IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 690 OF 2014

M/s.Air Liquide Global E & C Solutions India Pvt.Ltd. …Petitioner
vs.
Indian Oil Corporation Ltd. ....Respondent

Mr.Kevic Setalwad, Senior Advocate with Melissa Paes, S.D. Shetty i/b. M/s.M.V. Kini & Co. for Petitioner.
Mr.Virag Tulzapurkar, Senior Advocate with Mr.Paresh Shah, Ms.Mona Aneja, Mrs.Mona Rathod and Ms.Meghana Mehta i/b. M/s. Shah & Sanghavi for Respondent.

CORAM : S.C. GUPTE, J.

15 JUNE 2015

P.C. :

This petition seeks winding up of the Respondent Company on the ground of inability to pay its debts. The facts of the case may be briefly stated as follows :

2 The Respondent company had engaged the Petitioner for providing project management consultancy and other services for its hydrocracker project at Haldia Refinery. The Petitioner claims to have completed the contract mark and performed all its obligations. The Petitioner claims to be entitled *inter alia* to (i) lumpsum price of Rs.23.64 crores (for the original contract work), (ii) lumpsum price of Rs.15.50 crores (for the change order placed during the execution of the contract) and (iii) some further compensation / additional price in accordance with the terms of the contract. The Petitioner claims to have consistently raised invoices for the original contract work and change orders. It is the Petitioner's case that despite admitting the amount due and payable to it, the Respondent failed to release a sum of Rs.17.63 crores to the Petitioner, comprising of a sum of Rs.3.45 crores under the original contract and a sum of Rs.14.18 crores under the change orders. It is submitted that the Petitioner duly sent a statutory demand notice claiming the debt, but the Respondent failed to comply with the notice and

in fact, addressed a perfunctory reply, generally denying the debt. The Petitioner has, in the premises, approached this Court in its company jurisdiction for winding up the Respondent company on the ground of the latter's deemed inability to pay.

3 The petition is opposed by the Respondent on various grounds. It is submitted that there is no admission on the part of the Respondent of the alleged debt. It is submitted that far from there being any debt owed by the Respondent to the Petitioner, it is the Petitioner who owes a debt to the Respondent; that the Respondent has already invoked an arbitration agreement between the parties for recovery of that debt; and that there is no case, either on the ground of the Respondent's inability to pay or otherwise, for winding up of the Respondent.

4 Mr.Setalwad, learned Senior Counsel for the Petitioner, laid great stress at the hearing of the petition on the Respondent's purported admissions of its liability throughout the relevant period. He submitted that the defence now sought to be raised in respect of the debt was formulated for the first time after this petition was filed. Mr.Tulzapurkar, learned Senior Counsel appearing for the Respondent, on the other hand, seeks to explain the letters addressed by the Respondent, which are, according to him, mistakenly read as admissions by Mr.Setalwad.

5 It is an admitted position that against the original contract work (original value of Rs.23.64 crores) and change orders (total original value of Rs.15.50 crores) carried out by the Petitioner, a total sum of Rs.42.70 crores has been paid by the Respondent to the Petitioner. The Petitioner's case is that the completion of the project was extended beyond the stipulated time of 41 months for reasons not attributable to the Petitioner; so also, there was change in the work carried out by the Petitioner with approval and / or knowledge of the Respondent. On the other hand, it is the case of the Respondent (as alleged in its reply dated 12 September 2014 to the statutory notice) that there were defaults on the part of the Petitioner in addition to its failure to complete the work in time. It is submitted that the Petitioner was the custodian of the Respondent's materials

and has till date not completed material reconciliation, with the result that spares supplied to the Petitioner have not been returned to the Respondent or accounted for; that commissioning of certain work (centrifuge under EPCC-7) is still pending; that there is no final certificate as yet for the contract work; and that there is no confirmation / certification of other contractor's bills. In the premises, it is the case of the Respondent that the last milestone payment of 5% of the lump sum price, i.e. Rs.1.39 crores, has not yet fallen due. In addition, a sum of Rs.1.78 crores has been adjusted from the Petitioner's invoices periodically towards price reduction for delay in mechanical completion. On this footing, the Respondent contests the Petitioner's claim of Rs.3.45 crores payable in respect of the original contract value. As far as the claims arising out of change orders are concerned, it is the Respondent's case that change order Nos.5 and 7 have not been approved or agreed to by the Respondent and continue to remain mere proposals or disputed claims of the Petitioner. As for the other change orders, the Respondent has outlined detailed reasons in its reply to the statutory notice to show that the claims are untenable. From these reasons, it is apparent that each of these claims is contested on merits. The Respondent submits that after taking into the account the amounts due and payable by the Petitioner to the Respondent towards (i) price reduction / discount (claimed to be arising under Clause 8.10 of the contract), (ii) negative change order on account of execution of SRU package in EPCM Mode (claimed as payable under Clause 1.2.2 of schedule of rates and payment terms), (iii) pending recoveries towards materials not returned and incomplete jobs (claimed under Clause 28.2(V) of the contract) and (iv) non-settlement of services (in terms of Clause 8.2.2 of the contract), and giving credit for amounts recovered from the Petitioner, a sum of Rs.3.37 crores is due and payable by the Petitioner to the Respondent. The Respondent has already filed an arbitration reference to recover this amount. An arbitrator has been duly appointed to adjudicate upon the disputes by Delhi High Court.

6 These facts *prima facie* show that the alleged debt has been bona fide disputed by the Respondent company. Learned Counsel for the Petitioner submits that these disputes have been raised belatedly and that throughout the relevant period, the Respondent admitted its liability to pay. The letters referred to

in this behalf by the learned Counsel are : (i) letter dated 11 December 2013 from the Petitioner to the Respondent; (ii) letter dated 21 January 2014 from the Respondent to the Petitioner; (iii) letter dated 29 January 2014 from the Petitioner to the Respondent; (iv) letter dated 6 February 2014 from the Respondent to the Petitioner; (v) letter dated 26 February 2014 from the Respondent to the Petitioner; and (v) letter dated 26 December 2011 from the Petitioner to the Respondent. From these letters, it is apparent that in response to the Petitioner's demand notice of 11 December 2013 setting out the various claims under the original contract as well as change orders, the Respondent by its letter dated 22 January 2014 alleged to have processed some of the claims which were found tenable as per the terms of the contract. These claims were, however, stated to be subject to the approval of the competent authority. Subsequently, when the Petitioner reiterated its demand by letter dated 29 January 2014, the Respondent replied, in reiteration of their earlier letter, that the tenable claims were processed even before the Petitioner's first demand notice, but the Respondent was unable to make any commercial commitment without the approvals. By a further letter dated 26 February 2014, the Respondent objected to certain claims, which according to the Respondent were not tenable as per the contract between the parties. The Respondent once again reiterated that change order claims which were tenable / partially tenable were under review and would be communicated after getting due approval from the competent authority. The Respondent also simultaneously indicated the various issues which were still pending at site and advised the Petitioner to take necessary action in that behalf. These letters do not indicate that any liability is admitted by the Respondent. In the first place, there is no indication as to the particular claims which were found tentatively accepted as tenable and the extent of such claims. Secondly, the claims which were found to be tenable were also stated to be subject to the approval of the competent authority of the Respondent. Thirdly, even in reply to the statutory notice, the Respondent does not dispute that there are some claims, as stated in its reply, which were tenable, but were not being paid, since they were to be adjusted against the pending dues of the Respondent as indicated in its reply. As for the letter dated 28 December 2011, which is said to contain admissions of the Respondent in a meeting between the parties, the letter simply contains an offer (stated to be “final offer”) of the Petitioner, with a view to settle all the claims between the parties. This is a unilateral offer and hardly amounts to an evidence of admission of liability.

7 In that view of the matter, it is apparent that the debt claimed as due and payable by the Respondent to the Petitioner is bone fide disputed by the Respondent. In fact, these disputes are even sought to be agitated by the Respondent before an arbitral forum, after seeking an appointment of an arbitrator from Delhi High Court. It is pertinent to note that even before the Delhi High Court, whilst resisting the claim of the Respondent for reference to arbitration, the Petitioner had alleged that the liability was admitted by the Respondent and that there were no disputes between the parties calling for a reference order. The Delhi High Court negatived the Petitioner's contention holding that the replies of the Respondent to the demand notice of the Petitioner do not *prima facie* appear to constitute any unequivocal admission of the Petitioner's claims. In the premises, there is no merit in the company petition.

8 Accordingly, the petition is dismissed. There shall be no order as to costs.

(S.C. Gupte, J.)