

IN THE HIGH COURT OF DELHI AT NEW DELHI

COMPANY JURISDICTION

COMPANY PETITION NO. 88 OF 2008

AND

CO. APPLN. NO. 786/2008

Reserved on: 09-09-2010

Date of pronouncement : 17-01-2011

M/s JPS Associates Private Limited

.....Petitioner

Through : Mr. Virender Ganda, Sr. Advocate
with Mr. S.K.Giri, Advocate

Versus

Feedback Ventures Private Limited & Anr.

.....Respondent

Through : Mr. Rajat Joneja, Advocate

CORAM :

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

SUDERSHAN KUMAR MISRA, J.

1. This petition under S.433(e) and S.434 of the Companies Act, 1956 for the winding up of Feedback Ventures Pvt. Ltd. has been filed by JPS Associates Pvt. Ltd. on the ground that an amount of Rs. 20,84,398/- is due and payable to the petitioner under a Memorandum of Understanding entered into between the parties on 9th August, 2005.

2. Feedback Ventures Pvt. Ltd., i.e. the first respondent, is a private limited company, whose registered office falls within the jurisdiction of this Court. It is stated to be, inter alia, in the business of rendering consultancy services in managerial, engineering, industrial and technical matters. The second respondent is the Public Works Department, Public Health Branch, Government of Haryana, and is a proforma respondent.

3. It is the petitioner's case that a Memorandum of Understanding was executed between the petitioner and the first respondent on 9th August, 2005, whereby the parties agreed to collaborate to submit a joint proposal for the preparation of Reform Action Plans for Urban Local Bodies in 6 towns in the State of Haryana to the second respondent; to prepare a winning bid for the same; and, if the bid was successful, to work together to execute the aforesaid project. Under Clause 3 of the Memorandum of Understanding, the first respondent was to be the lead consultant on this collaboration. As lead consultant, in terms of Clause 4 of the aforesaid Memorandum, the first respondent was to manage all financial transactions with the second respondent; prepare and submit the bills as per the agreed payment schedule; and release the funds to the petitioner, when received from the second respondent. Clause 10 of the aforesaid Memorandum dealt with 'Sharing of Revenue and Release of Payments to the Parties' and provided that the fee (accounting for time cost of the professional staff on the project) would be shared by the petitioner and the first respondent in the ratio of 60 : 40. Under Clause 11 of the

Memorandum, further provisions for contingencies, additional costs and savings were also set down. Clause 11 is reproduced below;

“Any unanticipated contingent expenditure involving additional costs such as related to extra (more than the schedule number) visits to states, local travel and workshops would be met out of the savings, if any, or/and out of the professional fee of the respective parties on the basis of common consensus. Any savings, after having met all the out-of-pocket expenses related to the assignment, would be divided amongst the parties on a 50:50 basis.”

According to the petitioner, the total expenditure of the project was budgeted by the parties themselves at Rs.78,81,100/-.

4. Ultimately, this consortium of the petitioner and the first respondent was awarded the contract by the second respondent, being a, “Contract for Consultants’ Services for JBIC Assisted Reform Action Plan for Six Towns of Haryana Under YAP – II”, for a total ceiling value of Rs.1,49,43,267/-. The aforesaid contract was executed between the first and second respondents on 22nd February, 2006. It was modified in March 2006 to also include the town of ‘Jagadhari’ for an additional fee. The work under this contract was to be completed within six months of the commencement of services by the consortium.

5. Admittedly, the execution of the project by the consortium was delayed. It was completed in approximately two years, as opposed to the contractually stipulated period of six months. Further, all payments that had to be released by the second respondent in respect of the same have, admittedly, been released. The first respondent has also made some payments to the petitioner. However, the petitioner’s case is that the first respondent has unjustly and

illegally deducted a large portion of the fee that, remains due and payable to it. The petitioner has further alleged malafides on the part of the first respondent in making these deductions, and averred that they were made only in order to reduce the petitioner's otherwise legitimate claim for the work it had carried out on the project. The first respondent's stand is that, since the project was delayed, certain additional and unforeseen expenses were incurred, which led to a proportionate reduction in the petitioner's share.

6. Under S.433(e) of the Companies Act, 1956, a company may be wound up by a Court if it is unable to pay its debts. The scope of the expression, "debt", is however limited to a debt in respect of which no bona fide dispute is raised by the company. Therefore, the issue before this Court is, essentially, whether there is a debt due and payable to the petitioner, in respect of which there is no bona fide dispute that would oblige this Court to consider whether the first respondent ought to be wound up.

7. A statement of expenses that had so far been incurred in the project was provided to the petitioner by the first respondent in March 2007. With reference to this statement of expenses, the petitioner sent an email dated 23rd April, 2007, wherein it expressed its concern that the expenses incurred by the first respondent were higher than expected. Communications dated 30th April, 2007, 7th May, 2007 and 25th July, 2007, were also sent by the petitioner, reiterating the same. Thereafter, in another email dated 30th August, 2007, the petitioner stated that, since the project had been concluded, and since it had received some payment by this date, a balance outstanding

amount of Rs.25,09,398/- remained payable to it by the first respondent. Further communications dated 26th October, 2007, 14th November, 2007 and 27th November, 2007 were also sent by the petitioner, demanding the aforesaid balance amount. In its replies to many of the abovementioned communications, the first respondent stated, inter alia, that the project was not entirely complete and certain aspects of the project remained to be finalized before any further payments could be made to the petitioner.

8. A statutory notice dated 17th December, 2007 under S.433(e) of the Companies Act, 1956 was then issued by the petitioner to the first respondent, demanding payment of an amount of Rs.30,49,398/-.

9. In its reply dated 31st December, 2007 to the aforesaid statutory notice, the first respondent disputed the petitioner's claim in respect of the additional work carried out, and further stated as follows;

"After setting off the above-mentioned expenses from the total Professional Fee of Rs.64.09 Lacs, there remains a balance of Rs.36.07 Lacs being the total pool of Professional Fee available for distribution amongst the parties. Your client's share at 60% thereof amounts to Rs.21.65 Lacs. Of this amount, a sum of Rs.12.00 Lacs has already been paid to JPS as acknowledged by you also in your letter. The balance pertaining to your client is Rs.9.65 Lacs for which we are enclosing herewith a cheque for Rs.8,55,665/- (Net of TDS @ 11.33% on Rs.9.65 Lacs) vide cheque no. 001650 dated March 31, 2007 drawn on YES BANK LIMITED payable at New Delhi."

In the same communication, the first respondent also disputed the fee claimed by the petitioner for the additional work in relation to the town of Jagadhari, stating that the total additional fee in respect thereof was Rs.3,00,000/-, instead of the amount of Rs.9,00,000/- being mentioned by the petitioner. In this context, the petitioner has filed a copy of the minutes of a meeting held on 7th December, 2006 between the first respondent's representatives and the Chief Engineer of the Public Works Department, P.H. Branch, Government of Haryana, showing that the amount to be paid in respect of the work for Jagadhari town was Rs.9 lakhs.

10. The petitioner then sent another legal notice dated 28th January, 2008, claiming an amount of Rs.20,84,398/- and also disputing the deductions made by the first respondent on account of the extra expenses allegedly incurred by the consortium during the execution of the project, stating that the same had been agreed to be made only on the basis of common consensus, and further that, "There have been no discussions in respect of the alleged additional costs nor any communication to this effect was ever made to our Client....".

11. In its reply dated 18th February, 2008 to the petitioner's second legal notice, the first respondent once again stated that various steps in respect of the project were yet to be completed, and that, in view of the arbitration clause contained in Clause 15 of the Memorandum of Understanding, the matter should be referred to arbitration if a dispute had arisen with regard to any aspect covered by it.

12. During these proceedings, the matter was referred to mediation, which was unsuccessful.

13. In short, the first respondent's case is that out of a total professional fee of Rs.64.09 lakh in respect of the services provided by the consortium, after deduction of additional and unforeseen expenses of approximately Rs.28 lakh by the second respondent, a balance amount of Rs.36.07 lakh remained for distribution between the petitioner and itself. Further, as the amount payable to the petitioner was 60% of the professional fees, according to the first respondent, the petitioner's share came to approximately Rs. 21.65 lakh. Furthermore, the first respondent has also filed CA No. 786/200, seeking a reference to arbitration under S.8 of the Arbitration and Conciliation Act, 1996.

14. The petitioner then filed an application under the Right to Information Act with the second respondent, inquiring about the payments released by it to the first respondent in respect of the project. There, the second respondent has stated that all amounts that had been claimed by the first respondent on behalf of the consortium were paid, except for a deduction of approximately Rs.3,08,000/- effected by it. However, the fact remains that the first respondent was the lead consultant in the consortium, as well as in-charge of the affairs of the consortium. This means that the project was executed under the control and supervision of the first respondent. Both the petitioner and the first respondent had expressly agreed to this arrangement. Completion of the project was admittedly delayed, and seeing that the project was completed only over two

years, as opposed to the agreed period of six months, it is natural that employees and the professional persons involved in executing the project would have to be paid even for the further period of 18 months that it took for the work to be completed. The petitioner's case is not that it has received no payment pursuant to the work undertaken by it, instead it is that, while it has received some payment, a portion of the remainder has been deducted by the first respondent in a malafide manner, under the pretext of additional and unforeseen expenses incurred by the consortium as a whole. Many issues must be addressed including, inter alia, whether the second respondent actually incurred the expenses claimed by it; what was the actual amount claimed by the second respondent from the third respondent towards these expenses; if a lesser amount was claimed by the second respondent from the third respondent, the reason for the same etc. Further, if the first respondent had incurred some expenses which were not reimbursed by the second respondent, who was liable to bear them and in what proportion. All these are questions that require a trial and, it would be dangerous for the company court to assume the indebtedness of the second respondent to the petitioner merely on the basis of some communication issued by the third respondent to the petitioner under the Right to Information Act, without anything more.

15. The first respondent's main contention is that additional and unforeseen expenses were incurred for a number of reasons, including, inter alia, a delay in the completion of the project, and that, therefore, the amount payable to the petitioner was proportionately reduced in terms of Clause 11 of the Memorandum of Understanding.

Therefore, whether the additional expense, either fully or in part, that was allegedly incurred, was validly incurred or not, is a matter of fact that must be proved by the parties in a trial. From the material placed on record, one cannot reach a conclusion, at this stage, that the additional expenses that the first respondent claims the consortium was put to, were totally malafide. The jurisdiction of this Court in a winding up proceeding is summary in nature and this Court will not be justified in investigating complex questions of fact, which are to be decided by letting in evidence by the parties. [See, **K.S. Mothilal vs. K.S. Kasimaris Ceramique (P.) Ltd.**, [2004] 50 SCL 116 (Mad)].

16. Counsel for the petitioner has been unable to convince this Court that the defense is ex-facie mala fide and that the matter falls within the jurisdiction of the Company Court under S.433 and S.434 of the Companies Act, 1956, since, in my view, it involves a determination of facts. It is also noteworthy that, during the course of these proceedings, counsel for the first respondent, without prejudice to the rights of his client and the contentions raised herein, and without admitting any liability on its part to pay any amount at all to the petitioner, indicated his client's willingness to pay the petitioner a sum of Rs.3.85 lakhs, with a view to bringing an end to these winding up proceedings, which was declined by counsel for the petitioner.

17. As regards CA No. 786/2008, that has been filed by the first respondent seeking a reference to arbitration, in view of the fact that the issue before this Court in exercise of company jurisdiction is whether the first respondent ought to be wound up or not, which issue is not available either to the Civil Court or to the arbitrator for

decision, the same is dismissed as misconceived on this ground alone. The parties are free to explore any other fora for the resolution of their disputes, as they may be advised.

18. The petition and the application are dismissed in the above terms.

SUDERSHAN KUMAR MISRA, J.

January 17, 2011
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