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

COMPANY PETITION NO. 225 OF 2016

Shubhangi Papers Private Limited ...Petitioner

Versus

Meridian Sunmica and Laminate Pvt. Ltd. ...Respondent

Ms.Minakshi Nimbalkar a/w. Ms. Prachi Raval I/b. Mr.Satyan Israni for Petitioner.
Mr.Hemant Sharma a/w. Mr. Amol Patil I/b. Mr.Parmvir Narula for Respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 1 OCTOBER 2018

P.C.:

1 This petition is for winding up of respondent company - Meridian Sunmica and Laminate Pvt. Ltd. (the company) under the provisions of the Companies Act, 1956. According to petitioner, the company is indebted to petitioner and unable to discharge its debts and is commercially insolvent.

2 On 24th July 2017, at the time of admission of petition, the following order came to be passed :

> *"i) The Company Petition is admitted and made returnable on 11th September, 2017.*
>
> *(ii) The Petitioner is directed to advertise the Petition in two local newspaper viz: "Free Press Journal" (in English) and "Navshakti"(in Marathi) and 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 noncompliance with this direction or with the Companies (Court) Rules 1959.*
>
> *(iii) The Petitioner shall also deposit an amount of Rs.10,000/with the Prothonotary and Senior Master of this Court with intimation to the Company Registrar towards publication charges, within a period of three weeks from the date of this order, failing which the Petition shall stand dismissed for non-prosecution without further reference to the Court.*
>
> *(iv) Notice under Rule 28 of the Companies (Court) Rules, 1959 be issued".*

Subsequently, the company appeared on 2nd August, 2018 and on 23rd August, 2018. Pursuant to the liberty granted, the company filed an affidavit in reply of one Mr.Ashok Shah affirmed on 18th August, 2018.

3. It is the case of petitioner that the company had approached petitioner for supplying of Kraft Paper Deluxe (Kalptaru). It is stated that petitioner was supplying since 2012 and raising various invoices upon the company. It is stated in the petition that the company was making payments, though late and in the beginning after persistent follow ups and requests. Subsequently, the company stopped paying. Copies of the invoices are annexed to the petition. It is also stated that on or before 1st November 2013, the company paid an amount of Rs. 5,00,000/- and thereafter, did not make any payments. There is an outstanding according to petitioner, of Rs.1,32,55,675/-. Petitioner is also claiming interest at the rate of Rs. 18% per annum, though invoices do not mention of any rate of interest. It is stated in the petition that the statutory notice dated 7th March, 2015

sent to the company through petitioner's advocate came back undelivered with an endorsement of the India Post "Delivery Attempted: Door Locked-Intimation Served." To the petition is annexed an extract of the tracking report of India Post in which it is stated that the delivery was attempted on 12th March, 2015 at 17:24:00 at Panvel HO. Thereafter, this petition came to be filed. At the time of admission on 24th July 2017, none appeared for the company. Therefore, petition cam be admitted. In the affidavit in reply, the following defences are taken :

(a) Respondent company suffered a huge loss on account of defective quality of goods supplied by petitioner.

(b) The company never received the statutory notice.

4 Going in the reversed order, so far as the statutory notice is concerned, counsel for petitioner relied on three judgments namely (1) ***N. Parameswaran Unni Versus G. Kannan and Another*** [1] (2) ***Logic Eastern India Pvt. Ltd v. KEC International Limited (Cables SBU)***[2] and (3) ***Deepak Machineries Pvt. Ltd. Versus Ispat Industries Limited.***[3]

5 Relying on these judgments, Ms. Nimbalkar, counsel for petitioner submitted that, intimation pasted by the postal authority at the registered address of the company is good service. Ms. Nimbalkar also

1. (2017) 5 SCC 737
2. 2018 SCC OnLine Bom 916
3. (2005) 2 Bom CR 94.

submitted that, 12th March 2015, the date on which the postal authority attempted to serve was Thursday and was not a holiday.

6 Mr.Sharma, counsel appearing for the company submitted that, there is no evidence to show that the track report of India Post annexed to the petition is correct. Mr. Sharma submitted that petitioner has not proved to whom this intimation was given and on whom the delivery was attempted and, therefore, the Court should not accept the averments of petitioner that an attempt to serve the notice was made. Mr. Sharma also submitted that under Section 434 of the Indian Companies Act, 1956, non service of the statutory notice is fatal to petitioner. Mr. Sharma submitted that *N. Parameswaran Unni (supra)* is under Section 138 of the Negotiable Instruments Act, 1881 and *Logic Eastern India Pvt. Ltd. (supra)* is under Section 37 of the Arbitration and Conciliation Act, 1996. Mr.Sharma did not further deal with *Deepak Machineries Pvt. Ltd. (supra)*.

7 Before I proceed further, it has to be noted that petitioner has not approached this Court on the ground that there was no reply to the statutory notice and, therefore, there is deemed inability to pay and hence the company should be wound up. It is the case of petitioner that the company has not paid the debts of petitioner and as such, the company is liable to be wound on the terms of provisions of Section 433 (e) read with

Section 434 of the Companies Act. Paragraph 13 of the petition reads as under:

> *"13.The Petitioner states that, the said Company has not paid the debts of the Petitioner and as such the Company is liable to be wound up in terms of the provisions of Section 433 (e) and under the provisions of Section 434 of the Companies Act, 1956. It is therefore, just, proper and equitable and in the interest of justice and the creditors of the said Company that the said Company be would up by and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956".*

8 In ***N.L.Mehta Cinema Enterprises vs Pravinchandra P. Mehta***[4], the Division Bench of this Court held that it was certainly open to the petitioner to make a claim, i.e., that the company in fact is not able to pay its debts and not just restrict its claim to say that the company is deemed to be unable to pay its debts. Similarly, in the matter of ***N.N. Valechha vs I.G. Petrochemicals Ltd.,***[5] this Court has observed that apart from the legal fiction, it is open to a petitioner to make and prove an alternative claim that the company is unable to pay its debts.

9 In any event, the Apex Court in *N. Parameswaran Unni (supra)* has in paragraph 15 observed as under:

> *"15. This Court in a catena of cases has held that when a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. Though in process of interpretation right of an honest lender cannot be defeated as has happened in this case. From the perusal of relevant sections it is clear that generally there is no bar under the NI Act to send a reminder notice to the drawer of the cheque and usually such notice*

4. 1989 (3) BomCR 101

5. 2008 (143) Company Cases 122 Bom

cannot be construed as an admission of non-service of the first notice by the appellant as has happened in this case".

10 Mr. Sharma, counsel for the company states that the tracking report of India Post does not show that the office was locked or closed or out of station. I am surprised by the statement of Mr. Sharma, because the tracking report expressly states that "Door Locked-Intimation Served". In *N. Parameswaran Unni (supra),* the Apex Court considered the provisions of the Negotiable Instruments Act, 1881 and in Logic Eastern India Pvt. Ltd. *(supra),* the Division Bench of this Court was dealing with the provisions of the Arbitration and Conciliation Act, 1996. Of course, the Division Bench even in those proceedings has relied upon the judgment of the Apex Court in *N. Parameswaran Unni (supra)*. Paragraph 23 to 28 of *Logic Eastern India Pvt. Ltd. (supra)*reads as under :

> *"23. We may also refer to the provisions of Section 27 of the General Clauses Act,1897 which provides for "Meaning of service by post", which in our opinion is applicable when we consider the issue of "delivery of the award"under Section 31 (5) read with Section 3 of the Act. Section 27 of the General Clauses Act,1897 reads thus:-*
>
> > "***27 Meaning of service by post.*** *Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post." (emphasis supplied.)*

24. Section 31 (5) uses the expression "delivered" and thus, would squarely fall within the connotation "or any other expression is used" as provided under Section 27 of the General Clauses Act. The cumulative effect of Section 3 of the Act read with Section 27 of the General Clauses Act would be that the communication and/or the award in the present case would be deemed to have been delivered when the learned Arbitrator properly addressed the same to the appellant on the known addresses, and on pre-paying and posting by registered post the envelop containing a covering letter and the award. The services would be deemed to be effected at the time at which the said envelop was being delivered in the ordinary course of post, as Section 27 of the General Clauses Act would provide. As noted the consequence and effect of Section 27 of the General Clauses Act qua the delivery of the award on the appellant is further amplified by the clear provisions of sub-clause (b) of Section 3 (1) of the Act.

25. If we are to accept the submissions as urged on behalf of the appellant, then, the consequence would be to render, the provisions of not only Section 3 of the Act which is a Special Act but also the provisions of Section 27 of the General Clauses Act, nugatory. We need to bear in mind that the duty of the Court when confronted with such pleas as raised by the appellant would be to safeguard the intention of the legislature behind Section 3 of the Act read with the provisions of Section 27 of the General Clauses Act in its applicability to Section 31 (5) of the Act, namely to maintain the salutary efficacy of arbitral procedure which cannot be left to be frustrated.

26. We may also refer to the provisions of Order XXIX of the Code of Civil Procedure which concerns "Suits by or against Corporations". Rule (2) of Order XXIX provides for 'Service on Corporation' in the following terms:-

*"2.**Service on corporation**.- Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served-*

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) <u>by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.</u> (emphasis supplied)

27. Thus, for the purpose of sub-rule (2) 'service on corporation' would be recognized as a good service by leaving it or sending it by post addressed to the corporation at the registered office, or when there is no registered office then at the place where the corporation carries on business.

> *28. We also refer to the provisions of Section 114 of the Evidence Act which enables the Court to presume the existence of certain facts which the Court thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case. Consequently, the Court can presume that the common course of business has been followed in particular cases. Applying the test to the communication sent by post, as prescribed under Section 114 of the Evidence Act, the Court can draw a presumption that in the common course of natural events, in public and private business, the communication has been delivered at the address of the addressee. There is no material whatsoever, on the basis of which it can be held that the presumption of deemed delivery of the award was rebutted by the appellant".*

11 The most important judgment on this point is of learned Single Judge of this Court (Vazifdar S.J., J. as he then was) in *Deepak Machineries Pvt. Ltd.(supra)*.The Court come to a conclusion that a notice which is returned as unclaimed but which was dispatched in the manner prescribed with the correct address on it is deemed to have been served under Section 434 (a) (1) of the Companies Act. The Court held that a person who properly addresses a notice and mails, he would be deemed to have fulfilled his obligation of sending the notice even if the same is returned unclaimed. If duly mailed by registered post addressed to the registered office of the company, must be deemed to have been "delivered" within the meaning of that expression in Section 434 (1) (a) of the Companies Act. It is not respondents' case that the address given in the statutory notice was not registered address. It is useful to reproduce paragraph 15 to 25 of the said judgment :

"15. In any event the first statutory notice dated 14th October,1999 was in fact served at the Mahalaxmi office of the company which, it is contended by the company, is its registered office. The same was returned unclaimed. Mr. Madon submitted that the notice was thus validly served. In support of this submission he relied upon a judgment of the Supreme Court in (K. Bhaskaran v. Sankaran Vaidhvan Balan)2000 (5) Bom. C.R. (S.C.) 178: (1999) 7 SCC 510: A.I.R.1999 S.C.3762, where the Supreme Court held that a notice returned as unclaimed is presumed to have been served. Paragraphs 22, 23 and 24 of the judgment read as under :-

> "*22. It is settled that a notice refused to be accepted by the addressee can be presumed to have been served on him, vide (*Harcharan Singh v. Shivrani), *(1981) 2 SCC 535:* A.I.R. 1981 S.C. 1284, and (Jagdish Singh v. Natthu Singh*),* A.I.R. 1992 S.C.W. 1747: (1992) 1 SCC 647: A.I.R. 1992 S.C.1604.
>
> *23.* Here the notice is returned as unclaimed and not as refused. *Will there be any significant difference between the two so far as the presumption of service is concerned ? In this connection a reference to section 27 of the General Clauses Act will be useful. The section reads thus :*
>
> "***27. Meaning of service by post***.*-Where any Central Act of Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".*
>
> *24. No doubt section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice."*

16.(a) The reliance upon the judgment is well founded. The judgment applies with greater force to a case under section 434 of the Companies

Act, 1956. The Supreme Court was dealing with section 138 of the Negotiable Instruments Act the provisions of which are stricter and wider than those relating to a notice under section 435 (1) (a) of the Companies Act.

17. Clauses (b) and (c) to the proviso to section 138 (1) of the Negotiable Instruments Act are relevant in this regard and read as under :-

"*(b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

18. Section 434 (1) (a) of the Companies Act reads as under :-

"***434. Company when deemed unable to pay its debts****. - (1) A company shall be deemed to be unable to pay its debts-*

> *(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding (one lakh rupees) then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditors.*"

19. It would be noticed clearly that under section 138 (1) of the Negotiable Instruments Act, the payee or the holder in due course of a cheque is required to make a demand by <u>giving</u> a notice in writing to the drawer and the right to proceed under section 138 of the Negotiable Instruments Act arises only in the event of the drawer failing to make payment within fifteen days of the receipt of the said notice. The two essential ingredients of a notice under section 138 of the Negotiable Instruments Act are the giving of the same and the receipt of the same. Under Section 434 of the Companies Act, the notice is required "to be delivered". The Supreme Court in paragraphs 18 and 19 of the judgment noted that "giving a notice" is not the same as 'receipt of the notice". It is important to note that having noted the distinction, the Supreme Court however held in paragraphs 20 and 21 as follows :-

> "*20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice in the*

correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different stratiges and he could escape from the legal consequences of section 138 of the Act. It must be borne in mind that Court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

21. In Maxwell's "Interpretation of Statues", the learned Author has emphasized that "provisions relating to giving of notice often receive liberal interpretation," (Vide page 99 of the 12th Edn.). The context envisaged in section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in Clause (b) of the proviso to section 138, of the Act show that payee has the statutory obligation to "make a demand" by giving notice. The thrust in the clause is on the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and the next depends on what the sendee does."

20. The Supreme Court thereafter went on to hold that a notice which is returned as unclaimed but which was despatched in the manner prescribed with the correct address on it is deemed to have been served.

21. The judgment would apply to a notice under section 434 (a) (1) of the Companies Act with greater force. Section 138 of the Negotiable Instruments Act entails criminal consequences, whereas Section 434 (1) (a) involves only civil consequences. Moreover the requirements of a notice under section 138 of the Negotiable Instruments Act are stricter and wider. Despite the same, the Supreme Court held that a person who properly addresses a notice and mails it would be deemed to have fulfilled his obligation of sending the notice even if the same is returned unclaimed. On a parity of reasoning, it must be held that a notice though returned unclaimed, if duly mailed by registered post addressed to the registered office of the company, must be deemed to have been "delivered" within the meaning of that expression in Section 434 (1) (a) of the Companies Act.

22. I would come to this conclusion even or principle. Any other view would permit a dishonest company to avoid service of a notice in a variety of ways by refusing to claim the same from the postal authorities despite intimation of the delivery thereof. Take a simple example. Companies are known to have their registered office in premises where they do not carry on any significant manufacturing, trading or *administrative activities. The premises are used as a registered office only for the purpose of convenience and for complying with statutory provisions. In such a case, the company could well avoid service of notices and then refuse to claim the same despite notification from the postal authority to do so.*

23. In K. Bhaskaran (supra) the Supreme Court in paragraph 21 held that section 138 of the Negotiable Instruments Act invites a liberal interpretation in so far as it relates to the giving of a notice. The Supreme Court in relation to a notice under section 138 of the Negotiable Instruments Act applied the principle in Maxwell's Interpretation of Statutes that provisions relating to giving a notice often received a liberal interpretation. In my view this principle is equally applicable and ought to be applied in respect of a question regarding the delivery of a notice issued under section 434 (1) (a) of the Companies Act. Indeed such an interpretation would cause no prejudice to the company either. If in a given case the concerned officers of a company genuinely do not have the benefit of reading the notice for any reason whatever the same would furnish a valid ground for contending in the petition that may be filed that no presumption should be drawn against the company merely by virtue of the company not having replied to the said notice. On the other hand a view to the contrary would not only cause great prejudice to the creditors of a company but would in fact have the effect of rendering the provisions of sections 433 and 434 of the Companies Act otiose.

24. Mr. Madon further submitted that even assuming that no statutory notices were served at the Mahalaxmi office, the company is disentitled from raising this defence at it led the petitioner to believe that all the correspondence including the statutory notices ought to be addressed to the company's Pune Office. He further submitted that in fact there was a representation by the company to the petitioner that the office at Pune was the registered office of the company. In support of this submission he relied upon the judgment of a learned Single Judge of the Karnataka High Court in the case of (Manganese Ore (India) Ltd. v. idia Sandur Manganese and Iron Ores Ltd.), 1999(98) Com.Cas. 755. However, considering the view that I have taken I do not find it necessary to decide this point.

25. The first contention that no statutory notice was delivered at the registered office of the company is rejected".

12 Thus, it appears that after petition came to be admitted, respondent decided to appear and take all kinds of defences. Petitioner has not approached this Court contending that presumption should be drawn against the company merely by virtue of the Company of not having a

replied to the said notice. Therefore, this defence of the company is rejected. Next defence is that the company suffered a huge loss on account of defective quality of goods supplied by petitioner. I have to note that counsel made a statement that there is no proof of any agreement to supply of goods to indicate no goods were supplied. I have to strongly reject that statement because if no goods were supplied, the question of supply of defective goods and the company suffering loss would not arise. Moreover, this is a bald statement made in the affidavit with no document annexed. Therefore, this ground of defence has to be rejected as an after thought. I have to note that in the petition serious allegations have been made against the company that the company has duped and cheated various suppliers/creditors and swindled the funds and the company is struggling beneath mountain of debts and has lost its overall substratum and has stopped its business activities. No statement is made by the company to prove these allegations as wrong. A simple bald statement made in the affidavit in reply to say that these allegations are denied would not suffice to prevent this Court from passing an order of winding up against the company. I would have expected the company to atleast place on record the financial status of the company to prove that the company is in business and is financially capable of paying all the claims or debts. In the circumstances, I am satisfied that the company is unable to pay its debts and the company deserves to be wound up.

13 On record is an affidavit of Ms. Minakshi Nimbalkar confirming advertising the petition in Free Press Journal and Navshakti on 22nd August, 2017 and also in the Maharashtra Government Gazette for the period 31st August, 2017 to 6th September, 2017 at serial no.M- 17168. Company department has placed on record service report dated 8th September, 2017. So far as notice under Rule 28 of the Companies (Court) Rules, 1959 is concerned, it was noticed in the order dated 2nd August, 2018 that service report does not indicate that the notice has been effectively served as it only said "Bag opened". Therefore, petitioner was directed to re-serve notice under Rule 28 of the Companies (Court) Rules, 1959 upon the company at the address mentioned in the MCA website. On record is an affidavit of one Sandip Deshpande affirmed on 21st August, 2018 confirming service of notice under Rule 28 of the Companies (Court) Rules, 1959. In the circumstances, preliminary requirements to pass a final order of winding up against a company has been complied with. I have already noted that the company is indebted to petitioner and unable to discharge its debts and is commercially insolvent.

14 In the circumstances, company petition is allowed in terms of prayer clauses – (a) and (b) which read as under :

> *(a) That the Company be wound up and under the directions of this Hon'ble Court under the provisions of the Companies Act, 1956;*

> *(b) That the Official Liquidator or some other fit and proper person be appointed as Liquidator of MERIDIAN SUNMICA AND LAMINATE PRIVATE LIMITED with all powers under the provisions of the Companies Act, 1956.*

15 Official Liquidator, within two weeks, to take steps upon receiving an authenticated copy of this order from the advocate for petitioner without waiting for any notification. The counsel for petitioner is also directed to forward a copy of this order to National Company Law Tribunal for information.

16 Upon receipt of the authenticated copy from petitioner's advocate, 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 statement of affairs as required under Section 454 of the Companies Act 1956, failing which 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.

17 Company petition accordingly stands disposed.

(K.R. SHRIRAM, J.)

Trupti