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

COMPANY PETITION NO. 141 OF 2016

M/s. Geetanjali Solar Enterprises,
Prop. Anupam Baral .. Petitioner
Vs.
Eversun Energy Pvt. Ltd. .. Respondent

Mr.Sitesh Sharma a/w. Mr.Vijay Upadhyay for petitioner.

Mr.Ramesh Dube-Patil for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 28TH JUNE 2018

P.C.

1 This petition is for winding up of respondent company-Eversun Energy Pvt. Ltd. (the company) on the ground that the company is unable to discharge its debt and is commercially insolvent.

2 On 20th February 2018, the following order came to be passed :-

1 The petition is filed to wind up respondent company on the grounds that company is unable to discharge its debts and is commercially insolvent.

2 The company had entered into a contract with petitioner as reflected in the purchase order amendment EPBL/1314/076 dated 22.8.2013 for design, supply of Solar PV power plant of 5 Kw capacity and design supply of Solar PV power plant of 1 Kw capacity inclusive of packaging and forwarding etc. Further Work Order (Amendment) bearing Order No.EEPL/1314/077 was issued by the company in favour of petitioner. Petitioner executed the work under the contract and raised 9 invoices totaling to Rs.1,72,71,362/. Further invoices were also raised towards additional expenses totaling to Rs.17,15,477/.

3 According to petitioner the company had, at the time of *awarding the contract, given bank guarantee towards 5% advance for aggregate sum of Rs.34,41,270/. After deducting this amount paid by way of bank guarantee, an amount of Rs.1,55,45,569/ was due and payable by the company to petitioner. The company had given its ledger account for the period 1.4.2010 to 26.5.2015, copy whereof is at Exh.F to the petition and counsel for petitioner states that by this, the company had admitted liability to the extent of Rs.1,33,92,739/.*

4 It is stated in the petition that despite admission of liability the company failed and neglected to pay the amount. There is also a copy of mutual understanding entered into between the company and petitioner in which company has admitted a liability of Rs.1,55,45,560/ as on 31.3.2015. As no payments came forth, petitioner caused notice dated 5.10.2015 issued to the company to which there is no response.

5 Petitioner has placed on record an affidavit of one Asha Kanzarikya affirmed on 9.2.2018 stating that the petition that was sent to the registered office of the company has come back undelivered with the endorsement "insufficient address". Mr.Sharma for petitioners tenders print out of company master data taken out today which is taken on record and marked `X' for identification in which the registered address given is the same as the address to which petition was sent. Moreover, in the affidavit it is also mentioned that emails have been sent to their email id given in the company master data. Nobody is present for company though served and no affidavit in reply opposing petition has been filed. Therefore, none of the averments in the petition are controverted.

6 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 I have also perused the petition and the documents annexed to the petition and also heard counsel for petitioner. In the ledger account read with the mutual understanding entered *into between the parties, the company has admitted its liability to the extent of Rs.1,33,92,739/ , if not Rs.1,55,45,560/. I am satisfied that the company is indebted to petitioner, is unable to pay its debts and is commercially insolvent and the company deserves to be wound up. In the circumstances, in my view, the petition requires to be admitted and the following order is passed …........."*

3 On 27th April 2018, the following order came to be passed :-

"Matter was called out yesterday and at joint request of advocate for the parties, kept back for today. Today, due to paucity of time not taken up.
Stand over to 3 May 2018."

4 On 3rd May 2018, the following order came to be passed :-

"1 Petition is listed for final hearing today. In the order dated 20th February 2018, in paragraph 5, it is recorded that the petition has been served by email because the petition that was sent to the registered office came back undelivered with the endorsement "Insufficient address". The address is the same as shown in the Company Master Data. The counsel for respondent company confirms having received a copy of the petition by email but has no explanation as to why the endorsement shows registered office address as insufficient address. Even on 26th April, 2018 when the petition was listed, it was stood over to 27th April, 2018 and it is now listed today. Even today, there is no affidavit in reply filed and the counsel for respondent company is seeking time. Mr. Sharma, counsel for petitioner is strongly objecting and states that if any time is being granted, the Court should put the company to terms.

2 The conduct of the company shows that the attempt is only to delay the matter. The counsel for respondent company admits having received a copy of the petition before 20th February, 2018 and there is no explanation coming forth as to why for more than two months, reply has not been filed.

3 Be that as it may, I am still inclined to grant an opportunity to respondent company but the company has to be certainly put to terms. Litigants should be discouraged by imposing substantial cost so that they do not indulge in attempts to delay the proceedings. The company to file an affidavit in reply and serve a copy thereof within two weeks from today. Rejoinder, if any to be filed and

> *copy served within two weeks of receiving copy of the affidavit in reply.*
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> *4 For today's adjournment, the company to pay a sum of Rs.50,000/ as cost to petitioner by way of cheque drawn in favour of the advocate on record for petitioner. The company shall also give a donation of Rs.50,000/ to National Defence Fund (NDF), State Bank of India, Institutional Division, Parliament Street, New Delhi, Account No.11084239799www.pmindia. nic.in. These amounts to be paid within two weeks from today.*
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> *5 It is made clear that if these amounts are not paid but the affidavit in reply is filed within two weeks, the affidavit in reply will not be considered. If these amounts are paid but the affidavit in reply is not filed within two weeks, the affidavit in reply will not be considered. The counsel for respondent company has made a note of this order passed and no excuse of the order not being available in the website will be entertained.*
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> *6 Stand over to 7th June, 2018".*

5 Mr.Dube-Patil states that the company has chosen not comply with the orders of this Court but his instructions are to challenge the order. But no such challenge is yet filed. Therefore, there is no affidavit in reply on record contesting the petition and the company has also decided to disobey the orders of this Court which shows pure contempt.

6 Be that as it may, this Court will proceed on the basis that the averments in this petition are uncontroverted. There is also no reply 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, 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.

7 On record is an affidavit of one Ms.Asha Kanzariya confirming advertising the petition in Free Press Journal and Navshakti on 23rd April 2018 and also in Maharashtra Government Gazette for the period June, 14-20, 2018 at Sr.No. 1884.

8 So far as the notice under Rule 28 is concerned, as noted in the order dated 20th February 2018, the same was sent but has come back with the endorsement *'Insufficient address'* but the address to which the notice was dispatched is the same address as shown in the extract of Company Master Data, which is taken on 3rd May 2018. In any event, the company has appeared on 26th April 2018, 27th April 2018 and 3rd May 2018 and therefore, it is noted that the company was aware about the existence of this petition and also has received copy of this petition. In fact, the company has chosen not to file any reply despite being given a chance on 3rd May 2018.

9 From the petition, the documents and record and the fact that none none of the averments in the petition have been controverted and added to that there is no reply to the statutory notice, it is rather obvious that the company is indebted to petitioner, unable to discharge its debts and requires to be wound up. Petition, therefore, is allowed in terms of prayer clauses (a) which read as under :-

> *"(a) That this Hon'ble Court may kindly be please to pass an order of winding-up of the respondent company, namely, M/s. Eversun Energy Private Limited, having its registered office address at Sagar Complex, Building No.1, Ground Floor, Mumbai-Pune Road, Kasarwadi, Pune 411034, Maharashtra, India."*

10 Petitioner's advocate, within two weeks, to forward an authenticated copy of this order to the official liquidator who shall take immediate steps to liquidate the company without waiting for any notification.

11 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.

12 The company petition accordingly disposed.

(K.R. SHRIRAM, J.)