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

COMPANY PETITION NO.708 OF 2015

Accutech Infosystems Private Limited ….Petitioner

Vs.

M/s. Patel Infosystems Private Limited ....Respondent

Mr. Yogendra M. Kanchan for petitioner.
None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 4th JANUARY, 2018

P.C.:

1 This petition is for winding up of respondent company – M/s. Patel Infosystems Private Limited on the ground that the company is unable to discharge its debts and is commercially insolvent. On 6th April, 2017 when the petition was taken up for admission, this Court was pleased to pass the following order :

> *xxxxxxxxxxxxxx*
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> *2. By this petition, the petitioner seeks winding up of the respondent company on the ground that the respondent is unable to pay its debts.*
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> *3. It is the case of the petitioner that during the period between April 2011 and March 2012, pursuant to various orders placed by the respondent, the petitioner sold, supplied and delivered the goods as per the request of the respondent an aggregate sum of Rs.2,41,26,090/-. The respondent, however, made part payment of Rs.1,62,63,417/- out of the payment of Rs.2,41,26,090/-. Copies of the invoices and the cheque are annexed to the petition.*
>
> *4. Learned counsel appearing for the petitioner invited my attention to the documents annexed to the petition and also the correspondence exchanged between the parties. He submits that the respondent vide its letter dated 25th September 2012 and several other e-mails which are annexed to the petition acknowledging its liability and assured to make payment of the dues of the petitioner, but did not make any payment subsequently.*

5. The respondent issued a cheque in the sum of Rs.78,62,673/- dated 15^{th} December 2013 which was dishonoured on presentation by the petitioner four times with the remarks "funds insufficient." The petitioner, thereafter, issued a notice upon the respondent under Section 138 of the Negotiable Instruments Act, 1881 calling upon the respondent to pay the said amount. In response to the said notice, the respondent vide its advocate's reply dated 22nd February 2014 for the first time alleged that the goods agreed to be delivered by the petitioner to the respondent were never delivered as per the specifications requested by the respondent and the invoices raised by the petitioner were never actually matched with the goods delivered by the petitioner to the respondent. It is further stated in the said reply that the cheque issued by the respondent was only given to the petitioner as a security.

6. The petitioner, thereafter, issued a statutory notice upon the respondent vide its advocate's letter dated 29th September 2014 which was delivered to the respondent. There was neither any response to the said notice nor any payment was made by the respondent pursuant to the said notice. According to the petitioner, the respondent was liable to pay a sum of Rs.96,20,465/- as on 22nd December 2014 with further interest thereon @ 24% p.a. on the principal amount from the date of filing the petition till payment.

7. Learned counsel for the petitioner invited my attention to the reply addressed by the respondent to the notice dated 11th February 2014 and would submit that the issue of alleged defective goods raised by the respondent were raised for the first time in the reply dated 22nd February 2014 and were never raised when the goods were delivered to the respondent. He submits that the respondent has acknowledged the liability of the petitioner and has assured to clear the dues of the petitioner shortly.

8. A perusal of the record indicates that the petitioner sold, supplied and delivered various goods to the respondent as per the orders placed by the respondent. The correspondence annexed to the petition further indicates that the respondent has acknowledged the liability of the petitioner and assured to make payment shortly. A cheque of Rs.78,62,673/- dated 15th December 2013 issued by the respondent towards the payment of the petitioner is dishonoured upon presentation by the petitioner with the remarks "funds insufficient."

9. In so far as the reply of the respondent vide its advocate's letter dated 22nd February 2014 in response to the notice issued under Section 138 of the Negotiable Instruments Act, 1881, it is clear that the issue of defective goods or that the goods were not delivered as per the specifications ordered by the respondent or that the cheque was issued only as and by way of security is concerned, the said defence is raised for the first time in the said reply dated 22nd February 2014 and never raised when the goods were delivered to the respondent or when the respondent has acknowledged the liability of the petitioner.

> *10. The defence raised for the first time in the reply dated 22nd February 2014 is ex facie moonshine and is not bona fide. There was no response to the statutory notice issued by the petitioner.*
>
> *11. In these circumstances, in my view, the defence thus raised in the reply to the statutory notice is not bona fide and is moonshine. I am of the prima facie view that the respondent is unable to pay its debts and is commercially insolvent.*
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> *xxxxxxxxxxxxxxxx*

2 On record there is an affidavit of one Sachin Gajanan Gosavi affirmed on 28th April, 2017 confirming advertising of the petition in Free Press Journal (in English) and Navshakti (in Marathi) on 26th April, 2017 and also in the Maharashtra Government Gazette. Since to the affidavit, petitioner has only annexed the proof of application to the Government Press for advertising in the Government Gazette, Mr. Kanchan, counsel for petitioner undertakes to file further affidavit annexing thereto the gazette notification within one week from today. The Company Department has also filed a service report dated 29th April, 2017 confirming service of the notice under Rule 28 of the Companies (Court) Rules, 1959 upon the company on 24th April, 2017.

3 Respondent had neither appeared at any stage nor filed any affidavit in reply opposing the petition. This Court in its order of 6th April, 2017 has considered the reply given by respondent company to the notice given under Section 138 of the Negotiable Instruments Act, 1881 and observed that the defence raised in the reply dated 22nd February, 2014 is

ex facie moonshine and is not bonafide. There is, however, no reply to the statutory notice given under the Companies Act, 1956. 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 I have considered the petition, the documents annexed thereto and also heard Mr. Kanchan, counsel for petitioner. Even I am satisfied that the defence that was raised for the first time in reply dated 22nd February, 2014 to the notice under Section 138 of the Negotiable Instruments Act, 1881 is *ex facie* moonshine and is not bonafide. As no affidavit in reply has been filed opposing the petition, the averments in the petition are also not controverted.

5 This Court while admitting the petition has observed that “I am of the *prima facie* view that respondent is unable to pay its debts and is commercially insolvent”. I am also satisfied that respondent is unable to

discharge its debts, is commercially insolvent and requires to be wound up.

6 Company petition is, therefore, allowed in terms of prayer clauses – (a) and (b), which read as under :

> (a) that the Company, i.e., M/s. Patel Infosystems Private Limited, be wound up by this Hon'ble Court under the provisions of the Companies Act, 1956;
>
> (b) that the Official Liquidator be appointed as Liquidator of M/s. Patel Infosystems Private Limited with all necessary powers under the provisions of the Companies Act, I of 1956.

7 Official Liquidator shall forthwith act on an authenticated copy of this order.

8 Company petition accordingly stands disposed.

(K.R. SHRIRAM, J.)