

IN THE HIGH COURT OF BOMBAY AT GOA
COMPANY PETITION NO.11 OF 2015

Vedanta Limited

having its registered office at
SESA Ghor, 20 EDC Complex,
Patto – Panjim Goa 403 001.
through Shri Mahesh Devjani
AGM-legal vide Resolution
dated 23.02.2015.

.... Petitioner

Versus

Global Energy Private Limited,
a Company registered under the
Companies Act, 1956,
CIN Number U40101GA1994PTC001663
and having its registered office at
207 GERA Imperium II,
Patto Plaza, Panjim Goa 403 001.

... Respondent

Mr. Kevic Setalvad, Senior Advocate i/b Mr. Jonathan Costa and Ms.
Aneesa Cheema, Advocates for the Petitioner.

Mr. N. Sardessai, Senior Advocate with Mr. Nilesh Takkekar with
Ms. G. Kamat and Mr. Sairaj Bhaje, Advocates for the Respondent.

Coram : N.M. Jamdar, J.

Date : 21 December 2017.

ORAL JUDGEMENT :

This Company Petition is filed seeking winding up of the Respondent Company, the Global Energy Private Ltd.

2. The Petitioner-Vedanta Limited is a Company registered under the Companies Act, 1956. It is engaged in the business of commercial power generation. The Respondent-Global Energy Private Ltd is in the business of the sale, purchase, and distribution of power.

3. On 25 February 2013, the Respondent communicated to the Petitioner that it intends to purchase 150MW of power from the Petitioner for the period between 16 May 2013 to 15 August 2013. The offer was accepted. Upon negotiations between the parties, a letter of intent (LOI) was issued by the Petitioner and on 18 March 2013, an agreement was drawn up. As per the Letter of Intent ,power up to 150MW was to be sold between 16 May 2013 to 15 August 2013. The details regarding billing cycle, the due date of payment, rebate, surcharge, etc. , were enlisted. The LOI contained clauses regarding *force majeure* event and compensation for short supply and off-take. The tariff rate for the period 16 May 2013 to 31 May 2013 was specified as 3.46/- per Kwh and after that Rs.3.36 per Kwh. The surcharge was payable for payments outstanding and open

access charges were also specified.

4. The Petitioner commenced the supply of power with effect from 16 May 2013. The power was supplied by the Petitioner between May 2013 to August 2013, and the invoices were raised. The invoices were raised for the period between 16 May 2013 to 1 August 2013 and these amounts of invoices were paid by the Respondent, except for the invoices from 2 August 2013 to 15 August 2013. The total amount by the invoices raised was Rs.52,71,65,549.82 for the period from May 2013 to 18 December 2013. The Respondent Company paid an amount of Rs.41,81,43,090.90 and the amount of Rs.10,90,22,458.92, remained unpaid out of the said invoices.

5. A meeting was held between the representatives of the Petitioner and the Respondent on 18 December 2013 and e-mails were exchanged between the parties on that day. The Respondent made a grievance that there was a sudden short fall in power supply for some period. The Respondent deposited an amount of Rs.10000000/- and sought reconciliation of accounts and restart of power. Thus, as per the Petitioner, the Respondent Company was still liable to pay an amount of Rs.99022459/- . The Petitioner sent a letter in respect of some amount to the Respondent on 14 February 2014 which was replied by the Respondent Company on 31 March

2014. The Petitioner wrote another letter on 14 July 2014 calling upon the Respondent Company to pay the amount. Since the amount was not paid as sought for, the Petitioner issued a statutory notice to the Respondent Company under Section 434 of the Company Act calling upon the Respondent Company to pay an amount of Rs.100931282/- which according to the Petitioner was payable on 2 September 2014. On 13 September 2014, the Respondent Company sent an e-mail and sought to initiate discussion for settlement of the dispute. Thereafter, the Respondent Company replied to the statutory notice on 1 October 2014 and disputed the claim made by the Petitioner. The Respondent Company further a letter on 19 January 2015 disputing the claim of the Petitioner.

6. The Petitioner filed the present Company Petition on 30 March 2015 seeking winding up of the Respondent Company on the ground that it has failed and neglected to pay the Petitioner's outstanding dues and it is clear that the Respondent was unable to pay its debt and therefore it needs to be wound up. A notice was issued to the Respondent on 6 August 2015. On 4 September 2015, the Respondent appeared through their counsel and made an offer of Rs.3 crore without prejudice to their rights and contentions. It is informed that this amount of Rs.3 crore was paid by the Respondent.

The dispute was not resolved.

7. On 23 October 2015, an affidavit in reply was filed by the Respondent Company. In the reply, it was contended by the Respondent Company that the quantum of power supplied under the LOI up to 24.00 hrs. of 15 August 2013 was not as per the LOI but there were a shortfall and interruptions. It was averred that in spite of this shortfall in supply, the Petitioner issued a *force majeure* notice on 9 July 2013 in respect of non-supply of power between 6 July 2013 to 9 July 2013. It was asserted by the Respondent Company that there was no warrant to invoke *force majeure* clause. It was contended that sudden shortfall in power caused immense loss to the Respondent and affected the Petitioner's commitments to its customers. It was contended that the parties attempted to reconciliation from July 2013 to December 2013 and ultimately a joint meeting was held on 18 December 2013 for closing the accounts. In this meeting, the Petitioner agreed to recommence the supply upon deposit of Rs.1 crore by the Respondent, and in spite of the Respondent depositing Rs.1 crore, the supply was not recommenced. It is in this background; the e-mail correspondences was entered into between the parties which shows that the Respondent was eager to have the supply of power restarted and upon the assurance to the Respondent to do so made the payment of

Rs.1 Crore. It was contended that the amount demanded varied from time to time and bank guarantee given by the Respondent was not even invoked by the Petitioner. Broadly stating thus, the Respondent Company contested that the Petition contending that there was a complex of civil dispute and the Company Petition should not be entertained.

8. The parties filed their further pleadings. The Petitioner filed its rejoinder on 22 February 2016. In the rejoinder, the Petitioner controverted the contentions raised by the Respondent. The Petitioner placed on record the circumstances in which a shortfall of power occurred. Reliance was placed on the communication issued by the Executive Engineer, Hirakud Reservoir project on 10 June 2013. According to the Petitioner, this direction by the Executive Engineer triggered the operation of the *force majeure* clause. The Petitioner reiterated that in the meeting held on 18 December 2013, the Respondent had agreed to repay the dues, and there was no such settlement agreement arrived at on that date. The Petitioner, relying on the correspondence between the parties, reiterated their contention that the power supplied was admittedly consumed by the Respondent and on the ground of some irregularity for some period, for the power admittedly consumed, payment cannot be withheld. The Respondent filed an additional affidavit on

13 April 2016, to place the material indicating the financial position of the Respondent Company on record, to demonstrate that it is commercially very sound. A further affidavit was filed by the Respondent on 23 June 2016 to bring on record the communication entered between the parties in January 2016 and reconciliation efforts. It was stated that the Respondent was always ready to resolve the dispute amicably. However, the Petitioner was adamant in insisting on payment for one period, without reference to any factor. A further affidavit was filed by the Respondent on 26 August 2016 that the Respondent had filed a civil suit bearing Special Civil Suit No.27/2016/A in the Court of Civil Judge Senior Division, Panaji seeking specific performance of the agreement dated 18 December 2014 and also making a monetary claim. In this affidavit, the plaint of the Special Civil Suit was annexed.

9. In the meanwhile, parties attempted to resolve the dispute amicably. On 4 December 2015, hearing of the Company Petition was deferred to enable the parties to negotiate. The matter was adjourned thereafter on two-three occasions on the ground that the parties were negotiating the settlement. On 22 July 2016, the Respondent offered, without prejudice to their rights and contentions to show their bonafides to pay Rs.25 Lakhs to the Petitioner. Again, the Petition was adjourned for settlement. Finally,

it was informed to the Court that the settlement is not possible and the matter was posted for arguments.

10. Mr. Kevic Setalvad, the learned Senior Advocate, addressed the court on behalf of the Petitioner and Mr. Nitin Sardesai, learned Senior Advocate for the Respondent.

11. The contentions advanced by Mr. Setalvad ,in short, were that the petitioner has made out a clear case based on the admitted position. Power was supplied to the Respondent as per the agreement between the parties and the payment for this supply has admittedly not been done. In the notice for winding up, details of the invoices raised and the power supplied was given and it is an admitted position that for the invoices for the period between 2 August 2013 to 5 August 2013, 6 August 2013 to 8 August 2013, 9 August 2013 to 12 August 2013 and 13 August 2013 to 15 August 2013, amounts have not been paid by the Respondent. It was contended that merely on the ground of short supply in respect of some other period, for the power which was admittedly supplied, the Respondent Company cannot withhold payment. There is no merit in this dispute since the Petitioner had raised *force majeure* clause contained in the Agreement. There was clear direction from the Engineer of the dam from where the water had to be drawn for generation of power, to stop drawing of water. It is because of this

position, the short fall occurred. The e-mail correspondences between the parties in a short span of time on 18 December 2013 clearly shows that the Respondent had agreed to pay the amount and only sought time for repayment. There is a clear admission of liability in the e-mail correspondence. The Respondent on their own have deposited Rs.32500000/- in this Court ,and no party who was disputing the debt, would deposit such an amount unless there is a liability. The deposit during the hearing is only in continuance of the acknowledgment of debt shown during the correspondence. The suit filed by the Respondent is a complete afterthought as it is filed in the year 2016, after the Company Petition was heard on various dates. Even assuming the amount claimed by the Respondent Company in the civil suit is decreed, it still does not cover the claim of the Petitioner and as long as the debt is above the statutory limit, which is not paid and there is no defense to the same, then the case for admission of Company Petition is made out. The Suit is entirely frivolous at the most it is a suit for specific performance and even if the Suit is decreed for specific performance, it does not absolve the Respondent from their liability to pay the amount. The Suit cannot be considered as a counter claim in the context of a winding-up petition. Mr. Setalvad, relying on the decision of House of Lords in the case of *C. Czarnikow Ltd. v Centrala Handlu Zagranicznego Rolimpex*, the decision of this Court in the case of *Advent*

Corporation Pvt. Ltd.,¹ and the decision of Delhi High Court in the case of *Deutsche Homöopathie – Union Dhu Arzneimittel GmbH & Co. KG v R. K. Import Private Limited & Anr.*² submitted that a clear case for admission of the Company Petition is made out.

12. Mr. Sardesai, the learned Senior Advocate for the Respondent, countered the submissions contending that the dispute does not arise from a usual business scenario of supply of goods to be consumed. The dispute will have to be understood in the context of the peculiar business of electricity supply and distribution. Since electricity cannot be stored, when shortfall occurred, it instantaneously affected the supply to the consumer of the Respondent Company. The Petitioner, without warning, supplied less power than what was agreed under the agreement, which caused serious embarrassment to the Respondent in fulfilling its commitments to its consumer, and the Respondent suffered a serious loss of reputation and damages. Under the agreement, itself the damages for shortfall were provided for, and the Respondent has a legitimate claim against the Petitioner for seeking damages. It was contended that therefore the present is the case where both the parties raised the money claim against each other based on the very same agreement. First, the parties were first discussing the issue

¹ (1969)39 CompCas 463 (Bom)

² (2008) 145 Comp Cas 377

orally, and it led to the meeting on 18 December 2013 in which an agreement was arrived at. The parties agreed that the Petitioner will restart the electricity, which was the main concern of the Respondent, and that the Respondent will pay an amount of Rs.1 crore. In spite of the payment of Rs.1 crore, the Petitioner did not adhere to its promise of restart the supply. The Respondent was continuously hopeful of the Petitioner restarting the electricity. Therefore, under an impression that the Petitioner is responding favorably, Respondent paid certain amounts and exchanged the emails. There is no admission of any specific amount in the correspondence. The case of the Petitioner of *force majeure* is without merit. The Petitioner had a clear notice of the event and could easily make the alternate arrangement and inform the Respondent. The Suit is filed within the period of limitation, and it is not only for specific performance but for damages. It cannot be said that the Respondent has no case at all. The Respondent is commercially extremely sound, and the debt is seriously disputed, and Petitioner itself has breached the agreement and had no equities in its favor. Considering all these aspects, there is no case made out by the Petitioner. The consequences of even the admission of the Company Petition are serious, and Company Petition be dismissed.

13. Most of the facts are admitted. An agreement is

executed between the parties as there is a letter of intent issued by the Petitioner. The agreement was executed under the LOI on 18 March 2013. Two clauses are relevant to this petition, which are reproduced. First is about *force majeure* which reads thus :

“Force Majeure:

A Force Majeure Event shall mean any event or circumstances or combination of events or circumstances (not otherwise constituting an Indian Political Event) that adversely affects, prevents or delays any party in the performance of its obligation in accordance with the terms and conditions of this LOI, but only if and to the extent:

(i) Such Events and Circumstances are not within the reasonable control of the affected party and

(ii) Such Events or Circumstances could not have been prevented through employment of prudent utility practices.

Neither party shall be in breach of its obligation pursuant to this understanding to the extent that the performance of its obligation was prevented, hindered or delayed due to Force Majeure Event, and without in any way prejudicing the obligation of either party to make payments of amounts accrued due to prior to the occurrence of the event of Force Majeure, which shall be payable on the original Due Date.

Force Majeure events shall include but limited to:

a) Act of War, invasions, armed conflict, blockade, revolution, riot, insurrection or civil commotion, terrorism, sabotage, fire or criminal damage.

b) Act of God including fire, lightening, cyclone, typhoon, tidal wave, storm, earthquake, landslide, epidemic or similar cataclysmic event.

c) Any curtailment/suspension/no availability of transmission capacity imposed by any Intervening RLDC's.

d) Change in law.

e) Regulatory/Govt. Intervention in the matter of Power trading as also orders from CERC/SERCs./Appellate Tribunal of Electricity/High Courts/Supreme Court particularly related to rates at which power can be sold/purchased/traded. This will also include regulations/orders already issued but yet to be conclusively enforced.”

Second is regarding Compensation Charges which reads as under :

“Compensation charges:-

Without prejudice to the provisions for force majeure, if the selling utility fails to schedule the contracted quantum for the concerned period at least to the extent of 80% on monthly basis of total contracted period, the selling utility shall pay compensation for the difference (shortage) quantity at the rate of 2.00 per unit. Similarly, if the power scheduled by Buyer is less than 80% of the contracted quantum for the concerned period on monthly basis of total contracted period, GEPL shall pay compensation for the difference (shortage)

quantity at the rate of Rs.1.96 per unit i.e. instead of 80% if the power supplied is 70% in any month of the total contracted period then the compensation will be applicable for 80%-70% =10% of shortage quantity.

In case, Selling Utilities fails to initiate/apply for Open Access in stipulated time as per RLDC's guidelines in force, then compensation shall be levied at the rate mentioned in compensation clause and the contracted quantum shall be considered as deemed scheduled.”

14. It is an admitted position that the invoices were raised by the Petitioner. The details have been enumerated in paragraph 6(e) of the Company Petition. It is further an admitted position that the invoices at serial No.24 to 27 for the period 2 August 2013 to 5 August 2013, 6 August 2013 to 8 August 2013, 9 August 2013 to 12 August 2013 and 13 August 2013 to 15 August 2013, the entire amount has not been paid by the Respondent. The correspondence that has entered between the parties such as statutory notice, replies and e-mail correspondence, is not in dispute. The letter issued by the Petitioner to the Respondent Company on 9 July 2013 regarding the force majeure due to non-availability of water level along with a letter of the Executive Engineer, Main Dam Division, Burla, is also placed on record. That there was a meeting on 18 December 2013 is also an accepted position.

15. The nature of electricity and the business of its supply and distribution is emphasized and elaborated by Mr.Sardesai. The electricity, unlike other tangible goods, cannot be stored. Electricity moves near instantaneously. Fluctuations, shortfalls can have deleterious effects on those who rely on the steady supply of power. The entire business of the Respondent is about the distribution of the electricity to its customers. The Respondent heavily depends on the entities who generate and supply electricity power. The Petitioner is one of the world's largest global diversified natural resource majors and is inter alia engaged in the business of commercial power generation. This business position *vis-a-vis* the petitioner and the Respondent has to be kept mind while examining the contemporaneous correspondence between the parties and their rival stands.

16. Mr. Setalavd has argued the case for the petitioner in great detail to demonstrate how the Respondent Company is liable to pay the amount to the Petitioner. However, I must keep in mind the nature of the jurisdiction of the Company Court in a petition for winding up. A company petition is not suit for recovery of money. Broadly what is to be seen is whether the company is withholding the payment of amount without any good reason and the company has

become commercially unviable. The remedy under Sections 433 and 434 of the Companies Act, 1956 is within the discretion of the Company Court. A creditor cannot demand winding up of the perfectly solvent company, irrespective of other surrounding circumstances which the Company Court is entitled to take into consideration. The Company Court is not bound to wind up a company merely because one of the ingredients for the discretion is present. It is necessary for the Company Court to consider all aspects before proceeding, such as financial status of the company, impact on its functioning, and the impact on the workmen. The Company Court must be sure of the parameters, and when the company has no bonafide dispute whatsoever, and the dispute is being put forth in the name sake to deny the amount payable, the Company Court may proceed. The case put up by a company is to be tested to find whether it is bogus and a facade. If the defense of the Company is not moonshine and that there exist good reasons in favour of the company and that other equitable factors exist, the Company Court will leave the matter at that and relegate the parties to the competent forum to get their civil dispute resolved. Winding up of a solvent company cannot be explored as a first resort but as a last resort. The Apex Court in the case of *IBA Health (India) Private Limited v Info-Drive System SDN. BHD*³ has observed that even the admission of Company Petition and consequent publication can have serious

3 (2010) 10 SCC 553

consequences for a company. The Apex Court has emphasized that a party to the dispute should not be allowed to use the threat of winding up petition as a means of enforcing a bona fide disputed debt. A Company Court cannot be reduced to a debt collecting agency. Apex Court noted that of late the jurisdiction of a Company Court is being abused to pressurize the companies to pay the debts which are substantially disputed. Issuing notices and ordering publication in the newspapers attract adverse publicity for the company. Publication in the newspapers of the filing of winding up petition may damage the creditworthiness or financial standing of the company, and it may also have other economic and social ramifications. Such course of action may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Apex Court has impressed upon the Company Courts to act with circumspection, care, and caution and examine as to whether an attempt is made to pressurize the company. A Company Court should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere.

17. The petitioner rests its case on two main contentions. First, there is no payment for the specified period. Second, there is an admission of liability in spite of which amount is not paid. Within

the legal position alluded to above, the reply of Respondent as regards these two propositions will have to be examined.

18. There is no dispute that during the period when the power was supplied to the Respondent under the agreement dated 18 March 2013, there was a shortfall by the petitioner in the supply of power. The Respondent's grievance is that this shortfall had serious ramifications on the Respondent's business. The clause for compensation in the agreement dated 18 March 2013 entitles the Petitioner to raise a claim of compensation. The response of the Petitioner is, firstly, that the reason why shortfall occurred was out of its control. Secondly, this aspect need not be considered in view of the non-payment for the period of admitted receipt of power during the other period.

19. It is the contention of Mr. Setlavad that even if there was a shortfall in supply of power, it is irrelevant for payment of dues for the period there is an admitted supply. In short, the court should only focus on the admitted non-payment. It is not possible to compartmentalize the relationship between the parties in this fashion. The parties had entered into a comprehensive agreement on 18 March 2013 for a specified period. The delivery, point rate, access, rebate, surcharge, security mechanism power supply schedule was all

covered in this agreement. This agreement contemplated supply of power at a pre-quantum to the respondent. The supply of power at an agreed quantum was one of the important ingredients of the agreement between the parties. During the period between 28 June 2013 to 30 June 2013, 5 July 2013 to 8 July 2013, there was a shortfall in supply of power. Thus the Petitioner itself did not supply the power as agreed between the parties. The grievance of the Respondent of impact on the business when it suddenly received a short supply, can be easily understood. The main business of the Respondent is to channelize transmission of electricity released by the Petitioner through CTU of the Respondent, to its consumers. Reliability and regularity of power supply are the selling points for this business. If the Petitioner breached the contract and that such breach had serious repercussion on the Respondent and when the Petitioner has brought a petition for winding up, the Company Court is entitled to examine the entire conspectus including this conduct of Petitioner. It cannot be urged by the Petitioner that, even if it may have breached the terms of the agreement and caused damage, the Company Court shall not look into any other aspect except the fact non-payment for a particular period. Wearing such blinders is not contemplated when the Company Court is exercising its equity jurisdiction. Therefore, I am not inclined to accept the absolute proposition that, even though the Petitioner may have

supplied the power at less quantity than agreed, that factor is irrelevant and the Company Court should only focus on the part of non-payment by Respondent.

20. Turning now to the second contention of the Petitioner that the shortfall in power for the above-mentioned period was beyond its control. On 9 July 2013, the Petitioner wrote to the Respondent giving notice of *force majeure* due to non-availability of water for operation of the power plant at Jharsuguda. This letter was handed over by Mr. Setalvad and Mr. Sardesai placed annexures thereto on record. In this notice, the Petitioner have stated that operating units of the Petitioner were stopped on 28 June 2013 due to low water level at Hirakud Reservoir . It was stated by the Petitioner that the communication is received from the Executive Engineer, Main Dam Division, Burla clearly restricting the Petitioner from drawl of any water from Hirakud Reservoir as there was shortfall supply of water. The Petitioner stated out that this unpredictable scenario was a *force majeure* event. The letter is dated 9 July 2013. The letter was sent by the Petitioner after shortfall had occurred. Mr. Sardesai contended that there was no such *force majeure* event as annexure to the letter itself indicates that the Engineer had written the letter on 10 June 2013 and on that date, there was no such low level of water. Mr. Setalvad raised an

objection that this has never been the stand of the Respondent in the correspondence or otherwise and this contention cannot be allowed to be raised. This objection has no substance. The Respondent has all along been disputing the fact that the Petitioner are entitled to invoke the *force majeure* clause. Even in reply to the Petition a contention is raised to that effect. The communication relied upon by the Petitioner itself make a reference to the letter of the Executive Engineer and once both these documents are part of record, the Respondent are entitled to base their case on the same. Perusal of the letter from the Executing Engineer indicates that the Engineer had informed all the surrounding industries, including the Petitioner, that Hirakud Reservoir is going to attain a pre-level shortly and when the water level is below 595.00 feet, the Petitioner should stop the water drawl. This communication was sent on 10 June 2013. It was stated in the letter that petitioner should stop drawl of water when the water level will reach the permissible limit. This was a direction for the future event and not on that day. Furthermore, the letter seems to have been signed on 10 June 2013, much prior to that shortfall. That prior to monsoon, water levels in the dams in India fall, is not an unforeseen eventuality. A power generation company such as the Petitioner has to make alternate arrangement in this season. The least Petitioner could have done is to inform the Respondent in advance when it received a letter from the Engineer.

All this was admittedly not done by the Petitioner. The Petitioner suddenly sent short supply of power and much later informed the Respondent, when damage was already done to the Respondent. This conduct is not as per the spirit of the agreement between the parties.

21. Mr. Setalvad relied upon a decision firstly of the House of Lords in the case of *C. Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex* to contend that the direction of the Government can be also an important factor. In this decision, the question of *force majeure* in respect of a contract of delivery of sugar led to a dispute which ultimately had to be resolved by the House of Lords. The party therein invoked *force majeure* based on direction issued by the Government of Poland. Considering the directive of the Government of Poland, the House of Lords, in the facts of that case, found that there was a *force majeure* event. In the case before the House of Lords what was under consideration was not a Company Petition, but a dispute arising from recovery of an amount from the breach of contract.

22. The Company Court is required to examine whether the defense of the company can be considered as moonshine. As stated earlier, this Court is not deciding a civil suit for recovery money or trying the suit filed by the Respondent Company. All that the Company Court needs to be consider whether a case is made out for

winding up of the Respondent Company. That it has no defense and is without any good reason withholding payment. It cannot be said that the Respondent has no case whatsoever when contended that the Petitioner could have made an alternate arrangement or at least given a warning. There is merit in the contention of the Respondent that there was no force majeure event. That being so it can be said that the Petitioner failed to adhere to its part of the agreement and once there was a failure to adhere to the part of the agreement by supplying the power below the agreed level, the Respondent was entitled to raise its independent claims for damages as provided under the agreement itself. Mr. Sardesai is right in contending that it is not the law nor business prudence that the Respondent must first return the money to the Petitioner irrespective of the breach by the petitioner and then file a suit for recovery of its dues. The Respondent was entitled to demand that parties should sit across and reconcile accounts. A stand that was repeated even during the arguments.

23. Turning now to the correspondence between the parties, which is heavily relied upon by Mr. Setalvad to contend that the claim was admitted by the Respondent. When the notice for winding up was issued by the Petitioner on 5 September 2014, the Respondent wrote on 13 September 2014 and immediately offered

to find an amicable solution. The Respondent, whose entire business depends on the transmission of power and that the Petitioner is one of the major producers of power, the immediate reaction of the Respondent was to find an amicable business solution. It is quite obvious, as contended by Mr.Sardessai that in view it's heavy dependence on the supply of power, the Respondent did not intent to risk its entire future business on this one dispute.

24. On 18 December 2013, a meeting was held between the parties. Surprisingly, from the end of contract period in August 2013 till December 2013, there are no written communications exchanged between the parties. It is inconceivable that the parties will simply forget about their respective dues, to suddenly hold a meeting on 18 December 2013 and that nothing happened in the meanwhile. Thus, there is merit in the contention of Mr. Sardesai that this meeting took place in view of the oral discussions between the parties in the intervening period. It is in the context of the position of the parties in the business that the correspondences will have to be considered.

25. After the meeting took place on 18 December 2013, the Respondent sent an email on the same day summarizing, what according to it was mutually agreed, as under :

“1. GEPL is remitting Rs.1 Cr. on a/c payment

against our current out standing to Sterlite today itself.

2. Sterlite will sell upto 150 MW to GEPL for sale to HT and other Consumers at rate of Rs.2.70 at CTU (through ER-NR link) from 1st Jan'14 onwards for a period of 1 year (we request you to kindly release LOI today itself so that advance application may be processed on 1st priority for scheduling power from 1st Jan onwards, rest T&C shall be as per prudent utility practices).

3. Sterlite will schedule power from its Eastern region interconnection (ER-NR link) to GEPL for HT and other consumers.

4. Old outstanding due amount shall be remitted @15% of balance amount with each monthly billing cycle till complete dues as per billing cycle for supply from 1st Jan' 14 onwards by Sterlite .

5. GEPL will provide a Bank Guarantee of about Rs.5Cr-7Cr based on schedules to Sterlite on account basis for monthly billing against such power purchase from Sterlite.

6. GEPL will off-take power from 1st January 2014 onwards on RTC firm basis.

7. As discussed GEPL also undertake that as GEPL has valid PSM in form of Performance Bank Guarantee from each of such HT consumers, we anticipate no payment issue in same respect and if required we may provide all

PSM copies to Sterlite too.

*I hope the points as discussed is well covered,
we acknowledge your kind support in taking
our professional association forward.”*

This e-mail was sent at 13.29 p.m. Petitioner immediately responded at 13.44 p.m. that there needs to be remittance of 20% of the outstanding to kick-start, and the Respondent was requested to move forward. There was no denial of what was stated in the e-mail sent at 13.29 p.m. Tenor of the mail was also conciliatory. By an email at 18.54 p.m. on the very same day, the Respondent had agreed to clear 20% of the outstanding to kick-start the transaction and requested to issue LOI on priority on the next date as the Respondent had to take up the application process for January 2014, in advance. Thereafter, the Petitioner responded that it had received an amount of Rs.1 crore however as on 30 November 2013, Rs. 10.90 crores were overdue and called upon the Respondent to pay the balance amount. This e-mail was sent at 18.19 p.m. which was immediately responded to by the Respondent at 20.40 p.m. drawing the attention of the Petitioner to the fact that there were major changes in what was discussed and tabulated the stand. The Respondent stated that all outstanding payments need quick reconciliation.

26. It is from this correspondence; the Petitioner has attempted to cull out from the admission of the debt itself. Mr. Sardesai has sought to explain the circumstance in which these statements were made. He pointed out that the Respondent was committed to its consumers and after taking necessary permissions was keen to restart the distribution of power immediately. Mr. Sardesai pointed out that throughout in the correspondence the Respondent has emphasized the need for immediate starting of power. If one goes through the e-mail correspondence, it cannot be said that this contention is without merit. The Respondent has time again emphasized for immediate issuance of LOI, showing its eagerness to restart the business with the Petitioner. The Respondent has even deposited the amount of Rs.1 crore. Mr. Sardesai contended that since the magnitude of business with Petitioner and its importance to the business of the Respondent was immense, the Petitioner did not want its larger business to be jeopardized in this dispute and therefore, in a reconciliatory note, with an intention to restart the business, and being led by the promise of restarting the power that the Respondent sent e-mails and kept on depositing money. This explanation cannot be said to be without substance. Furthermore, there is no admission of any particular amount. The context in which the correspondence was entered into therefore cannot be lost sight of. The deposit of the amount of Rs.3 crore in

this Court was with the same intention. The contention of Mr. Setalvad that the deposit of the amount in this Court clearly indicates the acknowledgment of the liability cannot be accepted. It cannot, therefore, be said that there was a clear admission of liability by the Respondent.

27. As regards the reliance of the Petitioner on the decision of the learned Company Judge of Delhi High Court in the case of *Deutsche Homoeopathie – Union Dhu-Arzneimittel GmbH & Co. KG*, the learned Company Court was considering a petition arising from a contract between the parties in respect of purchase of homeopathy medicines and the goods were supplied however the payments were not made. The learned Company Judge observed that for a counter claim to be effective and complete shield must exceed the admitted claim. In a given case, it is possible to compartmentalize the claim and counter claim separately and to call upon the Respondent to demonstrate that how its counter claim is justified. It will depend on the nature of the transaction and the agreement between the parties. In the facts of the present case, two admitted positions themselves make the defence of the Respondent possible. That there is an admitted shortfall in supply of power and second the agreement itself give rise to the claim of damages. There is no such law that the Company Court has to ignore all aspects, including the

conduct of the petitioner, and permit the Petitioner to force through its claim and wind up the company. Ultimately, whether to wind up the Company or not is within the discretion of the Company Court and for that purpose totality of the circumstance goes into the use of the discretion. Same is the position in respect of the decision of the learned Company Judge in the case of *Advent Corporation Pvt. Ltd.*⁴ Mr. Setalvad placed reliance on the observations of the learned Company Judge that once liability is established and that there is no defense to wind up, the petition must be automatically admitted. This decision was rendered in the year 1968 and this absolute proposition laid down therein has lost much of its force in view of the decision of the Apex Court in the case of *IBA Health (India) Private Limited*. On the other hand, Mr. Sardesai relied upon the decision of the Company Judge of this court in *Dalmia Cement (Bharat) Ltd. v Indian Seamless Steels & Alloys Ltd.*⁵ wherein the learned Judge observed that winding up petition cannot be used for payment when there is a bonafide dispute. The learned counsel also relied upon a decision of the Division Bench of Gujarat High Court in the case of *Tata Iron and Steel Co. v Micro Forge (India) Ltd.*⁶ wherein the Division Bench summarized various aspects that the Company Court needs to keep in mind while dealing with winding up petition.

4 (1969) 39CompCas 463 (Bom)

5 (2002) 112 Comp Cas 314

6 (2001) 104 CompCas 533

28. During the pendency of the Company Petition, the Respondent filed a suit for specific performance and for damage. It is the contention of Mr. Setalvad that this suit cannot be an answer to the Company Petition as it is a complete after thought and if such tactics are allowed by the Court, it will defeat every winding up petition. It is correct to contend that a company which all along accepts its liability cannot suddenly turn around and start raising dispute and file counter proceedings and they have to be looked at with suspicion. However, in the present case, this is not so. In furtherance of the winding up notice, the Respondent raised the issue of losses suffered due to non-supply of power to the consumers. It did refer to the claim arise to the Respondent due to this non-supply of power. Even in the meeting, it took place on 18 December 2013, this issue was raised by the Respondent. The Respondent called upon the Petitioner to reconcile the accounts and abide by the commitment. Mr. Setalvad contended that the suit is not a suit for recovery of money but only for specific performance and there is no even averment regarding the readiness and willingness. I am not trying the suit which has been filed and only for the purpose of understanding the case of the Respondent in the suit, that I have looked at the plaint. It has to be noted that till date the Petitioner has not filed a written statement on the ground that the suit is transferred

to the Commercial Court. In this suit, a prayer is made for the specific performance of the contract of 18 December 2013 and seeking damage. It is contended by Mr. Sardesai that the damages are as such in the alternative as if in future the price of electricity fall, it will be inequitable to have a binding agreement at that price and therefore damages have been sought in the alternative. It was contended that the discussion of 18 December 2013, to which there was no dispute at that time, clearly stipulate an agreement for starting of power for which consideration was paid. Be that as it may, merely because the suit was filed subsequently, does not mean that this defense was thought of subsequently. This defense of the Respondent always existed, which is discernible from the correspondence as far as in December 2013.

29. The Respondent Company has placed on record by way of an additional affidavit showing the net worth of the Respondent Company and paid up share capital of the Respondent Company is Rs.1,065,369,027/-. The assets are to the tune of Rs.3,24,77,53,920/-. The valuation of the assets of the company situated at Belgundi, District Belgaum, Karnataka. The Respondent Company enjoys substantial reputation and has availed of various credit facilities. It has investments in subsidiary companies such as Belgundi Cements Pvt. Ltd., India Electron Exchange Limited,

Indianeye Security Private Limited, Sukhashanti Estates Pvt. Ltd. It is informed that Respondent Company employed large work force. Though the solvency of the company is not a standalone defense in the winding up proceedings, it is still a relevant criterion to be considered along with other factors which are in favor of the company. It is not the case that the Respondent Company has lost substratum or has become commercially insolvent.

30. The Respondent had alleged breach of the agreement on the part of the Petitioner and raised its own claim. The Respondent had sought for restoration of the supply of power and is ready to comply with the conditions and deposited necessary amount. The Petitioner has sought to segregate the dispute and is calling upon the Court not to look into any other aspect of the matter, but only to focus only on one aspect, that is for some period there was supply for which there is no payment. The request of the Respondent for reconciliation of accounts has gone unheeded. The request of the Respondent to restart the power has not been acceded to, in spite of receiving the amount of Rs.1 crore on 18 December 2013 and subsequently Rs.3.25 crore in this Court. The Company Court cannot be oblivious to all these factors which go into the exercise of discretion. The Apex Court in the case of *IBA Health (India) Private Limited* has held that the primary test that to be applied by the

Company Court is see that the Respondent Company has "*no good reason*" to withhold the debt. It appears to me that the Petitioner is taking advantage of dominant position to engage in an arm-twisting tactic to try to recover a disputed amount. It cannot be said that the Respondent Company has no legitimate claim against the Petitioner. If this petition is admitted, it will have devastating effect on the Respondent Company, and will trigger various consequences and push the Respondent Company towards bankruptcy, which as of today is far from it. Considering the totality of the circumstances, I am of the opinion that no case is made out for admission of the Company Petition.

31. The Company Petition is dismissed. No costs.

N.M. Jamdar, J.