

HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

C.P.No.179 of 2012

Date :08.09.2015

Between:

M/s. RK Infra & Engineering (India) Pvt. Ltd.,  
Nizampet Road, Hydernagar, Kukatpally,  
Hyderabad, represented by its Managing Director  
Mr. B. Ravi Kalyan Reddy .. Petitioner

And

M/s. Bramhani Industries Ltd.,  
Vemaguntapally, Kothaguntapally,  
Thugutlapally, Jammalamadugu,  
YSR Kadapa District, represented by its  
Joint Managing Director  
Mr. Kapu Ramachandra Reddy .. Respondent

Counsel for petitioner : Mr. B. Chandrasen Reddy

Counsel for respondent : Mr. S. Ravi, Senior Counsel  
for Mr. Maddy Rajesh

The Court made the following:

**JUDGMENT:**

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This Company Petition is filed under Sections 433(e)(f) and 434 of the Companies Act, 1956 (for short “the Act”) for winding up of the respondent.

The petitioner averred that it is a Private Limited Company incorporated under the provisions of the Act and engaged in the business of execution of projects in the field of constructions, earth works, site levelling, reservoirs, roads and buildings, bridges, irrigation works, excavators, mining productions etc. That the respondent is a limited company incorporated under the provisions of the Act to (a) carry on the business of manufacturing, producing, casting, procuring, mastering, buying, selling, converting and in other ways dealing in all types of steels, castings, iron steels, aily, ingots, slabs, sheets, strips, rounds, bars, flats, sections and shapes, brass,

copper, aluminium, stainless steels and other non-ferrous metals, to distil, refine or produce zinc chloride; (b) carry on in India or elsewhere the business of manufacturing, producing, processing, melting, converting, manipulating, treating and to act as agent, broker, buyer, seller, trader, importer, exporter, distributor, stockiest, metallurgist, engineer, consultant, job worker, supplier, contractor or otherwise deal in Ferro alloys of all grades and forms including powder from such as ferro silicon, ferro chrome, silico mangances, silico calcium, silico chrome, ferro molybdenum, ferro vanadium, ferro nungsten, ferro silico, magnesium ferro manganese, ferro columbium, ferro niobium, ferro titanium or other ferro alloys present or future and other allied items; and (c) to promote, run, establish, install or set up integrated steel plants, composite steel plants, hor rolling steels mills, cold rolling mills, blooms and billet mills, steels insurances, contcasts, rolling mills, finances for the manufacturing, producing, converting, extracting, treating or processing of all types, grades and sizes of steels, stainless steels, high speed steels, dye steels, electrical steels, case hardening steels, nitriding steels and ball bearing steels.

The petitioner has further averred that the respondent issued Letter of Allotment (LOA) vide Lr.No.LOA/BIL/JMD(P)/A/A/1975, dated 31-7-2008 to it for execution of the work i.e., 'Earth Work/Site grading, site levelling to be executed in the integrated steel plant located in Bramhani Hills, Jammalamadugu, YSR Kadapa District at an agreed rate of Rs.180/- per Cubic Meter + 12.36% Service Tax, for the total estimated contract value of Rs.180 Crores. That one of the conditions stipulated in the said work in respect of payment of bills is that the respondent should pay the amounts to the petitioner based on the monthly Running Account (RA) bills, within fifteen days from the date of receipt of the bills; that the petitioner has submitted its last bills to the respondent on 31-3-2010 and as such the due date for payment of the said bill amount was 15-4-2010 apart from other pending bills; and that the said bills were raised after completion of part of the work as per the work order at the steel plant. That during the year 2008-2009, the petitioner has executed the work for the total amount of

Rs.155,09,49,695/-, excluding the construction work of compound wall for the steel plant for the total value of Rs.1,78,52,774/-; that during the year 2008-2009, the respondent has paid an amount of Rs.81,56,77,172/-, out of which Rs.61,04,76,862/- was towards execution of the work and Rs.20,52,00,310/- was towards advance and running account adjusted in the subsequent year; that for the year 2009-2010, the respondent paid an amount of Rs.37,36,63,960/- to the petitioner under different bills, totalling an amount of Rs.118,93,41,132/-, out of the total amount due of Rs.155,09,49,695/-; that as per the TDS Certificate issued by the respondent for the year 2008-2009, an amount of Rs.1,80,22,364/- was deducted and credited to the Central Government for the total amount of Rs.79,45,40,974/-; that for the year 2009-2010, an amount of Rs.1,83,03,508/- was paid for the total amount of Rs.86,51,51,405/-; and that, however, the petitioner has received only an amount of Rs.118,93,41,132/- for the said two years out of the total amount of Rs.155,09,49,695/-, leaving an outstanding amount of Rs.37,02,00,900/-. It was further averred that as per the conditions of the LOA, after completion of a part of the work, the RA bills were regularly submitted by the petitioner as and when the work was completed, but the respondent, inspite of a number of personal requests and reminders, failed to honour the stipulated condition and committed default in payment of the amounts; and that as per the audited accounts and the bills submitted by the petitioner, the respondent fell in dues to the tune of Rs.37,02,00,900/-. That the following are the details of the outstanding amounts from the respondent to the petitioner:

(a) Invoice No.09, dt. 31-3-2010 Rs. 6,24,20,448-00

(b) Invoice No.10, dt. 31-3-2010 Rs.29,91,88,144-00

(c) Compound wall construction as per

Instructions of Bramhani Industries Ltd. Rs. 8,51,691-00

(d) Retention money of M/s.RK Infra &

Engg. (India) Rs. 76,29,583-00

The petitioner further pleaded that the above mentioned bills and statements submitted by it were scrutinised and got reconciled by the respondent and that the latter has also confirmed the outstanding amount of Rs.37,02,00,900/- and undertaken to pay the same and informed the petitioner through letter dated 14-7-2010 under acknowledgement. That despite acknowledging the debt and the further correspondence of the petitioner demanding the outstanding amounts, the respondent has not responded positively. That the transactions between the petitioner and the respondent being commercial in nature, the latter is liable to pay interest @ 12% p.a. from 16-4-2010 i.e., from the date of the debt falling due, till its realisation. That the petitioner borrowed amounts from various banks and financial institutions for the purpose of execution of the work entrusted by the respondent and it is continuing to pay huge amounts towards interest. That the respondent has not responded to the verbal demands of the petitioner since 2010 for repayment of the aforesaid dues nor it has paid even a single pie out of the said amount and that the respondent is also liable to pay business loss in view of the flagrant violation of the conditions of the LOA.

It was further averred that on 21-5-2012 the petitioner has caused statutory notice dated 11-8-2012 to the respondent and the same was received and acknowledged by the latter on 25-5-2012 and that inspite of its receipt, the respondent failed to reply to the same. That the details of the amounts due and payable by the respondent to the petitioner together with interest as on 11-8-2012 are as under:

(i) Principal amount Rs.37,02,00,900-00

(ii) Interest @ 12% p.a. from

16-4-2010 to 11-8-2012 Rs.10,30,39,251-00

(iii) Total Rs.47,32,40,151-00

The petitioner further averred that it is the legitimate duty of the

respondent to pay the outstanding amount of Rs.47,32,40,151-00 and the business loss suffered by the petitioner. That the respondent never denied the amount claimed by the petitioner all these years; that there are no disputes between the petitioner and the respondent with regard to the execution of work under the LOA at any point of time; and that the respondent has also admitted the claim of the petitioner through its letter dated 14-7-2010. That inspite of acknowledging its debt due to the petitioner, the respondent has neglected to pay the same with a mala fide intention. That the respondent has become commercially insolvent as per the recent news published in the Press wherein it was notified that the Government has terminated its Memorandum of Understanding with the respondent. That as the respondent is unable to pay off its debt, it is liable to be wound up. That the petitioner filed C.P.No.175 of 2012 and withdrew the same with the permission of this Court with liberty to file a fresh petition due to the fact that the registered office of the respondent was wrongly mentioned in the cause title and pleadings therein; and that it has subsequently come to know about the change of address of the respondent's registered office through Form No.18 from the office of the Registrar of Companies; and that the petitioner has not initiated any other legal proceedings against the respondent in respect of the amounts claimed in the present Company Petition. The petitioner has accordingly prayed for winding up of the respondent.

The respondent filed a counter-affidavit through its Additional Director wherein while denying its liability to pay the amount claimed by the petitioner, accused the latter of indulging in suppression of material facts, and asserted that the respondent has paid the amount in excess of what was due to the petitioner. The respondent admitted the LOA dated 31-7-2008 as having been entered into by it with the petitioner at the agreed rate of Rs.180/- per Cubic Meter + 12.36% Service Tax, for the total estimated contract value of Rs.180 crores. That the LOA dated 31-7-2008 was for the years 2008 and 2009; that on 4-6-2009, a fresh LOA was issued vide LOA

No.BIL/ISP/LOA/CVL/0379 for execution of work at Rs.135/- per Cubic Meter for the total estimated value of Rs.55.485 crores; and that there is a rate difference of Rs.57.61 per Cubic Meter between the said two LOAs. That the petitioner addressed letter dated 22-8-2009 requesting the respondent to confirm the works done by it basing on both the above mentioned LOAs and that therefore the petitioner was conscious of the existence of two different rate contracts for two different periods providing for two different rates. The respondent, while admitting the condition in the LOA relating to payment of amounts to be made to the petitioner within 15 days of receipt of the bills, however denied that the petitioner had executed works worth Rs.155,09,49,695/-. It was further averred that the petitioner has executed works valued at Rs.75,14,04,690/-; that Invoice Nos.8 and 9 and the supplementary Invoice Nos.3, 5, 6, 7, 8 and 9 for Rs.25,08,54,708/-, Rs.24,95,02,185/- and Rs.29,91,88,114/- shown at page-84 in the ledger of the petitioner-company are totally false and fabricated. That the respondent has paid the petitioner Rs.81,56,77,172/- out of which Rs.61,04,76,862/- was towards execution of the work for 2008-2009 and Rs.20,52,00,310/- was towards advance for the year 2009-2010; that along with the advance amount, an additional amount of Rs.57,81,13,076/- was paid in 2009-2010, and thus a sum of Rs.139,37,60,248/- was paid to the petitioner for the years 2008-2009 and 2009-2010 (i.e., Rs.117,98,40,674/- through Bank, TDS of Rs.3,68,27,726/-, diesel supply charges of Rs.4,88,91,812/-, vehicle transfer amounts of Rs.12,16,11,491/-, aggregating to Rs.139,37,60,248/-); and that from the above mentioned payments, it is clear that the respondent, in fact, paid an excess amount of Rs.64,23,55,558/- to the petitioner.

The respondent further averred that the petitioner has filed fabricated documents to support and buttress its unjust and illegal claim in view of the prevailing situation in the respondent-company due to the arrest of its certain key personnel. It was further averred

that there is ample evidence to show that the invoices exhibited at page Nos.83 and 84, both dated 31-3-2010, of the material papers filed by the petitioner along with the Company Petition, are fabricated documents; that the invoice at page No.83 is purported to be Invoice No.9, dated 31-3-2010, whose value was shown to be Rs.24,95,02,185/-; that the net amount under the said invoice after deducting TDS was shown as Rs.24,20,02,324/-; that a sum of Rs.17,95,81,876/- was shown to have been paid to the petitioner and the alleged outstanding amount was shown as Rs.6,24,20,448/-; that however the Ledger of the petitioner from pages 85 to 88 for the relevant period does not disclose the alleged payment of Rs.17,95,81,876/- and that the same (the petitioner's ledger) shows the gross amount of the invoice. It was further averred that the purported "Invoice No.9" was already issued by the petitioner on 3-12-2009 itself; and that there is a specific reference to LOA No.BIL/ISP/LOA/CBL/0379, dated 4-6-2009 in the said invoice; that in view of the aforesaid contradiction, the respondent called upon the petitioner to produce the LOA; that the respondent is in possession of the office copy of the said LOA and averred that the same would be produced at the time of trial. It was also further averred that having already issued "Bill No.9" on 3-12-2009 itself and having specifically referred to LOA dated 4-6-2009, it is surprising that the petitioner fabricated the bill with the same number without reference to the LOA number, but dating the same to be 31-3-2010; that as a matter of fact the respondent has not received the said invoice at all and the same was not taken into consideration and thus the said invoice was fabricated by the petitioner.

As regards Invoice No.10 filed by the petitioner at page-84 of the material papers, the respondent averred that the same is a supplementary Invoice; that the quantities mentioned therein have already been billed in Invoice Nos.3, 5, 6, 7, 8 and 9 as per the claim of the petitioner; that however the actual bills submitted by the petitioner to the respondent which were acted upon and payments were released thereunder are entirely different. The respondent

specifically averred that the original Bill No.8, 9, 10 and 11, which are in its custody, correspond approximately to the quantities mentioned in the purported Invoice Nos.3, 5, 6 and 7 respectively; that Invoice Nos.8 and 9 do not exist in the form in which the petitioner has claimed; that the invoices bearing Nos.8 to 11 of various dates, which are in the possession of the respondent, make a specific reference to LOA dated 4-6-2009 and that there is no reference to the said LOA in Invoice No.10, at page-84 of the material papers produced by the petitioner. That notwithstanding the agreed rate of Rs.135/- per Cubic Meter as per the Purchase Order or LOA dated 4-6-2009, the petitioner raised invoice at Rs.150/- per Cubic Meter and at the time of settlement of bills, the respondent had corrected the rate at Rs.135/- per Cubic Meter in terms of the said LOA. That the claim in the purported Bill No.10 for the differential price computed at Rs.58.18 per cubic meter, plus the applicable taxes, education cess and S.H.E. cess comes approximately to Rs.64.17 per Cubic Meter; that the effort of the petitioner has been to fabricate invoices to arrive at a contractual price of approximately Rs.200/- per Cubic Meter as was agreed upon for the period 2009-09 under a separate LOA; that the petitioner had confirmed the existence of LOA dated 4-6-2009 and requested for certification of work on 22-8-2009; and that the petitioner played fraud to suppress LOA dated 4-6-2009. It was further specifically averred that unfortunately the former General Manager of the respondent Mr. N. Shashikanth colluded with the petitioner in giving fabricated accounts of the respondent; that letter dated 14-7-2010 was the letter prepared by the said former General Manager (Finance) in collusion with the petitioner and therefore the same cannot be considered as an acknowledgement of its liability by the respondent; and that the respondent is in the process of initiating criminal proceedings for the fraud committed by its former General Manager (Finance). That the fabricated accounts of the petitioner produced by it at pages 86 to 88 of the paper book do not correspond with the purported Ledger extract of the respondent, which were exhibited at pages 73 to 75 and again at pages 102 and 103; that while the former Ledger extract does not bear any certification, the

latter was certified by the petitioner itself. It was specifically averred that bill dated 31-3-2010 for Rs.37.49 crores finds place in the purported accounts of the respondent, but the same does not reflect in the petitioner's own accounts and that therefore the said bill is a bogus bill raised by the petitioner. That there is variation in other bills also in the accounts of the petitioner and that of the respondent; and that in order to arrive at the sum of Rs.37 crores, the petitioner resorted to fabrication of Invoice Nos.9 and 10. That the question of payment of interest does not arise as the respondent is not indebted to the petitioner and therefore the said claim is baseless. That the respondent has not violated the conditions of the LOA and therefore the petitioner has not suffered any business loss to be compensated by the respondent. It was further averred that though the petitioner claimed that the debt became due in the year 2010, it has not raised the said issue until 2012 and therefore the allegation that the respondent never denied its liability during the said period is not tenable. The respondent specifically averred that as the statutory notice was not served at its registered office, the Company Petition is not maintainable; that the respondent is a going concern and the same is commercially viable; that the petitioner cannot rely on newspaper reports to come to the conclusion that the respondent became commercially unviable; that the respondent is not liable to pay any amount to the petitioner; that as the debt is disputed, the petitioner should have approached the appropriate forum for recovery of amounts, if any, due to it from the respondent; and that the present Company Petition is filed with the sole object of arm twisting the respondent to extract monies from it.

The petitioner filed a reply affidavit denying the allegations of suppression of material facts and misrepresentation. It was averred that the respondent has admitted the debt due to the petitioner after due reconciliation of accounts and confirmed the same through various modes of correspondence as set out in the Company Petition and therefore the respondent cannot revert back its approval the accounts on vague contentions. That the records of both the

companies tallied and the dues were confirmed by the respondent and as such the respondent is legally bound to pay the same to the petitioner. The petitioner denied the averment of the respondent that the latter has paid amount in excess of the amount due to it and that there were two LOAs with huge difference of rate between them. That the respondent tampered the figures in respect of the value of contract and the value of work done by the petitioner is evident from letter dated 22-8-2009; that the work in respect of the first LOA was completed and there is no dispute with regard to the same; and that the dispute in question is with regard to the LOA dt.31-7-2008. It was further averred that there was a verbal understanding between the petitioner and the respondent that payment shall be released within 15 days from the date of receipt of bills. That the TDS certificates issued by the respondent confirm the total work done by the petitioner during the relevant period; that the allegation that the respondent has paid the amounts to the petitioner for the works not done by the latter cannot be accepted; and that the invoices have been duly signed and stamped by the respondent only after due verification and hence invoice Nos.8 and 9 and supplementary invoice Nos.3, 5, 6, 7, 8 and 9 for Rs.25,08,54,708/-, Rs.24,95,02,185/- and Rs.29,91,88,114/- respectively are correct and the same were taken to the accounts by the parties. That it is evident from the financial statement of the petitioner that the amount received by it from the respondent as advance has been shown as advance and that when the advance received is reflected in the books of accounts and the same is carried over to the next year, it is genuine that the petitioner has carried out the work for the financial years 2008-2009 and 2009-2010. With regard to the allegation that the respondent paid an additional amount of Rs.57,81,13,076/- in 2009-2010, the petitioner averred that no company gives such an additional amount apart from the outstanding amount of Rs.20,52,00,310/- without carrying the work as per the agreement and that the said amount was paid for the work already done. That the allegation that the respondent supplied diesel and debited the same towards charges to the account of the petitioner is quite

strange and the same does not hold any merit. The petitioner denied that the invoices produced by it are false and fabricated and alleged that the figures given by the respondent are imaginary and without any basis of recorded facts and to avoid payment of the amount due to the petitioner. The petitioner further averred that the respondent has not filed any evidence to show that the invoices dated 31-3-2010 raised by the petitioner are false; that the invoices filed along with the counter-affidavit are fabricated by the respondent for the purpose of its defence; that from the copies of invoices filed by the respondent, it can be seen that the LOAs dated 4-6-2008 and 12-6-2009 are non-existent and they are not relevant to the present case; that it is quite manifest that the four invoice Nos.8, 9, 10 and 11 produced by the respondent are tampered and fabricated as though the figures therein were corrected, the amounts in words were not corrected; that the respondent could not explain as to why there are three invoices i.e., invoice Nos.9, 10 and 11, dated 3-12-2009 instead of four invoices and the other invoice was dated 22-9-2009 and that the same clearly shows that the respondent has conveniently tampered and fabricated the invoices for the purpose of raising false defence. The petitioner denied that invoice dated 31-3-2010 is supposed to be treated as a supplementary invoice. That there must be accuracy in commercial and business transactions between the parties and there cannot be any suppositions as alleged by the respondent. The petitioner denied that it has suppressed the LOA dated 4-6-2009 which was accomplished and there is no claim in respect of the same. That the respondent has been trying to abdicate the facts before this Court by way of manipulation of the transactions only for the purpose of avoiding its legal liability. It was further averred that all the bills and statements submitted by the petitioner were scrutinised and got reconciled by the respondent; that the respondent also confirmed the outstanding amounts of Rs.37,02,00,900/-, both in figures and in words, and also undertook to pay the same and informed the petitioner through its letter dated 14-7-2010 duly making a request to send an acknowledgement as a token of acceptance from the petitioner; and that in spite of acknowledgement of the debt

and the further correspondence demanding the respondent to make payment of the outstanding amount, it has not responded positively.

The allegation that there was collusion between the petitioner and the General Manager (Finance) of the respondent leading to issuance of letter dated 14-7-2010 by the latter, has been denied by the petitioner. It was averred that the reconciliation of account pertaining to the work order was conducted by the General Manager (Finance) of the respondent and its other staff and they arrived that the amount of Rs.37,02,00,900/- was due and they asked the petitioner to confirm the same by supplying a copy of its ledger; and that the relevant ledger of the respondent also confirms the same. That the General Manager (Finance) of the respondent issued TDS certificate dated 21-6-2010 for the year 2010-11 in Form No.16-A to the petitioner under his signature and seal of the respondent-company confirming the deduction of tax at source to the tune of Rs.1,83,03,508/- in respect of a total sum of Rs.86,51,51,405/- and duly submitted the same to the Income Tax authorities; that when legal notice dated 21-5-2012 mentioning the admission of debt was issued, the respondent did not respond even after receiving it on 25-5-2012; that even in the statutory notice dated 11-8-2012, the same was mentioned but there was no response from the response; and that these facts clearly prove that the respondent has no case as alleged in its counter affidavit and the same tantamounts to admission of the facts pleaded by the petitioner. The petitioner further averred that the respondent is estopped from resiling from its admission of the outstanding amount as per the accounts and that under Section 58 of the Evidence Act, the facts admitted need not be proved. It was further averred that Mr. Shashikanth, the General Manager (Finance) of the respondent issued TDS certificate for the year 2010-11 and the same was accepted by the respondent; and that surprisingly the confirmation letter issued after reconciliation of the accounts is being questioned after considerable lapse of time only to drag the litigation on flimsy grounds. That the General

Manager (Finance) of the respondent was involved in its day-to-day affairs and he was authorised with all the financial powers and hence the TDS certificate issued by him is valid and binding on the respondent. The petitioner denied the allegation that it has not suffered loss of business and that the respondent is not liable to compensate the same. That the statutory notice was served on the respondent and having received the same, the respondent has not responded to the same; that all the verbal demands made by the petitioner from time to time remained futile and that the time given to the respondent to discharge its liability has not been availed by it. That there was wide-spread publicity that the respondent-company became insolvent; and that the Government scrapped the project as the respondent could not complete the same within the time frame fixed and for the irregularities committed by it. The petitioner averred that respondent, in order to protract the litigation, has been disputing the claim of the petitioner.

By order dt.25.9.2013 this Court has admitted the company petition on two grounds, namely (i) that the respondent failed to reply to the statutory notice and (ii) that it has deducted TDS on the claim made by the petitioner. However, the publication of advertisement was deferred.

On behalf of the petitioner, Mr. B. Ravi Kalyan Reddy, Managing Director of the petitioner company, was examined as P.W.1 and Exs.P.1 to P.19 were marked through him of which, Ex.P.5 was marked subject to the petitioner obtaining certificate from the competent authority on the authenticity of the said document and that if such certificate is not filed within two weeks, the same will be eschewed from evidence. Ex.P.10 was also marked without prejudice to the stand of the respondent on the authenticity of pages 41 and 42 thereof.

On behalf of the respondent, Mr. H. Eshwar Goud, its Additional Director, was examined as R.W.1 and Exs.R.1 to R.287 were marked through him. As the respective witnesses have reiterated the

contents of the pleadings of the respective parties they represent, it is unnecessary to refer to the same. It will suffice if the relevant parts of the cross-examination are referred to as and when the same is required in the course of discussion.

The case of the petitioner in a nutshell is that under Ex.P.2, LOA dt.31.7.2008 the respondent has entrusted the work pertaining to excavation in all types of soils and rocks covering all depths, lifts and levels, loading, transportation for all leads within the plant and filling, dozing and compacting by vibro rollers, providing proper dust suppression measures including watering, shifting and stacking of rocks/secondary blasted rocks of sizes 150-450 mm at designated places etc. It is their further case that the agreed rate was Rs.180 per Cubic meter + 12.36% Service Tax for the total estimated value of Rs.180 Crores, that during the year 2008-09 it has executed the work for a total amount of Rs.155,09,49,695/-, excluding the construction work of compound wall for the steel plant for the total value of Rs.1,78,52,774/-. That during that year the respondent has paid an amount of Rs.81,56,77,172/- out of which Rs.61,04,76,862/- was towards execution of the work and Rs.20,52,00,310/- was towards advance and that for the year 2009-10 the respondent paid an amount of Rs.37,36,63,960/- to the petitioner under different bills. Thus, according to the petitioner, out of total amount due of Rs.155,09,49,695/-, a sum of Rs.118,93,41,132/- was paid leaving a sum of Rs.37,02,00,900/- payable by the respondent and that out of this amount, under invoice No.09 (Ex.P10) a sum of Rs.6,24,20,448/- was due and under invoice No.10, an amount of Rs.29,91,88,144/- was due.

After the respondent has filed its counter affidavit and documents including invoices, the petitioner has filed invoices bearing Nos.3, 5, 6, 7 and 8 marked as Exs.P.11 to P.15 respectively. The respondent has seriously disputed the authenticity of these documents including invoice Nos.9 & 10 marked as Ex.P.10. It has filed Company Application No.468 of 2015 for sending these documents along with the invoices filed by it and marked as

Exs.R.279 to R.285 to the forensic laboratory on the genuineness of Exs.P.10 to P.15 with reference to the seal filed along with the application produced by the respondent and marked as M.O.1 (subject to objection) through R.W.1 on 24.11.2014. The respondent has alleged in the said application that the seal of rubber stamp affixed on EXs.P.10 to P.15 was not true and genuine, that the impression of seal of Ex.M.O.1 indicates a minute difference from the impression of seal on Exs.P.10 to 15 and therefore the respondent sought for sending of the said documents to forensic science laboratory along with M.O.1 seal in the above mentioned documents.

Having considered this application, this Court on 27.4.2015 has passed the order which reads as follows:

*“This Company Application is filed to send Exs.P-10 to P-15 and Exs.R-279 to 285 to Forensic Laboratory for its opinion on the genuineness of Exs.P-10 to P-15 after comparing the same with M.O-1 (Company’s seal).*

*The seal was marked as M.O.-1 through R.W.-1 on 24.11.2014.*

*At the hearing, it is noticed that M.O.-1 – seal is missing from the file. A perusal of the polythene cover in which the seal was placed shows that the same is in torn condition for a length of about 2 ½ inches and a width of about 1 inch which prima facie shows that somebody has deliberately made a hole to the polythene cover and taken the seal out. This Court seriously suspects foul play.*

*The Registrar (Judicial) is directed to hold a thorough enquiry into the missing of the seal and submit his report by the next date of hearing.*

*Post on 22.06.2015”*

As directed, the Registrar (Judicial) has submitted his report prima facie opining that the manner in which the seal was removed from the polythene cover reveals that someone has deliberately removed the seal probably by widening an existing small hole on the cover and that from his enquiry of the persons at various levels of the Registry who had access to the file, he is unable to point out any particular person being responsible and that he has also opined that unless an investigation by the Police is made, it is not possible to find

out as to who is responsible for the missing of the seal.

After giving a deep thought, this Court has decided to drop further action, as giving of police report may lead to causing undue hardship to even innocent personnel who had access to the file. However, this Court has decided to take up the issue on administrative side to avoid recurrence of such instances in future.

A mention to the above bizarre event had to be made to highlight the stand taken by the respondent on the genuineness or otherwise of Exs.P.10 to P.15. *De hors* the issue raised by the respondent based on the seal, let me now examine whether the respondent has disputed the authenticity of Exs.P.10 to P.15 bona fide.

It is the pleaded case of the respondent that it has issued two LOAs, namely Ex.P.2 dt.31.7.2008, whereunder the estimated quantity of earth was 10 million cubic meters and the agreed rate was Rs.180/- per cubic meter + 12.36% service tax for the total estimated contract value of Rs.180 crores, that a fresh LOA was issued by the respondent on 4.6.2009 (Ex.R.2) for works such as Railway Track Formation, Water Reservoir, Torpedo Ladle Repair Shop connected railway track, Steel Melt Shop and Rolling Mills, for a Quantity of 41.1 lakh cubic meters at the rate of Rs.135/- per cubic meter for an estimated value of Rs.55.485 Crores. That the respondent has also paid TDS of Rs.3,68,27,726/- on the amount paid to the petitioner, supplied diesel of the value of Rs.4,88,91,812/-, supplied 53 tippers of the value of Rs.12,16,11,491/-, in all aggregating to Rs.139,37,60,248, leading to excess payment of Rs.64,23,55,558/-.

The petitioner has denied the existence of Ex.R.2. However, confronted with Ex.R.1, confirmation letter issued by the petitioner's surveyor in his cross-examination, P.W.1 has admitted the same, but denied LOA dt.4.6.2009 referred under the caption "Name of Work" at Sl. No.3 of Ex.R.1. The witness has however not substantiated his

stand in denying the part of the Ex.R.1 relating to LOA dt.4.6.2009, while admitting Ex.R.1. In my opinion, this conduct of the petitioner arouses a serious suspicion on the entire case set up by it. The petitioner has not examined the surveyor who is the author of Ex.R.1 in order to elicit the reason for his referring to LOA dt.4.6.2009. If the said LOA has not come into existence, there was absolutely no possibility of the petitioner's own surveyor referring to such document while confirming execution of various quantities under two out of the three work orders. Therefore, I am not prepared to believe the case of the petitioner that Ex.R.2 has not come into existence.

Exs.P.10 to P.15 constitute the fulcrum of the petitioner's case. Along with the company petition, the petitioner has filed purported copy of invoice No.9 for a total amount of Rs.24,95,02,185/-. At the bottom of the table in the invoice, certain writings are made with pen, a perusal of which shows that a sum of Rs.74,99,861/- was deducted towards TDS and further sum of Rs.17,95,81,876/- has been deducted as 'paid' and a sum of Rs.6,24,20,448/- is shown as due. These details which have been found in manual script have not been found in original invoice marked as Ex.P.10.

Be that as it may, invoice No.9 contains quantity of 1848216.770 cubic meters of work, which is described as under:

*"Earth work/ Site Grading/ Site leveling work done at your Integrated Steel Plant located at Bramhani Hills, Ambavaram Post Jammalamadugu Mandal, Kadapa dt."*

A rate of 122.39 is shown in addition to service tax @ 10.%, Education Cess @ 2% and S.H.E. Cess @1%, shown in the bill. Invoice No.10, which is also a part of Ex.P.10, represents the amounts payable under invoices bearing Nos.3, 5, 6, 7, 8 and 9. Interestingly, the description of work in this bill is also given as the same as given in invoice No.9 and quantities under invoice Nos.3, 5, 6, 7 and 8 were separately shown. In addition, the quantity of 18,48,216.77 cubic meters for which invoice No.9, was issued was

again shown in invoice No.10. For All these quantities, rate of Rs.58.18541 ps. has been mentioned. P.W.1 was confronted with the basis for arriving the rate at Rs.122.39 ps. in invoice No.9. His reply was to the effect that the LOA provided for a consolidated rate of Rs.180/- per cubic meter to start with; that after 2009 the bill has been divided into two components, namely Rs.122.39 per cubic meter towards drilling, blasting, excavation and transportation and Rs.58/- per cubic meter towards leveling and compaction. To the question whether he can show such bifurcation from Ex.P.2 LOA, he has replied that no such term in Ex.P.2 exists showing such bifurcation. He has also admitted that there is no variation in description of work between Ex.P.10 (evidently referable to invoice No.10), and Ex.P.12 pertaining to invoice No.5. The witness also admitted that Ex.P.10 does not show that the said bill is only a part bill and the remaining part was paid.

Mr. S. Ravi, learned Senior Counsel, has pointed out the following suspicious circumstances in support of plea of the respondent that Ex.P.10 (invoice No.10) and Exs.P.11 to P.15 are fabricated.

- i. The seals on these documents compared to that contained in similar invoices which were sent by the petitioner to the respondent bearing Nos.5, 6, 8, 9, 10 and 11 are at variance, in that, after the words 'Brahmani Industries Limited' the marks “.” contained on the official seal of the respondent, do not exist on the seal impressions on Exs.P.10 to Ex.P.15.
- ii. That the quantity of 1848216.770 cubic meters of work for which invoice No.9 was raised by the petitioner was again included in invoice No.10 claiming separate rate of Rs.58.18541 and the Bill No.9 was shown as part bill, and invoice No.9 as well as invoice No.10 are described

as part Bills for the said quantity. No claim under invoice No.10 for the same quantity applying different rate could be claimed.

- iii. That use of as many as five decimals, i.e.,18541 reflect in the paise following Rs.58 in invoice No.10 supports the respondent's theory of fabrication. The learned Senior Counsel explained that this exercise was done to match price of Rs.180/- per cubic meter + 12.36% Service Tax as mentioned under LOA (Ex.P.2) even though that rate was not applicable in respect of the work done during the year 2009-2010.

He has further submitted that the price of Rs.122.39 claimed for 1848216.77 cubic meters quantity under invoice No.9, was nowhere agreed either under Ex.P.2 LOA or Ex.R.2 LOA and in the absence of any evidence to show that there was split up of the work, the price of Rs.122.39 is artificially created to match the price under Ex.P.2.

- iv. That the petitioner has sent and the respondent has received invoice No.5 dt.17.9.2009, Invoice Nos.6 and 8 dt.22.9.2009, Invoice Nos.9, 10 and 11 dt.3.12.2009 by claiming Rs.150/- per cubic meter, which was reduced to Rs.135/- per cubic meter as per Ex.R.2 LOA dt.4.6.2009 and that two sets of invoices bearing same number emanating from the petitioner cannot co-exist.
- v. That the petitioner has not filed Exs.P.11 to P.15 along with the company petition, which are invoice Nos.3, 5, 6, 7 and 8 respectively and that this itself shows that they were created subsequently to show as if they represent the quantity of work relating to drilling, blasting,

excavation and transportation, while invoice No.10 (Ex.P.10) was raised for the remaining part of the work of leveling and compaction, though no such description has been shown in the said invoice.

Learned counsel for the petitioner mainly relied upon two circumstances to support the claim of his client, namely, (i) that under Ex.P.3 letter, dt.14.7.2010, the General Manager - Finance of the respondent has confirmed that a sum of Rs.37,02,00,900/- is outstanding in the respondent's bank accounts payable to the petitioner and (ii) that the respondent has filed Form No.16A (Ex.P.6) before the Income Tax Department paying a sum of Rs.1,83,03,508/- towards TDS on the outstanding amount payable to the petitioner.

Both in the counter affidavit as well as in the evidence of R.W.1, the respondent has come out with the theory of collusion of its General Manager with the petitioner taking advantage of the fact that the company was in doldrums as its Managing Director and other Directors who were at the helm of affairs were arrested in connection with a C.B.I. case and they were languishing in jail.

While the Company Petition for winding up is not meant for recovery of money, the High Court exercises a special jurisdiction under the Companies Act in entertaining petitions for winding up. The order for winding up will not be made unless either the debt is admitted or where the debt is denied, such denial is not bona fide and the same is a cloke or moonshine to deny the debt in order to evade the same (See *M/s. Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.*, *Amalgamated Commercial Traders (P) Ltd. V. A.C.K. Krishnaswami and another*, *Pradeshia Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd.*, *Mediquip Systems (P) Ltd. V. Proxima Medical System GmbH*, *Vijay Industries v. NATL Technologies Ltd.*, *IBA Health (India) Pvt. Ltd. V. Info-Drive Systems SDN.BHD*, *Krishna Kilaru and another v. Maytas Properties Ltd.* and *M/s. India Bulls Housing Finance Ltd. V. M/s.*

*South Asian Agro Industries Ltd.).*

In the light of the above settled legal position, this Court needs to be satisfied whether denial of debt by the respondent is bona fide or not. While doing so, this Court will not embark upon appreciation of evidence minutely, which a civil court will do in a suit for recovery of money. If, on marshalling of evidence, this Court feels that the claim made is *prima facie* not bona fide or the same is laced with suspicious circumstances, it will not undertake further examination and it will relegate the parties to the Civil Court. Keeping this in mind, let me examine whether the claim of the petitioner is suspicious in nature and whether denial of such claim is bona fide.

(i) Denial of Ex.R.2 by the respondent

Not only that the petitioner has not disclosed existence of Ex.R.2, which is LOA dt.4.6.2009 and which contains the reduced rate of Rs.135/- per cubic meter, including all taxes and levies, as against Rs.180/- per cubic meter excluding such taxes and levies, when P.W.1 was confronted with Ex.R.1, the certificate issued by the petitioner's authorized signatory, he has perforce admitted the said certificate while denying existence of Ex.R.2. When Ex.R.1 refers to Ex.R.2 and the value of the contract thereunder as Rs.55,48,50,000/- and the status of execution as "being in progress", it is incomprehensible that the witness denies the existence of such LOA. Significantly, Ex.R.1 certificate dt.22.8.2009 supports the plea of the respondent that the work executed during 2009-2010 is governed by the reduced rate of Rs.135/- per cubic meter. That in respect of the work done after entering into Ex.R.2 the petitioner has sent separate invoices covering different quantities of work vide Bill No.5, dt.17.9.2009 (Ex.R.279), Bill No.6, dt.22.9.2009 (Ex.R.280), Bill No.8, dt.22.9.2009 (Ex.R.281), Bill No.9, dt.3.12.2009 (Ex.R.282), Bill No.10, dt.3.12.2009 (Exs.R.283), Bill No.11, dt.3.12.2009 (Ex.R.284) lends support to the plea of the respondent the petitioner is entitled to payment at the rate of Rs.135/- per cubic meter in respect of the work executed after 4.6.2009 when Ex.R.2 was purportedly issued by the

respondent. No doubt, the petitioner has disputed the authenticity of Exs.R.279 to R.284. A perusal of these invoices would show that they were raised at the rate of Rs.150/- per cubic meter and they were rounded off and the sum of Rs.135/- per cubic meter was written. However, Exs.R.280 and R.281 were prepared by showing the rate of Rs.135/- per cubic meter. Similarly, Exs.R.282 to R.284 were prepared by showing rate of Rs.150/- per cubic meter, but the said price was rounded off and the amounts were calculated by applying the rate of Rs.135/-. It is noticeable from these invoices that they contain the purported signatures of the Authorized Signatory of the petitioner. It is pertinent to note that except making a bald denial of the authenticity of these invoices, no effort has been made by the petitioner for sending the invoices to a hand-writing expert for opinion as to their genuineness. Thus, the plea of denial of existence of Ex.R.2 and authenticity of Exs.R.279 to R.284 set up by the petitioner in the light of the above discussed circumstances, is wholly unconvincing.

(ii) Authenticity of Exs.P.10 to P.15

As noted above, P.W.1 has categorically admitted that under Ex.P.2 the agreed rate was Rs.180/- per cubic meter, excluding service tax, education cess and S.H.E. cess. Under Ex.R.2 the rate is Rs.135/- per cubic meter. Therefore, neither the rate of Rs.122.39 claimed in invoice No.9 (Ex.P.10) nor the rate of Rs.58.18541 claimed in invoice No.10 (Ex.P.10) matches either of the two LOAs. However, P.W.1 has offered an explanation to the effect that after 2009 the bill has been divided into two components, i.e., Rs.122.39 ps. per cubic meter towards drilling, blasting, excavation and transportation and Rs.58/- per cubic meter for leveling and compaction. As noted hereinbefore, invoice No.9 which was raised for a quantity of 18,48,216.77 cubic meters at the rate of Rs.122.39 per cubic meter does not contain the description of work as drilling, blasting, excavation and transportation and on the contrary the said invoice as

well as invoice No.10 contain identical description of the work. Therefore, this explanation of P.W.1 is not supported by his own documentary evidence. As rightly pointed by the learned Senior Counsel for the respondent, if invoice No.9 is only a part bill for one item of the work, the same should have been described as a part bill. No such description is found in the said invoice. Assuming that the petitioner has inadvertently failed to make a proper description of the work in invoice No.9, he is expected to have corrected his mistake at least while preparing invoice No.10. As per the explanation of P.W.1 this invoice pertains to the work of leveling and compaction. As noted, the description of work in the said invoice is *ipsi sima verba* with that made in invoice No.9.

Exs.P.11 to P.15 are purported individual invoice Nos.3, 5, 6, 7 and 8. These invoices were raised showing the rate of Rs.122.39 per cubic meter from which it can be presumed that the same pertain to the work relating to drilling, blasting, excavation and transportation. Even these invoices also contain the same description as in invoice No.10. Interestingly, the petitioner has not filed these invoices along with the company petition, they were filed after the respondent has filed its counter and the documents. Absence of any shred of evidence to support its explanation, that due to division of work, separate bills showing separate rates were raised, such as supplementary work order or any correspondence between the parties, would render the theory put forth by the petitioner incredulous. The further circumstance of the respondent producing Exs.R.279 to R.284, invoice Nos.5, 6, 8, 9, 10 and 11, allegedly sent by the petitioner, also throws any amount of doubt on the genuineness of Exs.P.10 to P.15 as it is inconceivable that two sets of invoices bearing same numbers would co-exist. I would, however, hasten to add that this Court is not embarking upon the exercise of finding out of which of the two sets of invoices is genuine and which is false or fabricated. It is for the competent court in a properly instituted proceeding to decide this dispute. But for the present case examination of these documents is undertaken only for the purpose of finding out whether denial of debt

by the respondent is bona fide or not. On such examination for this limited purpose, this Court has no doubt in its mind that the petitioner has failed to satisfy this Court that the claim made by it against the respondent is not free from serious anomalies and doubts and dispute of debt by the respondent is bonafide.

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(iii) The petitioner's claim based on Exs.P.3 and P.6

Ex.P.3 is letter dt.14.7.2010 addressed by Mr. N. Shashikanth, General Manager – Finance, to the petitioner, wherein he has confirmed that credit balance of Rs.37,02,00,900/- payable to the petitioner is standing in the respondent's books of account. Ex.P.6 is Form No.16A filed on behalf of the respondent before the Income Tax Department wherein a sum of Rs.1,83,03,508/- was remitted towards tax deducted at source (TDS) on Rs.86,51,51,405/- payable to the petitioner. If these two documents are considered in isolation they would prove the debt of the petitioner. However, these two documents are not the be all and end all. A serious cloud is cast on these two documents, both of which are signed by Mr. N.Shashikanth, the then General Manager of the respondent, by the respondent alleging that taking advantage of the C.B.I. case against the top management, including the Chairman and important Directors of the respondent, its General Manager has colluded with the petitioner and was responsible for the said two documents coming into existence. No doubt, as submitted by the learned counsel for the petitioner, this allegation could not be proved by the respondent by adducing any evidence. However, based on these two documents alone, this Court is not prepared to ignore various aspects as discussed in detail hereinbefore which cast a long shadow on the case of the petitioner. Too many chinks in the petitioner's armoury exposed by the respondent made these documents pale into insignificance. Therefore, this Court has not felt persuaded to accept these two documents on their face value and pass an order adverse to the respondent solely on that basis.

For the aforementioned reasons, the company petition fails and the same is dismissed.

As a sequel to dismissal of the company petition, Company Application Nos.803 of 2013; 357, 358 and 382 of 2014; and 467 and 468 of 2015 shall stand disposed of as infructuous.

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C.V. Nagarjuna Reddy, J

08-09-2015

Am/bnr