**HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

**COMPANY PETITION No.223 OF 2015**

**ORDER:**

This Company Petition is filed invoking the provisions of Section 433(e), 434(1)(a) of the Companies Act, 1956 r/w Rule 95 of the Company (Court) Rules, 1959, alleging the respondent company is unable to pay its debts and thus is liable to be wound up.

As per the pleadings and according to the submissions made by the learned counsel for the petitioner in brief, petitioner company is engaged in the business of design, engineering and manufacturing of Distillery, Brewery, Ethanol Plants and Process equipment & systems. The respondent company with an intention to setup a 53 KLPD total Spirit Grain Based Distillery Plant at Annadevarapeta Village, West Godavari District, Andhra Pradesh, approached the petitioner company and a Supply Agreement dated 19.06.2012 was entered into. The petitioner undertaking to supply all the equipment in relation to the process plant and supervising the commission of the process plant including providing of basic design and extended basic engineering and detailed engineering for the process plant etc., during the erection and commission etc.,

The total agreed contract value is Rs18,29,25,000/-, petitioner has completed the work in terms of the contract and raised various invoices from time to time for a total amount of Rs18,30,90,276/-, as against which after giving credit to the amounts paid by the respondent, a sum of Rs.1,86,92,077/- became due and payable, a Notice dated 20.08.2014 was issued calling upon the respondent company to pay the balance amount of Rs.1,86,92,077/- with 15% interest per annum for the delayed payment, failing which the petitioner had asserted that they would be invoking the provisions of the Companies Act seeking winding up of the respondent company, but the same was not responded by the respondent counsel. It was further stated that the respondent company became unable to pay its debts and it is commercially insolvent.

On notice being issued, respondent company filed a counter affidavit categorically denying that there was any wilful default in paying the monies demanded by the petitioner. It was further asserted in the counter that the petitioner company had abandoned the work in the midst, resulting in respondent company to complete the project and in that process had incurred additional expenditure of about Rs.5,00,00,000/-, apart from spending huge money in completing the work. It was further asserted that in the process there was a delay of eight months in commissioning the plant, which resulted in financial loss to the respondent company on account of additional interest burden in addition to the production loss. A reference was also made to the reply letter dated 05.09.2014 in response to the letter dated 19.08.2014 of the petitioner, demanding the amounts.

A rejoinder affidavit is also filed by the petitioner company denying the averments made in the counter affidavit filed by the respondent and specifically stated that the respondent company has violated the Clauses 3, 4.2 of the Annexure-1 i.e., Special Terms and Conditions of the Contract and further the respondent has admitted in its letter dated 05.09.2014 that there has been delay in making payments to the petitioner due to the delay in financial releases by consortium banks and the respondent has also admitted its liability on 04.07.2013 vide Audit Confirmation of balances of the petitioner company, therefore, the allegation of laches on the part of the petitioner company are false and frivolous. It is further submitted that even as per the letter dated 05.09.2014 (Annexure R2) it has been clearly admitted that a sum of Rs.1,86,92,077/- is pending. Hence, prayed to allow the petition.

Heard learned counsel for the petitioner and the learned counsel for the respondent.

Having perused the material on record, it is not necessary for this Court to set out the settled principles of law, particularly that a winding up petition cannot be used for recovery of monies by a creditor when the debt is being seriously disputed. Even at the admission stage, the company Court is to be vigilant and to be cautious in exercising its jurisdiction on account of serious ill-consequences that may result to a company, on admission of a company petition. It is also settled law that the Company petition for winding up is akin to a summary suit under Order XXXVII of Code of Civil Procedure and that if there is a triable issue with respect to the debt on the facts borne out of record *prima facie* indicate that the respondent company is entitled to granting of leave to defend, in such cases the company petition does not deserve to be entertained. These well settled principles have been repeatedly captured in various judgments of the Supreme Court and also this Court. A reference may be made to the judgment of the Supreme Court in **Airwings Private Ltd., Vs. Viktoria Air**

**Cargo Gmbh**[1]**.** Before admitting and advertising a winding up petition under Section 433 of the Act, the Company Court is required to conduct a summary enquiry on the following aspects:

> (i) Whether the petitioning creditor is a creditor to whom the company owes an ascertained sum of money or substantially ascertained sum of money.
>
> (ii) Whether the said debt is within limitation.
>
> (iii) Whether the defence of the company is valid or bona fide or whether it is a mere moonshine.
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> The aforesaid three points will have a direct bearing on the competence of the petitioning-creditor to maintain such a petition.
>
> (iv) Whether from the material on record at this stage, a presumption arises that the company is unable to pay its debts as contemplated under section 434(1)(a) or (b), as the case may be; or
>
> (v) Whether from the material on record the court is prima facie satisfied that the company is commercially insolvent as contemplated under section 434(1)(c).

These settled principles were followed by this Court in **Indiabulls Housing Finance Limited Vs. South Asian Agro Industries Limited**[2]**.** The work order, which has been placed by the respondent company on the petitioner, is a turnkey contract, whereunder petitioner has agreed to design, manufacture, supply the machinery and supervise the plant erection and commissioning of the plant for production of grain based spirit to the satisfaction of the respondent company. In that process the petitioner company is also required to satisfy that they had executed the work within the stipulated time to the satisfaction of the

[1] 1995 82 CompCas 447 Kar
[2] (2014) 187 CompCas 205 (AP)

respondent company and further the output and quality should be in terms of the parameters set out in Annexures 1 to 7 annexed to the agreement. A cursory glance of the annexures for a limited purpose indicate the parameters are with respect to the (1) Design of the plant with technical parameters, (2) Process Description, (3) Input requirements and specifications, (4) Output generation, (5) Performance Parameters etcetera, apart from that Annexure-6 sets out various equipments, which the petitioner is required to supply, Annexure-8 detailing the scope of the work which the respondent is required to carryout from time to time. In other words, there are mutual obligations, which are agreed to be carried out by the petitioner as well as the respondent in sync with each other, as the major portion of work is to be carried out at the site. It is not in dispute in the present case that the petitioner had left the work halfway through and not completed the work in terms of the contract entered into.

The contention of the respondent company that on account of the petitioner abandoning of the work halfway through and considering the fact technically the design was that of the petitioner, respondent had difficulty in completing the work with the help of third parties and in that process had incurred huge expenditure, apart from suffering loss on account of the project over run and the production loss cannot also be ignored. In response to the notice issued under Section 433 of the Act demanding payment at the earliest point of time by a letter dated 05.09.2014, respondent had disputed the liability on its part specifically setting out the reasons. Clause 22 of the agreement dated 19.06.2012 provides for arbitration for reconciling the disputes, differences or claims arising out of the agreement or in any way relating thereto. In view of the said provision, this Court is refraining from dealing with the factual aspect which both the advocates submitted before this Court as any observations made by this Court may jeopardise the interests of either of the parties.

Admittedly, the respondent company is a running company and in the facts of the present case the defence raised by the respondent company that the debt itself is not admitted and disputed, cannot be said to be *bona fide*. On overall assessment of the facts on record, this court is not satisfied that the petitioner had made out a clear case of there being undisputed debt entitling the petitioner to invoke the winding up jurisdiction of this court.

Applying the settled principles to the present case, the Company Petition does not deserve admission for the above said reasons.

Accordingly, the Company Petition is dismissed.

**CHALLA KODANDA RAM, J**

Dated:27.09.2016
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