HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

Company Petition No.127 of 2014

Date: 01-04-2015

Between:

M/s. Paharpur Cooling Towers Limited, represented
by its Company Secretary

.. Petitioner

And:

M/s. Ultra Power Projects Private Limited,
Visakhapatnam.

…. Respondent

HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

Company Petition No.127 of 2014

ORDER:

This Company Petition is filed under Section 433 (e) and 439 of the Companies Act, seeking winding up of the respondent company and for appointment of Official Liquidator as Liquidator for the respondent company.

2. The case of the petitioner is that the petitioner company is incorporated under the Companies Act as M/s. Paharpur Timbers Private Limited on 25-10-1949 and subsequently changed to M/s. Paharpur Cooling Towers Private Limited on 13-05-1971 and became a deemed public limited company. The petitioner company is engaged in the business of construction, erection, commissioning and installation of air cooled condensers, cooling towers and its components. The respondent company was initially known as Shravana Power Projects Private Limited and incorporated under the Certificate of Incorporation dated 08-03-

2001 issued by Registrar of Companies, Hyderabad and the name of Shravana Power Projects Private Limited was changed to M/s. Ultra Projects Private Limited pursuant to resolution dated 03-09-2009. It is stated that the petitioner company had participated in the bid conducted by the respondent company for designing, engineering, manufacturing, supplying, erectioning and commissioning of one number Air Cool Condensers and by letter dated 14-08-2008 the respondent company confirmed the order for supply, erection and commissioning of the said Air Cooled Condensers and that as per the said contract, the contractual value for supply, erection and commission of the said Air Cooled Condenser was of Rs.3,40,00,000/-, which included Rs.3,00,00,000/- for supply of price of ACC system, Rs.26,00,000/- for erection and commissioning charges and Rs.14,00,000/- freight charges to plant site. It is also stated that while carrying out the assignment for design, engineering, manufacturing, supply, erection and commissioning of the ACC unit, the petitioner had been from time to time raising periodical bills/invoices for work done and on and from later half of 2010, the respondent company completely stopped payment of the petitioner's outstanding bills and that in spite of the demands, the respondent has not cleared the outstanding amount, still the petitioner commissioned the Air Cooled Condenser at some time in July, 2010. It is also stated that the respondent in its meeting held on 07-07-2010 committed to the petitioner that the balance supply bills would be paid after completion of performance trial, but in spite of such promise the respondent did not pay any amount to the petitioner. It is further stated that the petitioner, after raising their last bill dated 15-01-2011, had sent letters/e-mails dated 04-12-2012, 04-09-2013, 18-09-2013 and 03-02-2014 calling upon the respondent company to pay outstanding bills, but in spite of the request the respondent company did not pay the same, but the respondent company had again committed to pay and requested the petitioner to rectify some arrears of the work and the petitioner vide reply dated 18-06-2011 explained to the respondent company that all issues were taken care of by the petitioner and again requested the respondent to clear the outstanding dues. It is further stated that up to 01-07-2010, the respondent company made payment of a total amount of Rs.2,88,63,650/- against invoice raised by the petitioner amounting to Rs.3,61,92,604/- including taxes, VAT, duties, as applicable, thus leaving a balance of Rs.73,28,954/- still due and payable by the respondent. Though the respondent company was called upon to pay the outstanding dues of the petitioner, the same was not paid and when the respondent company failed to pay the amounts, the petitioner was constrained to issue a statutory demand notice on 10-03-2014 to the respondent company calling upon to make payment of its dues of a sum of Rs.73,28,954/- along with interest @ 18% p.a. from 21-01-2011. It is further stated that the respondent company, in spite of receipt of the said notice at its registered office, failed and neglected to pay the dues of the petitioner. When the representative of the petitioner company visited the office of the respondent company on several occasions, the respondent company assured payment of dues to the petitioner against the invoices, but it did not do so. In view of the above, the respondent company is unable to pay its debts having lost its financial viability and that if the respondent company is allowed to carry on business, the same is bound to injure the commercial suo verity of the business. It is also stated that the total dues as on 28-03-2014 comes to Rs.1,43,85,914.23 ps. payable by the respondent company to the petitioner. Hence, the Company Petition.

3. The respondent company filed its counter stating that the company petition seeking winding up of the respondent company is misconceived and not maintainable under law and denied the claim of the petitioner, the interest component and the statement of account filed by the petitioner and asked the petitioner to strict proof of the same. It is stated that in view of the breach of the terms and conditions of the contract/purchase order dated 10-06-2008 and 14-08-2008 in supply and erecting the defective/ substandard equipment, the respondent company is incurring recurring loss as shown in Annexure and the petitioner company is liable to pay the said loss/damages on account of the breach of contract committed by the petitioner company and therefore, the respondent company is not liable to pay any amount to the petitioner as claimed by them, and on the other hand, the petitioner company is liable to pay damages suffered by the respondent company on account of supply of defective/substandard equipment. It is also stated that as an ancillary for the purpose of establishing 7.5 MW biomass based power plant, being erected at Thakallpalli village, Yacharam Mandal, Nagarjunasagar Highway, Ranga Reddy District, the respondent company issued an offer dated 07-05-2008 for supply and erection of Air Cooled Condenser with the specifications as mentioned in the counter affidavit and the same was accepted by the petitioner and the respondent company placed work orders dated 10-06-2008 and 14-08-2008 for supply of Air Cooled condenser which included design, engineering, manufacturing, supply, erection, commissioning and trial run for ensuring the assured technical performance. It is further stated that the petitioner company failed to adhere to the terms and conditions of the work order dated 14-08-2008 and the

respondent company pointed out various deficiencies as detailed in the counter in supply and execution of the work by the petitioner. It is also stated that the respondent company made several requests in order to ensure the performance of ACC plants, the petitioner company has not come forward to satisfy the assured technical performance of the ACC plant by conducting a technical performance run at the ACC plant and that in spite of repeated correspondence with the petitioner company, the petitioner company has not shown the agreed performance by its ACC plant. It is further stated that the deficiencies pointed out in the e-mails of the respondent dated 01-06-2011, the same were unattended even till date, consequently, the respondent company suffered huge financial loss and distress and incurred a total loss of Rs.5,54,68,800/-. It is also stated that the commissioning of ACC plant was delayed by seven months, due to which, the generation of power by the respondent power plant was delayed and thus incurred loss of Rs.18,40,29,300/-, and thus, the petitioner company is liable to pay a total sum of Rs.24,96,67,380/- to the respondent company and that they are initiating separate proceedings for recovery of damages suffered by the respondent company due to the breach of contract by the petitioner company. The respondent company admitted sending of notice dated 10-03-2014, but stated that the same was misplaced by the concerned staff. The respondent company sought for dismissal of the company petition.

4. The petitioner company filed its reply affidavit denying the allegations made by the respondent company against the petitioner and reiterating the averments in the company petition. It is stated that in the meeting held on 07-10-2010 between the petitioner and the respondent, it was clearly recorded that the respondent would

make the balance payment due to the petitioner, but in spite of the same, the respondent failed to make any further payment of the petitioner dues. It is stated that by a letter dated 22-06-2010, it was pointed out to the respondent that they are required to take substantial care and in the event there was any vacuum drop problem, the same was because of non-maintenance of the unit by the respondent. It is also stated that in a meeting held on 31-07-2010, it was recorded that a complete maintenance was carried out to the satisfaction of the respondent and optimum vacuum pressure was obtained. It is also stated that ACC unit was always designed with 3 Fan Model and thus there could not have been any standby third fan. It is denied that the respondent incurred loss or auxiliary electrical consumption of 1900800 unit as alleged or that the respondent suffered a loss of Rs.1,69,280/- as on 10-06-2014 as alleged. It is also denied that the respondent incurred total loss of Rs.5,54,68,800/- as alleged and also denied that the respondent suffered a loss of Rs.18,40,29,300/- as alleged and further denied that there was any breach of contract committed by the petitioner.
It is stated that for the first time the respondent are making such an allegation and as an afterthought trying to make out a false and fabricated counter claim to deprive the petitioner from their legitimate dues. It is further stated that the respondent are running the said ACC and making profit out of the same. It is stated that assuming but not admitting that the respondent are entitled to hold back any sum of money they can do so only up to 5% of the contractual price in terms of clause 3.0 and 4.0 of the said contract/purchase order and that the respondent company deliberately did not reply to the statutory notice.

5. Learner counsel for the petitioner contends that the respondent company accepted the offer of the petitioner for

designing, engineering, supplying, erectioning and commissioning of Air Cooled Condensers vide letters dated 10-06-2008 and 14-08-2008 and they also agreed to pay an amount of Rs.3.40 lakhs in respect of execution of contract. He also contends that as per the minutes of the meeting held on 07-10-2010, the respondent agreed to pay the amounts for completion of performance trials and though the performance trials were completed, the respondent has not paid the due amount and the petitioner company sent e-mails for payment of outstanding amount of Rs.7.38 lakhs and also vide e-mails dated 03-02-2014, 08-09-2013 and 04-09-2013 and also e-mail dated 03-02-2014. He further contends that in spite of service of statutory notice dated 10-03-2014, the respondent company has neither paid the amount nor replied to the statutory notice and that as per the balance sheet of the respondent company as on 31-03-2012, the respondent company is running in profits by utilizing the ACC supplied by the petitioner company and since the respondent has not replied to the statutory notice, a presumption can be drawn under Section 434 of the Act that the respondent company is unable to pay its admitted debts. He further contends that the respondent admitted the erection of ACC for running of the respondent company's power plant and paid certain payments and in order to avoid dues, the respondent company is setting up false, frivolous and untenable grounds for denying the liability for the purpose of the company petition and that the defence set up by the respondent is not bonafide and it is only a moonshine. As such, the Company Petition is liable to be admitted. In support of his contentions, the learned counsel for the petitioner relied on judgments reported in **The New Red Bank Tea Company v. Jahar Roy**[1]**, Resham Singh and Co. (P) Ltd.,**

v. Daewoo Motors India Ltd[2]**, M/s. Olam Agro India Ltd., v. M/s. Mother v. Impex Pvt Ltd**[3] and **M/s. Integra v. M/s. Vedavaag System Limited**[4]**.**

6. On other hand, the learned counsel for the respondent company contends that the respondent company addressed several e-mails for rectification of the defects in ACC plant, in spite of which, the petitioner has not rectified the same, due to which, the respondent company suffered huge losses and in fact, the petitioner company is liable to pay damages to the respondent company for not rectifying the defects in ACC plants. He further contends that e-mail dated 14-09-2010 is one such e-mail stating the plan is running at restricted load due to vacuum problem and high steam consumption at Turbine due to vacuum problem and that the earlier clause is made applicable if the defects are not rectified. He further contends that even as per the minutes of the meeting dated 07-10-2010, the petitioner company has to conduct the performance trials, which they never did and that it is made clear in the minutes of the meeting dated 07-10-2010 that the balance will be paid after completion of performance trials and that since the petitioner was not able to conduct performance trials and cure defects pointed out by the respondent, the respondent company was justified in not paying the amounts. He further submits that the petitioner company has filed this petition for coercing the respondent not to pay the amounts i.e. recovery of the amounts and that the Company Petition cannot be entertained for mere recovery of monies. He further contends that the respondent has every reason for refusing to pay the amounts on account of the above mentioned factors and that the Company Petition cannot be admitted for mere omission to reply to the

statutory notice and the respondent company is able to justify to its stands taken in the counter by relying on the correspondence of the petitioner regarding non-payment of the amounts. He further contends that the dispute raised by the respondent is substantial and cannot be adjudicated in the company petition in a summary jurisdiction. In support of his contentions, he relied on **IBA Health (India) Private Limited v. Info-Drive Systems SDN. BHD**[5], **Pradeshiya Industrial and Investment Corporation of U.P. v. North India Petrochemicals Ltd., and another**[6] and **Mediquip Systems (P) Ltd., v. Proxima Medical System GMBH**[7].

7. In this case, admittedly, the purchase order dated 10-06-2008 was placed by the respondent company to the petitioner accepting the offer of the petitioner for Rs.3,40,00,000/- plus applicable taxes for supply, transportation, transit insurance, erection and commissioning of Air Cooled condenser system and the same was confirmed vide letter dated 14-08-2008 with certain conditions mentioned therein. There is no dispute regarding L.D. clause, which was accepted by the petitioner vide letter dated 14-08-2008. It is admitted fact that the petitioner commissioned ACC condenser system, but the respondent has not accepted the L.D. clause of 5% of the costs for any short fall in vacuum and the respondent also sent an e-mail dated 22-07-2009 to provide vacuum plan for completion of project and commissioning for the end of October, 2009 and also reiterating by letters dated 25-07-2009, 13-08-2009, 20-10-2009 and 29-10-2009 stating about poor progress of erection at the site. The respondent also informed through e-mails dated 01-11-2009, 27-11-2009, 15-01-2010, 23-01-2010, 16-02-2010, 19-02-2010, 22-02-2010, 26-02-2010, 02-03-2010, 18-03-2010, 26-03-2010, 03-04-2010, 09-04-2010, 12-04-

2010 about poor progress of erection and also late erection, apart from requesting about the pending works to be completed. The petitioner requested for modification of the purchase order vide e-mail dated 06-05-2010, but the respondent addressed e-mails regarding poor performance of ACC. The respondent further addressed through another e-mail dated 09-06-2010 to the petitioner stating that the plant was stopped to attend to the vacuum problems in ACC and also problem in Turbine system and that the problems in Turbine was sorted out by Triveni, but the vacuum problem in ACC is still persisting and pointed out certain defects. Further, the respondent addressed through e-mail dated 15-06-2010 requesting for completion of the works. The respondent sent an e-mail dated 21-06-2010, wherein it is stated that there are still defects and they are unable to maintain the vacuum which is resulting in constant tripping of the plant resulting in loss of operation time and finances and the respondent also sent another e-mail dated 12-07-2010, wherein it is stated that the vacuum in the system is not developing beyond -0.78 bar at this temp conditions, another e-mail dated 14-09-2010 was also sent by the respondent to the petitioner stating about performance of the trial and asking about performance trials and final settlement and the application of LD clauses in the event of non-rectification of the problem. The respondent sent another e-mail dated 23-10-2010 stating that payments will be made soon after finishing the balance works and conducting the performance trials and the respondent also sent e-mail dated 01-06-2011 stating that the performance test is not done as per the agreement and pointing out certain other defects and similar e-mails were also issued on 15-06-2011 and 18-11-2011 and the petitioner replied to some of e-mails sent by the respondent company. Since the respondent has admitted about erection and commissioning of ACC plant, the respondent is liable to pay the amounts as per the purchase order, but they justified for non-payment only on the ground that ACC supply was not properly functioning as per the specifications given in the letter dated 14-08-2008. So, the burden lies on the respondent to show that they are not liable to pay the amounts.

8. Now, a perusal of the e-mails referred to above, clearly go to show that from the beginning, the respondent is raising issues with the petitioner about late commissioning of the project and poor performance of the plant due to defects and the petitioner company is also replying to the same. In any of the e-mails referred to above, I do not find that there is acceptance of liability by the respondent unconditionally but stated that the payment will be made soon after performance of the trail is conducted and the defects are rectified. So, it cannot be said that the liability is admitted and the respondent also made it clear that the petitioner company has to satisfy about vacuum pressure in the e-mails.

9. In view of the consistent stand taken by the respondent, I am of the opinion that the dispute raised by the respondent company in not paying the amounts is bona fide dispute and not a moonshine and these disputed questions of fact require elaborate trial to be tried by way of regular civil suit and it is not possible to decide the same in a summary jurisdiction in this company petition and as asserted by the petitioner itself and even as per the balance sheet of the respondent company, the respondent company is in profits and therefore, it cannot be said that the respondent company is not commercially solvent and from that angle also, it cannot be said that the respondent neglected to pay the admitted amounts.

10. No doubt, the respondent company has not replied to the

statutory notice, an inference can be drawn under Section 434 of the Companies Act, but this court has ordered notice before admitting the company petition and now since the respondent company filed an elaborate counter referring to the correspondence with the petitioner and the respondent company raising certain issues for non-payment of the amounts, the presumption is rebutted. As such, only on the sole ground of not replying to the statutory notice, the company petition cannot be admitted and the respondent through its counter and correspondence stated that the dispute raised is substantial and bona fide. It is no doubt that non-reply to the statutory notice may be one of the factor for admitting the winding up petition, but the respondent has shown its justified cause for non-payment of the amounts to the petitioner. In **Resham Singh and Co. (P) Ltd., v. Daewoo Motors India Ltd** (2 supra), the High Court of Delhi held as follows:

> "......Normally, the Company Judge consider it prudent in the first instance to issue notice to the Respondent so that its defense to the possible far-reaching and fatal winding-up orders can be considered. The admission of the Petition at its first hearing is possible because, by virtue of Section 434 of the Companies Act, a presumption of the indebtness can be legitimately drawn by the Court where no Reply to the statutory notice is forthcoming. The risk of the admission of the Petition, as well as the appointment of a Provisional Liquidator is thus broodingly and ominously present in all those cases where the Respondent Company neglects to send any Reply to the winding-up notice. But this is as far as the danger extends. My attention has been justifiably drawn to the decision of the Single Judge of this Court in Vimco Ltd. v. Sidvink Properties (P) Ltd. , 1996 Vol. 86 Company Cases 610, where it has been held by P.K. Bahri, J. that where a bona fide dispute had been shown to the Court, the question of applying the deeming provision should not automatically arise. I continue to be in respectful agreement with his view. Applying this ratio to the facts of the present case, without in any manner diluting or undermining the significance of the failure of the Respondent Company to respond to the statutory notice, this factor will be duly kept in perspective when the conspectus of facts is considered….."

> "…….. (vii) Generally speaking, an admission of debt should be available and/ or the defence that has been adopted should appear to the court not to be dishonest and/or moonshine, for proceedings to continue. If there is insufficient material in favour of the petitioners, such disputes can be properly adjudicated in a regular civil suit. It is extremely helpful to draw upon the analogy of a summary suit under Order 37 of the Code of Civil Procedure. If the company court reaches the conclusion that, had it been exercising ordinary original civil jurisdiction it would have granted unconditional leave to defend, it must dismiss the winding up petition….."

11. In **the New Red Bank Tea Company v. Jahar Roy** (1 supra), it is held as follows:

> ".....We do not agree with the proposition that in reply to statutory notice under Section 434 of the Companies Act, 1956, the company is not obliged to disclose all its points of defence. The notice is a statutory step by the creditor; it calls upon the company to act. The negligence to act creates a legal fiction against the company. Such negligence can be inferred: first, from the company's total silence; and secondly, from its giving up the defence taken in reply to the statutory notice, when the creditor approaches the Company Court. The opportunity given to the company to file opposition the company petition cannot be seized by the company to set the clock back for replying to the statutory notice. Defence not taken in the reply to the statutory notice, but taken for the first time in the affidavit-in-opposition filed in Court, cannot be accepted for holding that the company's refusal to pay being based on bona fide defence, the non-payment of the debt did not amount to its neglect to pay. Therefore, we are of the view that the company is under an obligation to disclose all its points of defence in its reply to the statutory notice. The service of the statutory notice is not an empty formality; it conveys the message of consequences. The provisions of Section 434 of the Companies Act ensure settlement of disputes to curb avoidable litigations. The appellant-company's contention, if accepted, will be contrary to the legislative intent. Its proposition just encourages litigation……"

12. I have considered both the decisions, but I prefer to accept the view taken by the Delhi High Court in **Resham Singh and Co. (P) Ltd., v. Daewoo Motors India Ltd** (2 supra). More so, having issued notice before admitting company petition defence raised in the counter has to be considered before admitting company

petition. The facts in **M/s. Integra v. M/s. Vedavaag System Limited** (4 supra) are different and since vague pleas are taken in the counter and absence of reply to the statutory notice was held to be a ground for admission of the company petition. In the absence of bona fide dispute by the respondent, non-reply to the statutory notice may be a factor in the mind of the court for admitting the company petition. In this case, it is not the case that the respondent has not raised the defence in the counter, but from 2008 onwards they are agitating that the delay in commissioning the project and also defects in commissioning of ACC. As such, it cannot be said that the dispute raised by the respondent is not bona fide.

13. In **IBA Health (India) Private Limited v. Info-Drive Systems SDN. BHD** (5 supra), it is held as follows:

> "…… The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the Court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.
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> In this connection, reference may be made to the judgment of this Court in Amalgamated Commercial Traders (P) Ltd., v. A.C.K. Krishnaswami ((1965) 35

Comp. Cases 456 (DB) in which this Court held that:

> "It is well settled that 'a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court….."
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> The above mentioned decision was later followed by this court in Madhusudan Gordhandas and Co. V. Madhu Woollen Industries (P) Ltd., ((1971) 3 SCC 632). The principles laid down in the abovementioned judgment have again been reiterated by this Court in Mediquip System (P) Ltd., v. Proxima Medical System GmbH ((2005) 7 SCC 42) wherein this Court held that the defence raised bythe appellant company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The abovementioned judgments were later followed by this Court in Vijay Industries v. NATL Technologies LTd ((2009) 3 SCC 527)……"

14. The respondent company is commercially solvent even as per the balance sheet on which the petitioner company placed reliance and they have raised issues regarding non-payment through a series of correspondence. Apart from that, the Company Court has always a discretion either to admit the company petition or not and the petitioner cannot as a matter of right ask for winding up the company petition. In view of the law laid down by the Apex Court and other High Courts and in the facts and circumstances, I am of the opinion that the company petition has to be dismissed. This cannot, however, be construed that the petitioner has no case on merits, but it has to be tried in a properly instituted regular civil suit. Other decisions cited by the parties may not be relevant since company petition is dismissed on the ground that the issue is to be decided by civil court.

15. Accordingly, the Company Petition is dismissed.

However, if the petitioner institutes a civil suit, the same shall be decided by a competent civil court on merits without being influenced by any observations made herein, since this court is dismissing the company petition only on the ground that the issue cannot be adjudicated in a summary jurisdiction under the Companies Act.

A. RAJASHEKER REDDY, J

Date: 01-04-2015

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[1] (2003) 1 CALLT 310 HC

[2] (2003) 116 Company Cases 529

[3] (2014) 210 DLT 365

[4] CDJ 2014 APHC 1389

[5] (2010) 10 Supreme Court Cases 553

[6] (1994) 3 Supreme Court Cases 348

[7] (2005) 7 Supreme Court Cases 42