THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

THE HON'BLE SMT. JUSTICE T.RAJANI

O.S.A.No. 2 OF 2017

DATED 20TH FEBRUARY, 2017

Between:

M/s. ICOMM Tele Limited,
Office at ICOMM HOUSE,
Plot No. 31, Phase – I,
Kamalapuri, Srinagar Colony,
Hyderabad – 500073,
Rep. by its Company Secretary B.Rajesh … Appellant

AND

M/s. Broadcom Corporation (Earlier M/s. Beceem Communications),
Rep. by Power of Attorney Mr. Manoj, 5300,
California Avenue, Irvine,
California, USA … Respondent

Counsel for the appellant : M/s. Bharadwaj Associates

Counsel for the respondent : Sri Kishore Rai

THE COURT MADE THE FOLLOWING

JUDGMENT (*per Hon'ble Sri Justice C.V.Nagarjuna Reddy*)**:**

This original side appeal is filed against order dated 29-04-2016 in C.P.No. 182 of 2011.

2. We have heard Sri Vedula Venkata Ramana, learned senior counsel for the appellant, and Sri Kishore Rai, learned counsel for the respondent.

3. The respondent, which is a company incorporated under the domestic laws of the State of Delaware, U.S.A., and having its office at California, supplied chipsets and other allied goods to the appellant in accordance with the orders placed by the latter from time to time. The value of the goods so supplied to the appellant is claimed to be 23,75,520 U.S.$. As the appellant failed to pay the value of the goods supplied by the respondent, the latter has insisted on the appellant to make payments. Lot of correspondence ensued between the parties and one such correspondence is e-mail dated 13-01-2011 sent by the appellant, wherein, while admitting the liability, it has informed that it was facing cash flow issues and promised to remit the entire amount within 3 to 4 weeks. By another letter dated 24-03-2011, the appellant has again admitted its liability. Thereafter, a part payment of 3,00,000 U.S.$. was made on 26-05-2011 out of the total outstanding dues of 23,75,520 U.S.$. leaving a balance of 20,75,520 U.S.$. It is the pleaded case of the respondent that as payments were not made by the appellant, the respondent has instituted winding up proceedings registered as C.P.No. 182 of 2011 before this Court. Initially, the company petition was admitted by order dated 10-10-2013. The appellant carried the matter in O.S.A.No. 40 of 2013. The said appeal was allowed by a Division Bench of this Court on 28-04-2015 setting aside the order dated 10-10-2013 of the learned company judge and remitted the matter to him for fresh adjudication on certain aspects which were pointed out in the judgment of the Division Bench. After

remand, the learned company judge has passed a fresh order once again admitting the company petition. The learned company judge has framed the following points for consideration:

> *"(1) Whether the petitioner has made out prima facie case for admission of the company petition?; and*
>
> *(2) Whether the petitioner is entitled to the discretionary order under Section 433 read with 434 of the Act and the respondent Company is put to terms before admission of company petition?"*

The learned company judge has referred to the affidavit dated 26-02-2013 of the Managing Director of the appellant company, wherein he has admitted the liability and undertaken to pay the amounts as under:

> *"I respectfully submit that pursuant to the discussions with the Petitioner Company, the Respondent Company herein agreed for a mutual settlement for paying the admitted liability payable to the petitioner to the tune of US$ 2,075,520 on the following terms and condition.*
>
> *I respectfully submit that the outstanding debt of US$2,075,520 will be paid by the respondent company in the following manner:-*
>
> *US$ 100,000: on or before 28th Feb 13*
>
> *US$ 100,000: on or before 31st Mar' 13*
>
> *US$ 100,000: on or before 30th April' 13*
>
> *US$ 100,000: on or before 31st May' 13*
>
> *US$ 175,520: on or before 30th June' 13*

US$ 200,000: on or before 31st July' 13

US$ 200,000: on or before 30th August' 13

US$ 200,000: on or before 30th September' 13

US$ 300,000: on or before 31st October' 13

US$ 300,000: on or before 30th November' 13

US$ 300,000: on or before 30th December' 13

It is further submitted that I being the Managing Director of the respondent Company further stand as personal guarantor to the said amounts to be paid as per the aforesaid payment schedule and have accordingly executed a personal guarantee and the same is filed herewith as Annexure I.

That it is further submitted that in the event of default in payment of any of the installment as set forth in Clause No. 3, the petitioner is at liberty to pursue the company petition."

Based on the aforementioned affidavit, the learned company judge has rendered a finding that the appellant has to pay 20,75,520 U.S.$. and that it is unable to pay the same. The learned company judge has not accepted the plea of the appellant that as per the minutes of the meeting dated 22-02-2013, the appellant is unable to upload CPEs to PPOE and thereby BSNL is not accepting the performance of CPEs supplied by the appellant and payment is not being made. The learned company judge reasoned that the transaction between the parties has taken place on the terms and conditions stipulated by the appellant and accepted by the respondent and the obligations of the respondent are clearly defined. Adverting to the various clauses of the agreement between parties, the learned company judge found that the appellant has unequivocally undertaken to make payment within 180 days from the date of delivery of chipsets and that the minutes of the meeting dated 22-02-2013 do not in any way pinpoint delay in performance of the project on account of defective performance or for lack of technical compatibility of four chipsets supplied by the respondent. The learned company judge accordingly held that the defence raised based upon letter dated 22-04-2013 beyond the warranty period is an afterthought and cannot be countenanced. A further finding rendered by the learned company judge is that the purchase order dated 03-05-2010 cannot be read with a condition that the appellant makes payment under the invoices raised by the respondent after the appellant receives amount from BSNL. Based on the aforementioned findings, the learned company judge has directed the appellant to deposit the outstanding amount of 18,75,520 U.S.$. due in two equal installments of eight weeks each from the date of the order and that in default of payment of any installment, the petition shall be admitted and advertisement issued.

4. At the hearing, learned counsel for both parties have brought to the notice of this Court that as the appellant failed to deposit substantial part of the money as directed by the company judge, advertisement is issued and the inquiry is yet to be commenced.

5. After hearing learned counsel for both parties and considering the detailed reasons assigned by the learned company judge *prima facie* holding that the liability is an admitted one and that the appellant failed to discharge the liability, we do not find any reason to interfere with the same. As observed by the learned company judge, the appellant itself has admitted its liability more than once besides filing an affidavit by its Managing Director before the Court.

6. For the aforementioned reasons, the appeal fails and the same is, accordingly, dismissed.

7. As a sequel to dismissal of the appeal, Application No. 99 of 2017 stands dismissed as infructuous.

C.V.NAGARJUNA REDDY, J.

T.RAJANI, J.

Date: 20-02-2017.
JSK