IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 61 OF 2014

Hind Rectifiers Limited .. Petitioner
Vs.
Rahul Graphites Limited .. Respondent

Mr.Mikhail Behl a/w. Ms. Pavitra Pillay i/b M/s. Kanga and Co. for petitioner.

None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 9TH OCTOBER 2017

P.C.

1 By the above petition, petitioner seeks winding up of respondent-company -Rahul Graphites Limited (the Company) on the ground that it is unable to pay its debt. The petition is taken up for hearing and final disposal.

2 According to the Petitioner, by a purchase order dated 15th October, 2009, the Company placed an order on the Petitioner for supply of Rectifier Unit SHOP (HTCC)24-105 V/60 KA ("the Rectifier") for an amount of Rs. 5 crores (ex-works and excluding taxes and levies by the Central/State Govt./Local bodies and other statutory authorities). The terms of payment set out in the purchase order are as follows:

20 % Advance.

65% against proforma invoice before dispatch.
05% within 30 days commissioning and balance 10% within 3 months from commissioning or within 6 months from the date of dispatch.

The Petitioner received from the Company an advance payment of Rs. 1,00,00,000/- on 18th September, 2009 through ECS.

3 According to the Petitioner, the final inspection of the rectifier took place on 5th February, 2011 when the representatives of the Company and the Petitioner were present, and the same was declared to be technically fit for dispatch. The said rectifier was supplied to the Company by the Petitioner at their Bhusawal Unit vide Excise Invoice cum challan No. 1011/03283 dated 31st March, 2011. The Petitioner raised an invoice dated 31st March, 2011, upon the Company for an amount of Rs.6,20,43,750/-. A break up of the said amount of Rs. 6,20,43,750/- is reproduced hereunder:

(a) Basic price : Rs. 5,00,00,000/-

(b) Basic Excise Duty @ 10%	: Rs. 50,00,000/-
(c)Education cess @ 2%	: Rs. 1,00,000/-
(d) Higher Secondary Education Cess @ 1%	: Rs. 50,000/-
(e) VAT @ 12.5%	: Rs. 68,93,750
Total of item Nos. (b) to (e)	: Rs. 1,20,43,750/-

Total : Rs. 6,20,43,750/-

4 As agreed by the parties, 65 per cent of basic price was to be paid against proforma invoice. Therefore, the total dues payable upon the issuance of a proforma invoice was Rs. 3,25,00,000/- (i.e. 65% of Rs. 5,00,00,000/-) + Rs. 1,20,43,750/- (various taxes and duties as set out hereinabove). Therefore, the total dues payable against the proforma invoice was Rs. 4,45,43,750/-. As against the sum of Rs. 4,45,43,750/- , the Company paid to the Petitioner a sum of Rs. 4,27,37,187/- leaving a balance of Rs. 18,06,563/- payable against the proforma invoice. The Respondent was, as per payment terms, also required to pay 5% of the basic sales value of Rs. 5,00,00,000/- within 30 days of commissioning which worked out to Rs. 25,00,000/-. The Respondent was, as per payment terms, also required to pay 10% of the basic sales value of Rs.5,00,00,000/- within three months of commissioning or within six months from the date of dispatch which amount worked out to Rs. 50,00,000.-. The parties had disputes pertaining to delay in lifting the rectifier by the Company, delay in payment by the Company and delay in commissioning as regards which allegations were made by both the parties against each other. According to the Petitioner, they were unable to cooperate with the Company since payments were not coming forward. In view thereof, a Memorandum of Understanding ("MOU") dated 19th November, 2011, was executed between

the Chief Financial Officer of the Petitioner and the Director of the Company. The said MOU is annexed to the petition.

5 From the above MOU it is clear that out of the said sum of Rs. 18,06,563/- a sum of Rs.7,00,000/- was to be paid on or before 30th November, 2011 and the balance sum of Rs. 11,06,563/- was to be paid on or before 15th December, 2011. 5 per cent of the basic sales value i.e. Rs. 25,00,000/- was agreed to be paid latest by 31st January, 2012 and 10 per cent basic sales value i.e. Rs. 50,00,000/- was agreed to be paid within three months from the date of commissioning/smooth running (without breakdown) and latest by 31st March, 2012. It is further provided that if the commissioning is delayed beyond 31st December, 2011, on account of the Petitioner, period of three months may be counted from the date of commissioning/smooth running (without break down) and in that case period of limitation of 31st March, 2012 will not apply.

6 According to the Petitioner, out of the said sum of Rs. 18,06,563/-, an amount of Rs. 13,00,000/- was paid by the Company to the Petitioner, leaving a balance of Rs. 5,06,563/-. Also payments of Rs. 25,00,000/- and Rs. 50,00,000/- were not made as agreed. The total outstanding as per the MOU was Rs. 80,06,563/- . The Petitioner had raised debit notes totaling to

Rs. 4,57,331/-, on the Company in respect of erection and commissioning charges. The total principal amount outstanding therefore was Rs. 80,06,563/- plus Rs. 4,57,331/- aggregating to Rs. 84,63,894/-. Interest debit notes were also raised by the Petitioner on the Company aggregating to Rs. 30,14,925/-. Therefore, according to the Petitioner, the total payment due by the Company is Rs. 84,63,894/- plus Rs. 30,14,925/- , aggregating to Rs. 1,14,78,819/-, as claimed in the Particulars of Claim.

7 The rectifier was commissioned in the month of December, 2011. Thereafter the Company has forwarded its reminder letters dated 17th May, 2012, 11th June, 2012, 9th August, 2012 and 19th January, 2012. However, the Petitioner failed and neglected to respond to any of the said letters. On 13th May, 2013, the Petitioner sent its letter informing the Company that as per the books of accounts of the Petitioner, an amount of Rs. 1,07,14,985/- is due and payable by the Company to the Petitioner and for the audit purpose, the Company should send a duplicate copy of the said letter and return the same to the Petitioner. It was also recorded in the said letter that if the Petitioner fails to receive any communication from the Company within fifteen days from the date of receipt of the said letter, it would be presumed that the said balance amount agrees with the books of accounts of the Petitioner. The Company failed and neglected to respond to the said

letter dated 13th May, 2013. A statutory notice dated 1st August, 2013, was thereafter served on the Company setting out the aforestated facts and calling upon the Company to pay an amount of Rs. 84,63,894/- along with interest at the rate of 18 per cent per annum from 1st October, 2011 till date of payment and realization thereof, within three weeks from the date of receipt of the notice. However, the Company despite having received the said statutory notice failed and neglected to respond to the same. The Petitioner therefore filed the above Company Petition before this Court on 21st October, 2013, and on 13th February, 2014, served the Company with a copy of the same.

8 The Company through its Advocates filed appearance four months thereafter that is on 24th June, 2014 and filed its affidavit in reply only on 7th November, 2014, wherein the Company has made an attempt to create a confusion qua the figures mentioned by the Petitioner in the Petition and its notices though there exists none. The Company in its Affidavit in reply has stated that it is the Petitioner who failed to erect and commission the rectifier in time and has delayed the same and has thereafter forced the Company to execute the MOU dated 19th November, 2011. It is submitted that the debit notes have been unilaterally created. It is further stated in the affidavit in reply that the Company is recovering from its unsound position

and the loss was also contributed by the tactics of the Petitioner. It is submitted that the Company is recovering and entering into a settlement with the Banks for the payment of loans. The Company is likely to do well in the near future and therefore it cannot be said that the Company is unsound or is not able to meet its liabilities.

9 The Petitioner has filed its affidavit-in-rejoinder dated 17th November, 2014, wherein the contents of the affidavit in reply filed by the Company are denied and disputed.

10 The Company has filed a compilation of documents dated 12th December, 2014.

11 On 22nd December, 2014, Mr. Ramesh Upadhyay, Director of the Company was present in Court. He informed the Court that the Company is searching for an investor and the Company at that time was taking up only labour jobs. He informed the Court that the last balance-sheet filed with the Registrar of Companies ("ROC") is the balance-sheet as on 31st March, 2012, and thereafter no accounts or balance-sheet have been filed with the ROC. When this Court enquired from him as to what are the current assets and liabilities of the Company, he informed the Court that he

is not aware about the same and that Mr. Rahul Upadhyay, his Co-Director shall remain present on 24th December, 2014 and provide the necessary particulars to this Court.

12 Mr. Rahul Upadhyay, appeared before this Court on 24th December, 2014 and thereafter filed his additional affidavit dated 8th January, 2015 wherein he has stated that the annual audit report for the financial year 2012-2013 was not submitted to the ROC because of the delay caused due to change of professionals such as the Company Secretary of the Company. He submitted that the current liabilities of the Company are about Rs. 35 crores and the current assets of the Company is about Rs. 36 crores. There are about 50 employees who are working in the Company out of which 35 employees are fixed employees and 15 are contractual employees. He submitted that the Company is currently holding various orders from India and abroad and the Company is in a position to book profits in the near future.

13 I have considered the submissions advanced by the learned Advocates appearing for the parties. As set out in paragraph 3, a proforma invoice for an amount of Rs. 6,20,43,750/- dated 31st March, 2011 was raised by the Petitioner on the Company where the basic price of the transformer is

shown as Rs. 5 crores and tax and duties as Rs. 1,20,43,750/-. An amount of Rs. 1,00,00,000/- was paid by the Company to the Petitioner towards advance. The Company was liable to pay 65 per cent of Rs. 5 crores i.e. Rs. 3,25,00,000/- against proforma invoice plus Rs.1,20,43,750/-, aggregating to Rs. 4,45,43,750/- to the Petitioner. As against this, the Company paid a sum of Rs. 4,27,37,187/- leaving a balance of Rs. 18,06,563/- against the submission of proforma invoice. The Company has failed and neglected to explain as to why the said sum of Rs. 18,06,563/ was not paid by the Company to the Petitioner against submission of proforma invoice. The Company was also required to pay 5 per cent of the basic sales value of Rs. 5 crores within 30 days of commissioning which amount worked out to Rs. 25,00,000/- and 10 per cent of the basic sales value of Rs. 5 crores i.e. Rs. 50,00,000/- within three months of commissioning or six months from the date of dispatch of the transformer. It appears that there were some disputes pertaining to the lifting of the machine on time by the Company, delay in making payments and issues pertaining to commissioning which were all sorted out by the parties by entering into a MOU dated 19th November, 2011 reproduced in paragraph 4 hereinabove. From the said MOU it is clear that the Company has admitted that due to shortage of funds and due to non receipt of power supply at the site, the plant could not be commissioned. However, after discussion it was agreed that the

Company will make payments to the Petitioner as set out therein. Again it is mentioned in the MOU that the parties have agreed that none of the parties will raise past issues like delay in lifting the rectifier, delay in payment or delay in commissioning, interest or any other commercial issues in the event of the points of agreement set out in the MOU being fulfilled. The MOU does not at all appear to be one sided or a document prepared by the Petitioner and executed by the Director of the Company under any force. The MOU records that the same is prepared on 19th November, 2011, after the CFO of the Petitioner and the Director of the Company had discussions on Thursday 10th November, 2011 at the premises of the Petitioner and the subsequent telephonic discussions held on Wednesday 16th November, 2011. The said document in fact records that the Petitioner will re-depute their Engineers from 22nd November, 2011 and put all their efforts for successful commissioning of the rectifier supplied by the Petitioner. Time to pay the amount of Rs. 18,06,563/- which was admittedly payable by the Company against issue of the proforma invoice was also extended upto 15th December, 2011. In fact, from clauses 2 and 3 of the MOU it is clear that the transformer was to be commissioned by 31st December, 2011 and therefore the Petitioner agreed to accept 5 per cent of the invoice value by 31st January, 2012 and the 10 per cent of the invoice value i.e. Rs. 50,00,000/- within three months from the date of commissioning/smooth running (without break down) and latest by 31st March, 2012. The parties have also provided in the MOU that if the commissioning is delayed beyond 31st December, 2011, on account of the Petitioner, three months may be counted from the date of commissioning/smooth running (without break down) and in that case period of limitation of 31st March, 2012, will not apply. All these provisions make it clear that the terms in the MOU are more favourable to the Company rather than the Petitioner.

14 The transformer has been commissioned in December, 2011. Thereafter the Company has neither filed any complaint nor made a whisper about the Company being forced or coerced to sign the MOU dated 19th November 2011. In fact, during this period, the Petitioner has repeatedly sent letters to the Company requesting the Company to make payments. However the Company has failed to respond to the same. The Company has also not replied to the statutory notice received from the Petitioner. The defence now sought to be raised that the Company was made to execute the MOU by the Petitioner under coercion is nothing but a mere afterthought and the same cannot be accepted. Admittedly, the company is making huge losses. The fixed assets of the Company in the balance-sheet of the Company as on as on 31st March 2013, is approximately Rs. 20.40 crores. Out of the said Rs. 20 crores, the value of

the land and building is only worth approximately Rs. 6.43 crores and the balance is shown towards the value of electrical installations, electric transformers, plant and machinery, office equipments, etc. The Company has not filed its accounts for the period 201213 with the ROC and the excuse given that delay was caused due to change of professionals cannot be accepted. The purchase orders placed before the Court by the Company in the compilation of documents show that the deliveries were to be made by the Company on 21st October, 2014, 8th November, 2014, 30th November, 2014 and only in one case the delivery has to be made by 8th February, 2015. Apart from the fact that the orders placed are not of substantial amount, the Company has not explained as to whether the orders have been executed and whether the amounts purportedly due to the Company have been received or as to when they are expected to be received. Despite all these factors going against the Company, since the Director of the Company informed the Court that the Company shall very soon make up its losses, this Court enquired from Mr. Rahul Upadhyay the Director of the Company whether the Company was willing to deposit at least an amount of Rs. 30 lacs in Court.

15 However the Director of the Company has submitted that the Company is not in a position to deposit any amount above Rs. 5 lacs. In

view thereof, I am prima facie satisfied that the amount as claimed by the Petitioner is due and payable by the Company to the Petitioner. The Company despite having executed the Memorandum of Understanding dated 19th November 2011, failed to make payment as agreed therein. The Company has until service of the statutory notice in August 2013, not made a whisper about the Memorandum of Understanding having been executed under coercion, despite receiving several letters and reminders from the Petitioner for balance payment. The defense now sought to be raised by the Company is sham and bogus.

16 By an order dated 8th January 2015, the petition came to be admitted. The Court was pleased to pass the following order :-

> (i) The Company Petition is admitted and made returnable on 2nd March, 2015.
>
> (ii) Notice under Rule 28 of the Companies (Court) Rules, 1959, is waived.
>
> (iii) The Petitioners are directed to advertise the Petition in two local newspapers, viz. 'Free Press Journal' (in English) and 'Nav-Shakti' (in Marathi) and also in Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court)

Rules, 1959.

(iv) The Petitioners shall also deposit an amount of Rs 10,000/- with the Prothonotary and Senior Master of this Court towards publication charges, on or before 12th February 2015, with intimation to the Company Registrar failing which the Petition shall stand dismissed for non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the Petitioner.

(v) The Directors of the Company are restrained by an order and injunction of this Court from dealing with the fixed assets of the Company without the permission of this Court.

17 Against this order, respondent preferred an Appeal being Appeal (Lodg.) 232 of 2015. The Appeal came to be dismissed by an order dated 30th July 2015. Thereafter, the petition got listed before this Court in which it was recorded that the Court asked the respondent's counsel whether respondent was willing to deposit an amount of Rs.20 lakhs over and above Rs.10 lakhs deposited in this Court in pursuance to order dated 16th March 2015. Respondent's counsel stated that respondent will be able to deposit provided they are given some time. Respondent was granted six month's time to deposit. Respondent, however, did not deposit. By an order dated 9th June, 2016, it is noted that even on that date, respondent was not in a

position to comply with the order dated 30th October 2015.

18 The Company Petition has been advertised and an affidavit dated 2nd March 2015 proving publication in newspapers is on record. Copy of the Maharashtra Government Gazette (March 12-18, 2015), in which the admission of the Company Petition has been advertised, is also produced before the Court.

19 Notice under Section 28 of the Companies Court (Rules), 1959 has been dispensed with. At this stage, nobody is even appearing for the company to oppose the petition. The affidavit opposing the reply has already been considered before admitting the petition.

20 In view thereof, I am satisfied that the company is unable to pay its debt. It is commercially insolvent and is required to be wound up.

21 The Company Petition is therefore allowed in terms of prayer clauses (a) and (b) which are reproduced herein under :

> *(a) that the Company namely **"Rahul Graphites Limited"** having its last know registered office at 36, Sagar Pallazio, Ground Floor, Opposite Sudarshan Hotel Near Sakinaka Signal, Andheri-Kurla Road, Sakinaka Mumbai 400 072, Maharashtra India, be ordered to be wound up by and under the directions, supervision and control of this Hon'ble Court under the provisions of the Companies Act, 1956.*

> *(b) that the Official Liquidator, High Court, Bombay or some other fit and proper person be appointed as the Liquidator of all the business, assets, properties, income and books of accounts of the Company with all the powers under the provisions of the Companies Act, 1956.*

22 The Official Liquidator shall forthwith act on a copy of this order without waiting for any notification.

23 Company Petition accordingly disposed.

(K.R. SHRIRAM, J.)