

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

COMPANY PETITION NO.66 OF 2016

Kotak Mahindra Bank Limited)....Petitioner
V/s.

Kamla Landmark Infrastructure Pvt. Ltd.)....Respondent

Mr.Nikhil Rajani i/by V.Deshpande and Co. for petitioner.
None for respondent.

CORAM : K.R.SHRIRAM,J

DATE : 19.4.2018

P.C.:-

1 The petition is filed for winding up of the respondent company-Kamla Landmark Infrastructure Pvt. Ltd. on the grounds that the company is unable to pay its debts to petitioner and is commercially insolvent.

2 On 22.1.2018 at the time of admission of the petition, the following order came to be passed :-

“1 Petitioner is seeking winding up of respondent company Kamla Landmark Infrastructure Pvt. Ltd. (the company) on the grounds that the company is indebted to petitioner, unable to discharge its debts, is commercially insolvent and requires to be wound up.

2 Some time in September, 2011 at the request of respondent company, petitioner sanctioned two Term Loan Facilities to the extent of Rs.420 lakhs and Rs.580 lakhs as per the sanction letter dated 20th September, 2011 and addendum dated 26th September, 2011 on

terms and conditions mentioned therein. To secure the loan and its due repayment, company entered into Loan cum Hypothecation Agreement dated 28th September, 2011 alongwith other facility documents/agreements entered/executed pursuant thereto. The two Term Loan Facilities were secured by the mortgage of properties and hypothecation of present and future current assets and movable fixed including movable fixed assets belonging to the company and other parties mentioned therein and also by the personal guarantees given by Mr. Ramesh Jain, Mr. Jinendra Jain and Mr. Jitendra Jain, all dated 28th September, 2011.

3 As the amounts agreed to repay were not repaid, petitioner issued a recall notice dated 24th June, 2014 and consequently, a statutory demand notice under Section 13 (2) of the SARFAESI Act. Despite these notices, no amounts were paid. Therefore, petitioner issued a notice dated 28th July, 2015 under the provisions of Section 433, 434 and 439 of the Companies Act, 1956. No reply was given to this notice. Hence, this petition came to be filed.

4 Mr. Rajani, counsel for petitioner states that petition was served upon the company on 10th March, 2016. No affidavit in reply has been filed till date. Nobody has been appearing for respondent either. On 31st August, 2017 further directions were passed that affidavit in reply, if any, to be filed on or before 8th September, 2017 and rejoinder, if any, on or before 15th September, 2017. Petitioner's Advocates was directed to send intimation by email at the email address of respondent company provided in the company master data. Mr. Rajani tenders an affidavit of one Mahesh Girkar affirmed on 18th September, 2017 confirming sending the email to the email ID provided in the MCA website. Mr. Rajani also tenders extract taken out on 13th January, 2018 of the company master data maintained by the Ministry of Corporate Affairs. The email address mentioned therein is the same to which email has been sent.

5 When the petition was called out, Mr. Joshi, counsel

stated that he has instructions to appear for respondent company and the directors of respondent company are in prison and he requires time to take instructions to file Vakalatnama and to file affidavit in reply.

6 I have considered the petition and the documents annexed thereto. Petition has been served on respondent company way back in March, 2016, almost 22 months ago. It is not the case of Mr. Joshi that the directors have been behind bars even before the petition was served. Therefore, the company had enough time to file affidavit in reply. Moreover, no reply has been given 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.

7 Therefore, I am prima facie satisfied that the company is unable to discharge its debts and is commercially insolvent. The two directors of the company out of three directors, who had given personal guarantee to petitioner, Mr. Joshi states, are in prison. Mr. Joshi states that Mr. Ramesh Jain is not in jail. All the more reason why reply could have been filed earlier through Mr. Ramesh Jain as director of respondent company.

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3 On record is an affidavit of one Mahesh Girkar affirmed on 2.4.2018 confirming advertising the petition in 'Free Press Journal'

and 'Navshakti' on 26.2.2018 and in the Maharashtra Government Gazette for the period 15th to 21st March, 2018 at Serial No.M-17364. There is also another affidavit of Mahesh Girkar affirmed on 17.2.2018 confirming service of the copy of the order of admission passed on 22.1.2018. The company department has also placed service report dated 14.2.2018 confirming service of notice under Rule 28 under the Companies (courts) Rules 1959. No affidavit in reply is filed and therefore, none of the averments are controverted. No reply to the statutory notice was sent as noted in the order of admission. 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 I have perused the petition, heard Mr.Rajani 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.

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

“(a) that the Respondent Company viz.Kamla Landmark Infrastructure Private Limited be ordered to be wound up by and under the directions of this Hon'ble Court ;

(b) that the Official Liquidator attached to this Hon'ble Court be appointed as the Liquidator of the Respondent Company viz.Kamla Landmark Infrastructure Private Limited, with all powers under Section 457, 458 read with Section 454, 455 and 456 of the Companies Act, 1956.

6 The advocate for petitioner shall furnish a copy of this order, duly authenticated by the Associate of this court with the office of Official Liquidator. The Official Liquidator shall forthwith act thereupon without waiting for any notification appointing him as liquidator.

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

8 Petition disposed accordingly.

(K.R.SHRIRAM,J)