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

COMPANY PETITION NO.220 OF 2015

Harper Collins Publisher Limited)....Petitioner
V/s.
Dolphin Publications Pvt. Ltd.)....Respondent

Mr.Shyam Kapadia a/w Ms.Krithika Anand i/by M/s.Dhruve Liladhar and Co.for petitioners.
Ms.Suvarna Joshi for respondent.

CORAM : K.R.SHRIRAM,J
DATE : 9.3.2018.

P.C. :-

1 The petition is filed to wind up the respondent Dolphin Publications Pvt. Ltd. (the company) on the grounds that the company is unable to discharge its debts and is commercially insolvent.

2 Petitioners have come to this court stating : (a) petitioners are suppliers of books on different subjects; (b) Company approached petitioners with an offer to purchase books on credit and petitioners accepted offer and agreed to sell books on mutual terms and conditions and pursuant thereto sold, supplied and delivered books to the Company for sale ; (c) Petitioners raised several invoices and though the Company made payments, 20 invoices as listed in

paragraph 6(c) and copies whereof at Exh.B-1 to B-20 of the petition totaling to USD 1,06,721.62 has remained unpaid ; (d) petitioners issued a credit note dated 9.9.2011 for amount of USD 15,516.50 and after repeated reminders Company made on account part payment of USD 4,975 on 16.1.2013 leaving balance of USD 86,230.12/-; (e) despite repeated reminders, balance amount of USD 86,230.12 has remained unpaid, petitioner caused notice under Sections 433 & 434 of Companies Act 1956 to be issued demanding payment of USD 86,230.12 along with interest @ 12% p.a. from the date of invoices till payment and/or realization ; (f) The company is in financial difficulty and is otherwise commercially insolvent and requires to be wound up.

3 Petition came to be admitted by an order dated 28.6.2016. Company was not represented when the petition was admitted. No affidavit in reply was in place opposing the petition.

4 The company has filed an affidavit of one Pankaj Debnath affirmed on 21.12.2017. Subsequently with the leave of the court, company has filed another affidavit of said Pankaj Debnath affirmed on 20.1.2018.

5 The stand of the company in the 1st affidavit is that the distributor works on a thin margin and cannot take the burden of paying for unsalable stocks of the publisher and it is settled practice in the industry that unsold books were taken back by the publishers. The company has denied in paragraph-10 of the 1st affidavit in reply that the goods mentioned in the invoices are Exh.B-1 to Exh.B-20 were delivered to the company and put the petitioners to strict proof thereof. The company has also categorically stated that mere raising invoices without producing any delivery challan showing the goods were delivered to the respondent-company, does not make respondent liable to pay the same. The company admits credit note of USD 15,516.50 being issued by petitioner but has denied that after making USD 4,975 on 16.1.2013 the balance aggregating to USD 86,230.12 remained due and payable by the company. This point is of importance to consider the further defence of limitation raised by the company. The company, has stocks of the petitioner worth around Rs.35 lakhs which the company is unable to sell and petitioner can take back the entire stock. At the same time, company further states that petitioner was supplying books from time to time as their relationship goes back to year 2006 and the company was ready to pay all outstanding dues if any payable on the goods supplied by the petitioner but not on the goods supplied as stated in invoices being

Exh.B-1 to Exh.B-20 which does not show that the goods were delivered to the company.

In the 2nd affidavit in reply the company has, after reiterating what has been stated in the 1st affidavit in reply, denied that any part payment towards alleged invoices were made by the company and therefore, the petition in any event is barred by limitation.

Ms.Joshi for respondent states that invoices relate to the period between 15.2.2011 and 20.6.2011. In the rejoinder, petitioner has reiterated its averments in the petition and denied anything and everything contrary thereto.

6 When the petition was taken up for hearing on 1.2.2018 after the petition was heard for some time, Mr.Kapadia for petitioner sought leave of the court to file a further affidavit to show that on account payment was made by the company to petitioner.

7 The 1st point therefore, that requires to be considered is whether the petition is within limitation ?

8 As recorded in the order dated 1.2.2018, petitioner filed an additional affidavit of rejoinder of Vandana Saxena affirmed on

9.2.2018 to prove receipt of part payment of USD 4,975. To the affidavit is annexed an account statement purportedly issued by CITI Bank to petitioner and the statement date is 16.1.2013. Ms.Joshi raised an objection stating that : (a) this statement is unsigned ; (b) incomplete because the page annexed state “4/5” ; (c) certain portions have been blanked out and (d) it does not meet the requirements of Banker Books Evidence Act. Therefore, petitioner was given another opportunity to file an affidavit giving proper account statement to evidence that this payment has been made by the company. Mr.Kapadia in fairness stated that petitioner has not been able to obtain any such statement and petitioner cannot file any statement beyond what has been filed along with the affidavit dated 9.2.2018.

9 Mr.Kapadia submitted that (a) in paragraph 6 (e) petitioner has stated as under :-

> “Subsequently, pursuant to repeated reminders, the Respondent Company made certain on account part payment aggregating to USD 4,975.00 on 16th January, 2012 towards the amounts due and payable against the said Invoices. However, a balance amount aggregating to USD 86,230.12 (hereinafter referred to as “the said Outstanding Amount”) remained due and payable by the Respondent Company to the Petitioners”.

(b) In paragraph 15 petitioner has stated as under :-

> "The petitioners submit that on account of the part payment made by Respondent Company on 16.01.2013, no part of petitioners' claim is barred by limitation and the same is filed within time. The part payment is mentioned in Ex.A hereto."

(c) In the 1st affidavit in reply the company has not denied that it has made any part payment because in paragraph-12 it says as under :-

> "I deny that after making the payment of USD 4,975.00 on 16th January, 2013 a balance amount aggregating to USD 86,230.12 remained due and payable by the Respondent Company."

(d) Averments in paragraph-15 of the petition have not been denied because in paragraph-15 of the reply the company has stated as under :-

> "With reference to remaining paras of the petition I repeat, reiterate and confirm what is stated herein above and deny whatever is contrary or inconsistent therewith."

10 Mr.Kapadia submitted that before paragraph-15 in the 1st affidavit in reply, the company has not denied that it has not made part payment and has not taken the ground of limitation. Hence company is deemed to have admitted the averments in paragraph-15 of the petition. The defence of the company is that evidence is

required to be led and therefore, petition is not maintainable.

11 Mr.Kapadia also submitted that having conceded that part payment has been made, in the 2nd affidavit in reply, the company has taken a contradictory stand that no amount was paid as part payment and therefore, the company cannot approbate and reprobate.

12 Ms.Joshi reiterated the submissions in the affidavits opposing the petition and further submitted that this is a petition for winding up of the company and the principles to be applied are similar to the principles that would be applied while hearing the Summons for Judgment in a Summary Suit. Ms.Joshi submitted that if the defence raised by the company cannot be termed as moonshine or bogus or cannot be brushed aside, the Court should dismiss the petition and direct the parties to commence civil proceedings.

13 I have considered the pleadings, the documents annexed and also heard the counsel. On the issue of limitation, though the submissions made by Mr.Kapadia appears to be plausible and might be considered for acceptance, I am unable to brush aside the stand taken by the company as moonshine or an ingenious mask to cover up an admitted liability. While considering the stand of the parties, the

Court has to consider all the affidavits filed. It is true that in the 1st affidavit filed by the company, there is no specific denial as would be expected of a party as required under Order 8 Rule 5 of Code of Civil Procedure. At the same time, before the petition is finally taken up for hearing, the company with the leave granted by the court has filed a further affidavit specifically denied having made advance payment of USD 4,975. The petitioner was given an opportunity to submit documents to prove that this advance USD 4,975 was in fact made. Petitioner filed an affidavit which does not enthuse much confidence in the Court. Further opportunity was given to petitioner but petitioner stated that they cannot provide anything beyond what is filed with the further affidavit in rejoinder.

14 Coming to the merits of the matter, the company expressly has denied in paragraph nos.10 & 11 of the 1st affidavit in reply that any of the books as covered under 20 invoices, copies whereof at Exh.B-1 to Exh.B-20 of the petition were supplied. The Court would have expected the company to atleast file copies of documents to prove that these books were in fact supplied. Therefore, on this issue, the petitioner will have to lead evidence because entire basis of the petition is non payment of invoices for books supplied as stated in those invoices but there is no proof produced that those books were

supplied. I cannot accept petitioners' submissions that because invoices are raised, Court should assume that the books were supplied.

15 In the circumstances, the petition requires to be dismissed and hereby stands dismissed with no order as to costs.

16 Notwithstanding the above, Ms.Joshi states that whatever books the petitioner has supplied to the company, can still be taken by the petitioner. Ms.Joshi states that the company will hold on to those books for a further period of 8 weeks, within which period the petitioner may depute an authorized person to take away those books. Ms.Joshi states that within one week, the company will provide list of books available with the company to the advocate for petitioner. Eight weeks will begin from that date. After 8 weeks are over, the company need not hold on to the books and may dispose the same unless petitioner and the company can enter into any fresh agreement with regard to those books.

Petition disposed.

17 Petitioner to advertise dismissal of this petition within 2 weeks from today in `Free Press Journal' in English and in `Navshakti'

in Marathi, both Mumbai edition, as per the format prescribed under the Company Court Rules/Company Registrar and file an affidavit of compliance.

(K.R.SHRIRAM,J)