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

COMPANY PETITION NO. 133 OF 2016

M/s. Azelis (India) Private Limited … **Petitioner**

V/s.

M/s. Dat Industries Pvt. Ltd. … **Respondent**

Mr. Rajesh Ghag I/b Pushkar Patankar for the Petitioner.
Mr. Suryakant Pise for the Respondent.

CORAM : K.R. SHRIRAM, J.
DATE : 20th AUGUST, 2018

P.C.:

. The Petitioner has approached this Court to wind up Respondent Company on the ground that the Company is unable to discharge its debts and is commercially insolvent. Petitioner is an unpaid vendor. It is the Petitioner's case that in the course of business the Company placed orders upon the Petitioner and Petitioner supplied goods from time-to-time. Copies of invoices and delivery challans are annexed to the additional affidavit dated 12.07.2017 filed by one Hardeep Kalsi affirmed on 17.07.2017. It is also stated in the petition that by emails dated 25.07.2014 and 30.07.2014, the Company has admitted its liability to pay to the Petitioner the principal amount due under the invoices raised. Copies of these emails are at Exhibits 'E' and 'F' to the petition. In email dated 25.07.2014, it is stated “I will start making payment to your company immediately (Monday) and make sure that the payment is made on a regular basis. Hopefully will try and clear the overdue outstanding by end of August or mis September". In the email dated 30.07.2014, the company has agreed to pay Rs.1 Crore by 8th -10th August 2014 and Rs.2 to 2.50 crores by 30th August.

2 On 01.08.2014, the Petitioner sent a summary of discussion that it had with company and the same reads as under :

> *"Dear Vijaybhai,*
>
> *Further to our meeting yesterday, 31st July, we have discussed and agreed as follows:*
>
> *We have reiterated our position that almost INR 70 million is overdue payments from you and your customers and this is not acceptable situation for our management. We have committed to support you with regular supplies based on the payments that we received from you against the outstanding and this has been made very clear and you have agreed on same. We give below the summary of our discussions.*
>
> - *We will receive payment of 10 million INR on or before 8-10th of August 2014.*
> - *Azelis India will get payment of INR 25-30 million on or before 31st August 2014.*
> - *We will supply any of the polymer products against the payments received from you.*
> - *Material will be mutually decided, so that there will be no complaints on material and we shall keep you informed from booking of material to its arrival to Mumbai port.*
> - *You will keep making payments as per schedule notwithstanding any delay in material arrival or delay in Port clearing or delay in your customer's payment.*
> - *By the end of September you will completely clear the overdue payments.*
> - *The payment terms for new supplies will be 45 days credit period.*
> - *It has been categorically agreed and assured by Vijay Bhai that there will be no claims (quality or otherwise) in our all existing supplies to your customers (Keya/Bindal/ Siddhi/ Subham)*

- *By achieving above all points we hope to continue the Polymer business with you and your customers.*

Looking forward to your support and fulfillment of the commitments for our mutual business."

3 This has not been denied by the Company. Thereafter, reminder were sent by the Petitioner to company to which there has been no response. Hence, by a letter dated 16.06.2015, the Company issued a notice under the provisions of Companies Act, 1956 by recording that after the admission of liability and assurance of payment vide emails dated 25.07.2014 and 30.07.2014, the Company has paid only Rs.10 lakhs on 10.08.2014.

4 In reply to the Statutory Notice, the Company has not denied the transaction or the emails but has raised various points which are unrelated to the transaction in question. In the affidavit in reply also the company's defence are as under:

a) Claim is barred by limitation.

b) Petitioner never sold and delivered goods to the company.

c) No cause of action.

d) Serious dispute in respect of non delivery of goods and invoices or delivery challans.

e) Dispute is bonafide.

f) Company has suffered loss due to the Petitioner.

5 In my view, the defence raised is nothing but moonshine. The invoices have been raised for the period 31.12.2013 to 30.04.2014. The petition has been lodged on 05.12.2015. That apart in the email of 30.07.2014, Company has agreed to pay a sum of Rs.1 – 3.5 Crores by 30.08.2014. Hence, the petition is within limitation.

6 So far as the stand taken by Counsel for the Company that Petitioner did not sell or deliver any goods to the company, again the same is moonshine defence and after thought, because in the emails dated 25.07.2014 and 30.07.2014, the Company has not denied having received the goods and on the contrary, has agreed to pay for these goods. Even in the reply to the statutory notice, the Company does not state anywhere that the goods were not received by the Company.

7 So far as defence of no cause of action is concerned, it is nothing but a bald statement made in the Affidavit-in-Reply. Therefore, the defence raised by the Company is not bonafide and is misconceived.

8 As regard the defence of loss suffered, this is again a bald statement made in the Affidavit-in-Reply. There is nothing to explain how the company has suffered any loss or had to incur expenses by way of damages or that it could be attributed to Petitioner. The Affidavit-in-Reply has been affirmed on 05.07.2018, almost 4 to 5 years after the goods were supplied.

9 In the circumstances, I am satisfied that Petitioner has supplied goods

raised invoices and the company has to pay the amount as reflected in the invoices. The particulars of claim indicate that a sum of Rs. 2,01,53,517/- is principal amount due and payable. I had asked Counsel for Respondent as to whether the company would deposit a sum of Rs.2 crores with the Prothonotary and Senior Master, High Court, Bombay and parties can refer this dispute to Arbitration and stood over the matter to post lunch session.

10 Counsel for Respondent after taking instructions stated that his clients are not inclined to deposit Rs.2 Crores and they are not in a financial position to deposit that amount. Counsel offered to deposit Rs.25 lakhs which is rejected. There is also nothing on record to indicate that the Company is commercially solvent.

11 On record there is Affidavit of Mr. Vijay Pawar affirmed on 31.05.2018 confirming advertisement of the petition in Fress Press Journal and Nav-Shakti and in the Maharashtra Government Gazette for the period 17th to 23rd May, 2018 at Serial No. M1852. The company Department has placed a Service Report dated 21.02.2018 confirming the service of notice under Rule 28.

12 In the circumstances, the petition is allowed in terms of prayer clauses (a) and (b), which read thus:

> *"a) that the said Respondent Company, namely, M/s. DAT Industries Private Limited, be wound up by and under the order and directions of this Hon'ble Court and under the provisions of the Companies Act, 1956;*
>
> *b) that the Official Liquidator, High Court, Bombay, or some*

other fit and proper person be appointed as Liquidator of the said Respondent Company, namely, M/s.DAT Industries Private Limited, with all powers under the provisions of the Companies Act, 1956;”

13 Petitioner's advocate, within two weeks, to forward an authenticated copy of this order to the Official Liquidator who shall take immediate steps without waiting for any notification. The counsel for petitioner also to forward a copy of this order to the National Company Law Tribunal, Mumbai for information.

14 Upon receipt of the authenticated copy from petitioner's advocate, the Official Liquidator shall forthwith cause notice to all concerned directors calling upon them to file their respective statement of affairs strictly in consonance with the provision of law. All directors of respondent company, now in liquidation, are hereby directed to file their respective statements of affairs as required under Section 454 of the Companies Act, 1956, failing which, the Official Liquidator shall proceed further and lodge criminal complaint against the erring directors, without seeking prior sanction of this Court for initiation of criminal prosecution.

15 The Prothonotary and Senior Master, Bombay High Court to return the amount of Rs.10,000/- deposited by the Petitioner subject to deductions, if any.

16 Notwithstanding the above order, I am still inclined to give one opportunity to the Company to avoid winding up. The Company shall deposit a sum of Rs. 2 Crores with the Prothonotary and Senior Master, High Court, Bombay within four weeks from today. If this amount is deposited, on the Monday following the date of deposit, petition will be placed for directions. If

the amount is not deposited, Petitioner within two weeks from the expiry of four weeks shall forward a copy of this order to the Official Liquidator.

17 It is also made clear that during the four weeks interregnum period, the company, its Directors, Manager, servants, agents shall not create any third party rights or encumber or part with possession with any of the assets of the company.

18 Petition disposed accordingly.

(K.R. SHRIRAM, J.)