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IN THE HIGH COURT OF DELHI AT NEW DELHI

COMPANY PETITION NO. 436 /2010

Date of decision: 25th October, 2010

DR. FRITSCH MACHINES & POWDERS PVT. LTD. PETITIONER

Through Mr. Alok Tiwari, Advocate.

Versus

M/S OCTAHEDRON SUPERABRASIVES PVT. LTD.... RESPONDENT

Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

1. This petition under Section 433 (e) read with Section 434(1)(a) of the Companies Act, 1956 (Act for short) has been filed by Dr. Fritsch Machines & Powders Pvt. Ltd. for winding up of M/s Octahedron Superabrasives Private Limited. The petitioner it is stated had supplied two machines viz., Sintering Press SP-75 and Powder Mixer PM-02 vide invoice dated 21st April, 2008 for Rs.38,23,230/-. Subsequently, a debit note for Rs.66,660/- was issued towards short charge of the Central Sales Tax.
2. The respondent company had paid Rs.7,89,890/- as advance. It is accepted that the respondent company paid a further Rs.7,50,000/- from time to time.
3. Learned counsel for the petitioner has drawn my attention to the quotation and it is submitted that the respondent company had agreed

to make payment in three installments of Rs.1,00,000/- each at the end of the 30th , 60th and 90th day after installation of machines on the site and pay eight installments of Rs.3,00,000/- each at the end of the 4th to 11th month from the date of installation of machines and last installment of Rs.4,00,000/- on or before the end of the 12th month from the date of installation of the machines. It is stated that the respondent company had issued post-dated cheques for the installments mentioned above.

4. Learned counsel for the petitioner submits that the respondent company did not respond to the legal notice dated 3rd March, 2010, in which it was stated that an amount of Rs. 19,50,000/- with interest of 3% per month is due and payable towards the balance consideration of the machines, which were supplied/installed.

5. The petitioner has placed on record correspondence which have been written on behalf of the respondent company in the form of letters/e-mails dated 6th November, 2009, 16th November, 2009, 20th November, 2009, 16th December, 2009, 18th December, 2009, 2nd February, 2010 and 13th February, 2010. In the letters dated 6th November, 2009, 16th December, 2009 and e-mail dated 13th February, 2010 various allegations have been made against the petitioner with regard to promises made, actual operation of machines etc. It is alleged that there were lapses on the part of the petitioner and that the respondent company was misinformed. It is also alleged that second-hand clamping frames were supplied out of which two were taken back.

It is stated that frames were faulty. The e-mail/letter dated 16th December, 2009, reads:-

“The sintering machine SP-75 which your company supplied us on 27/04/2008 through TCI transporter vide your invoice number 062 dated 21/04/2008, is being a matter of dispute and not working from the day of installation.

In the board of directors meeting of Octahedron held on 16/12/2009, I explained why this machine is a matter of dispute and also explained the details of our meeting with you held on 10/12/2009.

Following points I discussed with you and which you have confirmed also.

1. The supplied SP-75 sintering machine against your quotation dated 16/03/2008 and our purchase order dated 17/3/2008 is not giving 75 square cm area.
2. Higher graphite cost per sintering with your SP-75 machine in comparison to the sintering machine available in India.
3. Use of inert gas in SP-75 does not reduce the cost of graphite compared with open air sintering.
4. You have supplied five number second-hand aluminium alloy clamping frame with SP-75 and the clamping frame got bent at the time of trial installation run of SP-75.
5. Now you are willing to replace the clamping frames, although we have been asking for it from July, 2008 onwards, Without clamping frame SP-75 machine cannot be operated for production.
6. Due to absence of clamping frame, higher graphite cost per sintering and the machine SP-75 supplied is

not as per as you quotation and our purchase order, so we never used it for production.

7. Now you are willing to take back the machine SP-75 since it is not working and supplied as per as our purchase order and also because it is not being used in our production line and due to our complain (sic) from July, 2008 onwards.

8. You have offered us a price by reducing the selling value by 60% while taking back the machine since it is one year seven month old from the date of sale and installation, and accepted that your machine life is only two years if it is being used in production.

9. You also accepted due to your mistake, you failed to send the drawing of the steel die used in clod press brought from Germany, which we had been asking for at the time of placing order.

A reputed company like yours in the field of manufacturing machinery for making diamond tools, has sadly failed on the customer care aspect, even after many reminders and after the machines stopped working.”

6. The aforesaid e-mail talks of meeting between the petitioner and respondent company and the offer made by the petitioner to the respondent company to repurchase the machinery after reducing the sale value by 60%. The petitioner has not placed on record any letter/correspondence to controvert or deny the said meeting and offer. Notice under section 434(1)(a) of the Act was issued after this email dated 16th December, 2009 was written/communicated.

7. Learned counsel for the petitioner submitted that the cheque dated 20th November, 2009 for Rs.4,00,000/- given by the respondent

company had bounced and the respondent company thereafter had issued a demand draft in favour of the petitioner. He submits that the demand draft was encashed and this shows that the respondent company is liable to pay the balance sale consideration. He relies upon the averments made in the correspondence written by the respondent company referring to its poor financial position.

8. The admitted position is that the respondent company had given post dated cheques beginning from 17th March, 2008 till 20th November, 2009. These cheques were not encashed by the petitioner. In fact they were never presented for encashment. There is no explanation and reason why these cheques were not presented. This indicates the dispute. These cheques have lapsed. The reluctance and failure to encash the cheque supports the case of the respondent. Only one cheque dated 20th November, 2009 for Rs.4,00,000/- was presented and bounced. After the said cheque had bounced, the respondent company made the payment for the said cheque. It is clear from the correspondence that there were problems/disputes and parties were talking to each other. I have already quoted above the letter dated 16th December, 2009 written by the respondent company, which is a defence raised by the respondent company against the claim of the petitioner. In these circumstances, it cannot be said that the alleged debt due is an admitted debt which the respondent company has willfully failed or neglected to pay. The respondent company has disputed the claim of the petitioner on the grounds and reasons which been set out in the correspondence.

9. The claim of the petitioner cannot be regarded as an admitted claim. In view of the above, I am not inclined to entertain the present petition for winding up under Section 433 (e) of the Act and the same is accordingly dismissed. It is open to the petitioner to raise their claim before civil court and establish it.

SANJIV KHANNA, J.

OCTOBER 25, 2010
NA