IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY PETITION NO.47 OF 2016

M/s Gajanan Tubes .. Petitioner
vs
Hotel Horizon Pvt.Ltd .. Respondent

Mr.Niraj Shah I/b Law Chambers of Siddharth Murarka for Petitioner
Mr.Sanskar Marathe for Respondent.

Coram : K.R.SHRIRAM, J
Date : 2nd MAY, 2018

P.C

The petition is filed for winding up of the respondent-company on the ground that the company is unable to discharge its debts and is commercially insolvent.

2. The petitioner is an unpaid vendor. The company had placed a purchase order dated 22.11.2014 for various quantities of MS pipes. The petitioner supplied according to the petition, the quantity ordered and raised an invoice dated 22.11.2014. It is the petitioner's case that the petitioner made further supplies on 13.1.2015 and raised two further invoices. According to the petitioner, all the three invoices totalling a sum of Rs.8,04,096.00

remained unpaid. The invoices also provide for interest at 24% p.a. on the unpaid amount. It is also stated in the petition that the company had issued a cheque for Rs.7,63,682.50 towards part discharge of its liability to the petitioner. The same came to be dishonoured when presented. The reason for the dishonour was "exceeds arrangement". A copy of the invoice, cheque and bank memo are annexed to the petition. It is further averred that as the company did not make any payments, the petitioner caused a statutory notice to be issued through its advocate on 22.9.2015. There was no reply to the statutory notice. It is settled law that when there is no reply to the statutory notice, the Court can draw a presumption of the company being commercially insolvent.

3. The company has filed an affidavit in reply through one Mr.Sagar Sharma affirmed on 28.8.2017. In the affidavit in reply, for the first time after almost three years of supply being made, the company has taken a defence that the purchase order expressly provided for pipes of Jindal Brand whereas the petitioner has supplied pipes of Maharashtra Seamless Brand and therefore, the

goods supplied were not in accordance with the purchase order. It is also stated that in February 2015 the parties met for negotiations and the petitioner did not take steps to correct the defect but, instead sent a notice through another Advocate on 10.3.2015 seeking value of the material supplied. The company has replied to this notice vide its letter dated 7.4.2015 in which in para 4 it is mentioned as under :

> 4. " The goods supplied suffer from defects and do not adhere to the required specifications and we have highlighted the same to your clients and also asked them to remove the defect material and replace them with the correct material. However, they have paid no heed to our request."

4. It is to be noted that the so called objection regarding not adhering with the required specifications by letter dated 7.4.2015 for the first time was almost five months after the supply was made. Moreover, when I asked Mr. Marathe, counsel appearing for the company, as to what has happened to the goods supplied, Mr

Marathe candidly stated that if not all, most of the goods have been consumed. Of course, Mr.Marathe had no answer to a query, if the goods were not in accordance with the specifications, why were they even consumed and why did the company not immediately write to the petitioner that the goods supplied were not in accordance with the purchase order and rejected the goods. Mr.Marathe stated that there is no communication to that effect. To the query as to why the cheque was then issued, Mr.Marathe stated that the cheque was issued prior to placing of the purchase order. Mr.Marathe submitted that the cheque issued was only as security, and at the time when the cheque was issued, there was no liability. The fact is that this cheque has been dishonoured because the company had exceeded the arrangement that it had with the bank. Hence,I am unable to accept this explanation of Mr.Marathe.

5. Therefore, the admitted position is that the goods sold were in any way consumed. There is nothing on record from the company to note how much has been consumed and how much is available. Moreover, the goods were supplied more than three years

ago and could have deteriorated in condition due to vagaries of nature.

6. In the circumstances, considering the facts in hand, I am unable to accept the reply of the company made after almost two years of receiving the statutory notice and also three years after receiving the goods to be bonafide.

7. I am therefore, satisfied that the company is unable to pay its debts and the company deserves to be wound up. In the circumstances, following order is passed:

O R D E R

(a) The company petition is admitted, returnable on 19.7.2018.

(b) Petitioner is directed to advertise within 2 weeks, the petition in two local newspapers, viz., (i) Free Press Journal (in English); and (ii) Navshakti (in Marathi) as also in the 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 Company (Court) Rules, 1959.

(c) Petitioner shall deposit Rs.15,000/- toward publication charges with the Prothonotary and Senior Master, under intimation to the Company Registrar, within a period of two weeks, failing which petition shall stand dismissed for non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to petitioner.

(d) Respondent waives notice under Rule 28 of Companies (Court) Rules, 1959.

8. Notwithstanding the above, I am inclined to give opportunity to the company before the company is ordered to be wound up. The company has to deposit a sum of Rs.8,00,000/- with the Prothonotary and Senior Master, High Court Bombay within four weeks from today. If this amount is deposited, the petition will stand dismissed without further reference to the Court. If not deposited,

time to advertise will begin on the day after expiry of four weeks period.

(K.R.SHRIRAM, J)