

5 After the petition was admitted on 6th November, 2017 when none appeared for respondent, the petition was listed on 23rd November, 2017, 9th February, 2018 and 16th February, 2018 and on all these dates, none appeared for respondent company. Today one advocate Mr. Paras N. Vira, whose name appears in the cause list, is present in Court and states that he has no papers and therefore, cannot go on with the matter. Strangely, the other excuse that Mr. Vira gave was that the final hearing cause list is not available on High Court website. It is apparently an incorrect statement because the final hearing cause list is uploaded in the website. Moreover, the cause list is also available for every advocate on record to purchase and check the cause list. Therefore, this excuse of Mr. Vira is utterly baseless. Mr. Vira did not make any submissions.

6 As stated in the order dated 6th November, 2017, the company has by a communication dated 14th March, 2013 confirmed the balance payable as per the company's books as on 28th February, 2013 to be Rs.19,23,458.04/- and retention amount of Rs.1,41,00,000/-. 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.

7 In the circumstances, as the company is unable to discharge its debts, a presumption can easily be made that the company is commercially insolvent and requires to be wound up. The company has not even annexed their financial status to explain whether the company is in a position to discharge its debts.

8 I have heard the counsel for petitioner and also considered the petition and the documents annexed to the petition. I am also satisfied that the Company is unable to discharge its debts, is commercially insolvent and requires to be wound up.

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

> *(a) That respondent namely Morya Grain Distilleries Private Limited be ordered to be wound up by and under the directions, supervision and control of this Hon'ble Court under the provisions of the Companies Act, 1956;*

(b) That Official Liquidator, Bombay High Court or some other fit and proper person be appointed as Liquidator of all the business, assets, properties, income and books of accounts of respondent with all the powers under the provisions of the Companies Act, 1956.

10 Petitioner's advocate to forward a copy of this order duly authenticated by the Associate of this Court to Official Liquidator. Official Liquidator to take further steps upon receiving copy of the order without waiting for notification.

11 Company petition accordingly stands disposed.

(K.R. SHRIRAM, J.)