THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

<u>COMPANY PETITION NO.239 OF 2014</u>

DATED:13-07-2015

Between:

Between:

M/s. Fabtech Projects & Engineers Limited
A Company incorporated under the Companies Act, 1956
Having its registered office
At J-504, MIDC, Bhosari
Pune-411026
Represented by its authorized signatory;
Ramakant Vaidkar … Petitioner

and

M/s.NCC Limited
A company incorporated under the Companies Act, 1956
Having its registered office at NCC House
Madhapur
Hyderabad-500081
Rep. by Managing Director
… Respondent

COUNSEL FOR THE PETITIONER: Mr. Dishit Bhattacharjee

COUNSEL FOR THE RESPONDENTS: Mr. Avinash Desai

THE COURT MADE THE FOLLOWING:

ORDER:

This company petition is filed for an order of winding up of the respondent company for non-payment of the debt due to the petitioner.

The petitioner pleaded that the respondent has placed orders for supply of certain equipment. The first purchase order was issued on 10.1.2011 for a sum of Rs.45,41,252/-; the second purchase order was issued 11.1.2011 for a sum of Rs.2,21,76,493/- and the third purchase order was issued on 28.2.2011 for a sum of Rs.8,89,92,918/-. Under these purchase orders, dates for inspection were prescribed. The purchase orders also contain a provision for payment of liquidated damages in case of delay in payment after delivery date. They also contain payment terms. The petitioner pleaded that the payment terms are as under:

"17. <u>PAYMENT TERMS</u>:

17.1 10% of the order value along with PO and submission of Advance Bank Guarantee from any nationalized or reputed bank.

17.2 10% against identification of Raw Materials.

17.3 50% against Dispatch Documents.

17.4 30% of the order value with taxes and duties by 30 days PDCS but after submission of Final documents + 10% of the order value against submission of PBG valid for 12 months from the date of acceptance of the material by NOCL."

It is the pleaded case of the petitioner that the respondent has paid 10% of the initial amount and despite expiry of the time for delivery stipulated under each purchase order, it has neither identified the raw-material nor made payments. That for the first time on 15.10.2011 the respondent has sent an e-mail informing the petitioner that financial closure of the Nagarjuna Oil Corporation Limited (NOCL), with whom the respondent entered into contract in connection with which it has placed order of equipment on the petitioner, has got delayed leading to making milestone payments by it to the respondent as per contract and due to this the respondent is also facing constrains in making timely payments to all its vendors as per purchase order terms. The respondent has therefore requested the petitioner to delay manufacturing activities of equipment/materials ordered by it until further intimation is sent by it and that the tentative deferment is upto 31.3.2012. Having received the e-mail, the petitioner has not immediately responded. However, on 2.4.2012 it has sent an e-mail wherein it is stated that all the raw-materials against the reference orders have been received and the same is blocked in their shop due to which no space is available to start fabrication of new equipment and that the investment to the tune of Rs.8.00 crores is made and the project is under hold. The petitioner has therefore requested the respondent to inspect and identify the material for starting production. By e-mail dt.7.6.2012 the respondent has informed the petitioner that the NOCL is not giving any firm commitment either to clear the outstanding dues or dates of payment, that although the respondent has incurred some losses and not fully de-mobilized from site anticipating resumption of project activities, now it has also decided to de-mobilize from the site to reduce further losses. It therefore requested the petitioner to furnish information on the following aspects.

1. *"What is the cost of raw materials that could not be diverted, but still kept under reserve for executing our orders?*
2. *If you would like to divert materials available in different stages of manufacturing, then you can do the same without any hindrance.*
3. *What would be your claim, if order is pre-closed as of now?"*

Instead of responding to this e-mail, the petitioner caused a statutory notice issued on the respondent and filed the present company petition.

In the counter affidavit filed on behalf of the respondent, it is *inter alia s*tated that as the NOCL, with whom the respondent has entered into sub-contract and in connection with which the orders for supply of equipment have been placed on the petitioner, could not get the financial closure, as a result of which, the whole contract has become unworkable. It is further stated that the respondent has duly honoured a part of the contract by making initial payment of 10% but due to failure of the NOCL to make progress in the main contract work, the respondent has requested the petitioner to defer manufacture of the goods and that as there was no firm commitment from the NOCL, the respondent also started demobilizing its establishment at the works site. It is further stated that the respondent has sent an e-mail dt.7.6.2012 requesting the petitioner to furnish details as to loss, if any, suffered by it on account of the respondent not proceeding with the contract works under the three purchase orders. Instead of furnishing the said information to the respondent, the petitioner has filed this company petition after issuing a statutory notice.

I have heard Mr. Dishit Bhattacharjee, learned counsel for the petitioner, and Mr. Avinash Desai, learned counsel for the respondent. This is not a case where the petitioner has manufactured the equipment ordered by the respondent. After receiving initial payment of 10% under three purchase orders, the contracts could not be proceeded with obviously due to the fact that the financial closure of the NOCL could not be completed. As noted above, by e-mail letter dt.7.6.2012, the respondent has requested the petitioner to furnish the details of the raw-materials procured by it for manufacture under the purchase orders and the quantity which could not be utilized by it. This is not a case of an admitted debt. The questions whether the respondent is liable to pay liquidated damages and, if so, to what extent it is liable to pay such damages need to be adjudicated by a competent forum. Till such adjudication is made, the claim of the petitioner does not mature into a crystallized debt. In the light of these facts, I am of the considered opinion that the nature of the dispute raised by the petitioner is not amenable to the jurisdiction of this Court under Section 433(e) of the Act. The appropriate remedy for the petitioner is to avail common law remedies.

Subject to the liberty given to the petitioner as above, the company petition is dismissed.

As a sequel to dismissal of the company petition, Company Application Nos.1289 and 1290 of 2012 shall stand disposed of as infructuous.

C.V. NAGARJUNA REDDY, J

13-7-2015

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