THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

COMPANY PETITION No.73 OF 2014

ORDER:

Petitioner is a listed Public Limited company promoted by the Government of India engaged in generation of hydro electricity. Likewise, the Respondents 1 and 2 are also listed public limited companies engaged in construction and development of infrastructure projects. The company petition is filed by the petitioner invoking Sections 433(e), 434 read with Section 439 of Companies Act, 1956 (for short, "the Act"), seeking the winding up of the respondents companies on the ground of their inability to pay debts as understood under the Act.

Petitioner had issued a tender notification calling for the competent bids for "Construction of Civil and Hydro-Mechanical works for Head Race Tunnel (HRT) and Associated Works (Lot PB-II) of Parbati HE Project (hereinafter referred to as "Project"). The tender notification provided for joint ventures formed by one or more qualified firms/the companies to offer their bid for execution of the project work. On 6th August, 2001 M/s.Maytas Infra Limited, Sri Sankaranarayana Construction Company, (a registered partnership firm) and M/s.Nagarjuna Construction Company (NCC) Limited entered in a joint venture agreement under the name and style 'Himachal Joint Venture' hereinafter referred to as "Himachal JV". It may be noted that on account of certain developments, M/s.Maytas Infra Limited became as IL and FS Engineering & Constructions Limited, (1st respondent) and M/s.Nagarjuna Construction Company Limited as NCC Limited. The individual joint venture participants had executed a power of attorney in favour of one Sri Manohar Shetty S/o. Late Sri Narayana Shetty who incidentally was also working partner of Sri Shanakaranarayana Construction Company, a member of joint venture entity. The Himachal JV became the successful bidder for execution of the project work. The contract was awarded in favour of Himachal JV and an agreement was also entered into on 7.11.2002 between the petitioner company and the Himachal JV. The Himachal JV commenced the execution of the work and after some time citing certain difficulties, the JV suspended further execution of the work. Alleging the execution of the work is not in terms of the agreed time schedule, petitioner terminated the contract of the respondents 1 and 2. Thereafter, respondent companies were issued with notices under Section 434 of the Act on 27.6.2013 making a claim for payment of about Rs.281 crores (Rs.281,59,94,645). Notice of demand, was responded to by the respondents companies vide their replies dated 29.7.2013 and 20.7.2013 respectively. Thereafter, the company petition is filed seeking winding up of the respondents companies invoking Sections 433(e), 434 read with Section 439 of the Act, alleging the respondents unable to pay the debts.

In the company petition, a detailed narration of the facts commencing from calling for tenders to issuance of notice of demand under Section 434 of the Act and the response of the respondents is set out in detail. Respondents in their counter-affidavit filed had categorically denied any liability much less the claimed amount of Rs.281 crores. The respondents also asserted that they are profit making public listed companies with sound finances executing a large number of important infrastructural projects in the country and outside the country. They had also categorically denied allegation of their owing any money to the petitioner company. They further asserted that as a matter of fact there are arbitration proceedings pending against the petitioner company with respect to claims of Himachal JV which are yet to be adjudicated. They had also denied the allegation that they had become insolvent and liable to be winded up. With the above, they prayed for dismissal of the company petition.

Shri P.Sree Raghuram, learned senior counsel appeared on behalf of the petitioner submitted the following –

1. By virtue of the terms of the joint venture agreement, both the respondents are jointly and severally liable to make good of the demand on account of the failure of JV for the balance of unadjusted mobilisation advance given to Himachal JV.

2. Though the joint venture agreement is with the Himachal JV on account of the individual constituents who formed the JV having given a power of attorney in favour of Sri Manohar Shetty authorising him to sign on behalf of the JV are jointly and severally liable for consequences of the breach of contract by the Himachal JV. In fact the respondents and the joint venture participants are to be treated as partners and hence they are directly liable for all the consequences under the agreement. The amount claimed in the legal notice is crystallized liability which is nothing but unadjusted mobilisation advance which was paid to the JV, which is liable to be refunded with interest under the contract. The respondents have also no reasonable right to withhold the amount on account of the termination of the contract. The defence raised in the counter-affidavit that there is an

arbitration claim pending and they have a counter claim is not a *bonafide* defence inasmuch as the claim pending before the arbitrator is a claim for damages which is yet to be ascertained and determined. The advance and interest as on 31.3.2012 is about Rs.281 crores and taking into consideration of other amounts recoverable on account of expenditure incurred at the risk and cost of HJV, on account of other contractual liabilities, liquidated damages towards delay in completion and expenditure incurred after expulsion of contractor from site the liability would be a total sum of Rs.281 crores.

3. The arbitration proceedings pending are with respect to claims and counter claim arising out of the contract, the prayer in the company petition is for winding up of the respondents companies on ground of their inability to pay the debts are two different and independent. Allowing the respondents companies to remain is not in the larger public interest.

4. An analysis of the balance sheets of the respondents companies after taking into consideration of the contingent liabilities would indicate that the respondents companies' finances are not in good health and allowing the companies to run any further would not be in public interest.

5. The relief that is being claimed against respondents companies is being one and the same i.e., winding up of the respondents companies for their inability to pay the debts, a composite company petition is maintainable and there is no prohibition in law.

6. Learned senior counsel also places reliance on the judgments reported in **Dolphin Investment Pvt., Limited vs.**

C Pinto Trade Commerce Pvt Ltd[1] and State Bank of Patiala vs. Hypine Carbons Limited (In Liquidation) and others[2], to support his contention that there is no mis-joinder of parties. At any rate, he would also submit that in case the Court comes to a conclusion that a joint petition is not maintainable opportunity may be given to the petitioner, as the defect is a curable defect and the learned senior counsel prays for allowing of the company petition.

On behalf of the respondents learned Senior Counsels Sri S. Ravi and Sri S. Niranjan Reddy made the following submissions.

1. The company petition filed by the petitioner seeking winding up of two companies is not maintainable either under the provisions of the Act or under the Rules. The specific provisions with respect to joinder of parties and common cause of action and the procedure available for filing a suit is not available with respect to filing of the company petitions seeking winding up of a company. Rule 95 of Company Court Rules reads as initiation of proceedings is against 'a' company thereby restricting the scope to a particular company. At any rate, though the respondents 1 and 2 are the constituents of the joint venture along with another partnership entity by themselves are not parties to agreement entered into with the petitioner company and in that view of the matter there is no privity of contract with the petitioner company in respect of the project work. At any rate, as against the petitioner's claim the joint venture has a claim on different heads including for the work done and not paid apart from damages arising for non fulfilment of the petitioner's obligations.

2. As a matter of fact, petitioner company suffered an award dated 14.07.2007 for a sum of Rs.113.65 crores and the dispute relating to the same is pending before

[1] 2007(138) CompCas 74
[2] AIR 1990 HP 10

Punjab and Haryana High Court in M.A.O.No.2893 of 2011. Further another claim for a sum of Rs.316 crores is pending before the Arbitral Tribunal. The learned counsel also by drawing the attention of the Court with respect to heads under which petitioner claims amounts due in the company petition to the heads under which the petitioner has made a claim before the Arbitrators submits that the petitioner is pursuing in two Forums for the same amounts and considering the fact that the counter claim before arbitrator is yet to be decided and as on date there is no crystallised debt due in favour of the petitioner to maintain the company petition.

3. Learned counsel also draws the attention of the Court to the details as set out in the respective counter-affidavits and additional counter-affidavits. The learned counsel also points out that as against the mobilisation advance amount of Rs.56.00 crores, there is a claim about Rs.60.00 corres unpaid amounts for the work executed. Even assuming the rest of the claims of the respondents are for damages likewise the claims of the petitioners are also on account of interest. Unless the principal amount is due and payable is determined, the question of determining the interest does not arise. In those circumstances, there are no crystallised debts due and payable. Without first determining the liability of the joint venture company and further apportionment of the liability of each of the constituents of the joint venture formed by three parties, the question of proceeding against the individual constituents is bad in law and at any rate no company petition is maintainable; admittedly that there are arbitration proceedings pending between the parties which establishes that there are serious disputes which are required to be resolved and even on that ground the company petition is not maintainable as held by the Supreme Court in para 33 of the judgment in **Pradeshiya Indusotrial and Investment Corporation of U.P vs. North India Petrochemical Limited and another**[3] and this judgment has been followed by the Bombay High Court

[3] (1994) 3 SCC 348

in the case of **Manipal Finance Corporation vs. CRC Carrier Limited**[4] and also followed by this Court in **Maharashtra Apex Corporation Limited v. Spartex Ceramics India Limited**[5]**.** Learned counsel also placed reliance on the judgments reported in **Madhsudan Gordhandas & Co. vs. Madhu Wollen Industries Pvt Limited** [6]**, IBA Health (I) Pvt. Ltd., vs Info-Drive Systems Sdn. Bhd.**[7]**, Kuoni Travel (India) Private Limited vs. Tecumseh Products India Private Limited**[8] **& Arcom Medical Devices Pvt. Ltd., vs. Yashoda Healthcare Services Pvt. Ltd**[9]**,** wherein the settled principles with respect to what is debt, when a company can be said to be commercially insolvent and a defence can be said to be a *bonafide* are considered.

Learned counsel for both the respondents also draw the attention to the balance sheets of the respondents companies and point out that both the companies are dividend paying and profit making companies with huge orders in their hands.

Perused the record. In the light of the respective submissions and keeping in view of the settled principles in dealing with company winding up petitions on the ground of a company's inability to pay the debts, broadly put the following questions arise for consideration in the present proceedings.

a. Whether a single company petition seeking winding up of two distant companies on the ground of their inability to pay the debts is maintainable within the scope of Sections 433(e), 434 read with Section 439 of the Act read with the Company Courts Rules.

b. In the facts of the present case whether there is undisputed crystallised sustainable debt due and payable by the respondents.

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[4] (2001) 107 Company Cases 288
[5] (2004) 5 ALD 316
[6] AIR 1971 SC 2600
[7] (2010) 159 CompCas 369 (SC)
[8] (2016) 194 CompCas 164 (AP)
[9] 2016(1) ALD 484

c. Whether the dispute raised by the respondents about the liability is *bonafide* and the defence against the company winding up petition is valid and sustainable.

At the outset, as fairly considered by the learned senior counsel that there is no direct authority under the provisions of the Act or under the Company Courts Rules, wherein a single company petition has been filed, considered and winding up ordered on the ground of the companies inability to pay the debts. Sections 433(e), 434 and 439 of the Act and read with Rules 6, 10 and 95 of the Company Court Rules deal with the matters relating to filing up of company petitions and method and manner and the procedure governing dealing with the same by the Company Court. Under Section 434 a creditor can seek winding up of a debtor company seeking winding up of the debtor company when the admitted undisputed and admitted debts are not cleared. The procedure is set out in the Rules. As pointed out by the learned senior counsel Sri S. Ravi, the provisions speak of 'a' and a/the company. In the process of adjudication various factors in relation to the company are required to be considered based on evidence produced before the Company Court. The Act and Rules framed did not contemplate filing of a single company petition seeking winding up of two distinct companies on the ground of their inability to pay debts.

The first stage of consideration by the Company Court is to ascertain, based on the affidavit evidence, whether the petitioner company had made a demand, whether the respondent's company had admitted/denied the liability, whether in the counter-affidavit filed before the Company Court there is an admission or denial of the liability, if there is a denial of liability, whether such denial is *bonafide* or not. The Company Court's consideration of a company petition at the admission stage is akin to consideration of a summary suit by a civil Court under Order XXXVII of the Code of Civil Procedure, 1908. In the suits filed invoking Order XXXVII of CPC, if the defendant, on affidavit, satisfies the Court that there is a triable issue for not issuing a judgment and decree as prayed for the Court would try the case under other provisions of the C.P.C as a regular suit. It may be noted that the procedure in summary suits is on affidavit evidence. Similarly, at the first stage, the Company Court also examines the matter in issue only on affidavit evidence along with the undisputed documents if any.

Applying the said principles to the present case on hand, if one examines the facts on record the claim of the petitioner is arising on account of a contract entered into by the petitioner with HJV, a joint venture entity. The joint venture entity prima facie appears to be a loosely formed association of two companies and a registered partnership firm. The joint venture agreement dated 6.8.2001 is entered into between the three entities for the specific purpose of submitting the bid in the tender floated by the petitioner and if successful to execute the same. It is in the nature of a partnership firm and their respective rights and obligations qua the partners is governed by the terms of the agreement and the provisions of the Partnership Act, 1932. Much reliance is placed by the learned senior counsel for the petitioner on the Clauses 5 and 6 of the Joint Venture Agreement, which read as under:

"5. **INTERNAL RESPONSIBILITIES AND LIABILITIES:**

(a) The division of individual scope of work may be worked out mutually by the parties but the parties shall be jointly and severally liable to the Employer for the whole work.

(b) The parties specially undertake to carry out their separate works in full compliance with the Contract with the Employer. Each party shall be responsible jointly and severally for consequences to any arising out of defective or delayed execution of works which falls within the individual party's area of responsibility and/or it has been caused due to acts and/or omission of the concerned party.

(c) the parties jointly and severally agree to replace, modify or repair any defect in their respective portions of works in accordance with the terms and conditions of the Contract with the Employer.

(d) The parties jointly and severally shall indemnify and hold harmless to each other against any claim made by the Employer or any other third party for injury, damage, loss or expenses is attributed to the breach/non-performance of his responsibilities by the indemnifying party in accordance with the Agreement and/or Contract with the Employer.

6. **RESPONSIBILITIES AND LIABILITIES OF THE JOINT VENTURE TOWARDS THE EMPLOYER:**

1) Parties hereto shall be jointly and severally liable and responsible for the acts, deeds and things done or omitted to be done in respect of the execution of the contract and for any financial liability arising therefrom;

2) Parties hereto shall be jointly and severally responsible to the Employer for the execution of the works in accordance with the Contract conditions;

3) Parties hereto shall jointly and severally indemnify the Employer against any claim made against the Employer or any other third party for any injury, damage or loss, which may be attributed to the breach of the obligations under the contract pursuant to the Contract."

On a careful analysis of Clauses 5 and 6, it becomes clear that on contract being awarded by the petitioner the total work is to be divided among the joint venture partners depending on their competence and field of expertise. While the entities forming the joint venture have declared their liability to the petitioner as joint and several the fact remains that they had agreed to divide the work depending on their competence and expertise. It is an admitted fact that the contract with the Himachal JV has been terminated and such termination is being disputed and such disputes are pending adjudication before the Arbitrators and the individual constituent members are not parties in the Arbitration proceedings. It is only on final determination of the claims against the Himachal JV, the respective liabilities of the individual constituents of the joint venture entity would get ascertained. As on date there is no ascertained sum due and payable determined against the joint venture entity itself and as such there cannot be any claim against the constituents of joint venture entity. The *inter se* agreement between the joint venture agreements agreeing among themselves that any liability that may arise in the process of executing the work for which Himachal JV is formed shall be joint and several by itself does not create any right in the petitioner against the individual constituents who formed the JV simply on account of the fact that there is no privity of contract between the petitioner and the Himachal JV constituents. Assuming the Himachal JV is to be treated as an unregistered partnership firm and may be sued by making the individual constituents as party respondents such proceedings can only be a proceeding initiated invoking the provisions of Civil Procedure Code read with the provisions of the Partnership Act. In a proceeding under Companies Act particularly seeking winding up on the ground of inability to pay debts the partnership firm M/s. Sri Sankaranarayana construction Company cannot be joined as a party respondent and as a matter of fact not joined as a party respondent in the company petition. As stated earlier until and unless the liability of Himachal JV is determined the individual liability cannot be apportioned among the constituents forming the JV.

The fact remains in the case on hand petitioner has invoked arbitration proceedings against Himachal JV alone for breach of contract and there is also a counter claim filed by the Himachal JV before the arbitrators. It may also be noted that it is not the case of the petitioner that there is any exclusion in the contract agreement and the dispute resolution mechanism therein with respect to the claims arising out of the breach referred to in the company petition. As a matter of fact, it is an admitted fact that the claim made before the arbitrators is inclusive of the amounts which are being due and payable in the present company petition.

The general power of attorney given by the parties to the joint venture agreement in favour of Sri Manohar Shetty to act for and on behalf of the joint venture for the purpose of execution of the work by itself cannot create any liability on individual members of the joint venture. The GPA has limited role and purpose and the acts of the GPA holder would bind the joint venture and the consequences arising from the acts of the joint venture would ultimately bind the JV constituents. As stated supra, as on date there are disputes between the parties and they are pending before the Arbitrator in arbitration proceedings. In those circumstances, it cannot be said that there is an ascertained liability against the respondents companies.

It is not necessary for this court to analyse the facts relating to the financial health of the respondent companies though prima facie this court on the material placed cannot come to the conclusion that the respondent companies are not in good financial health warranting examination whether the allowing the companies to continue would be in the public interest or not. It may be made clear this observation is only limited to this company petition in the peculiar facts and on the material as placed before the Court.

For the above said reasons, the Company Petition is dismissed. Company Applications, if any pending, shall stand closed. No order as to costs.

CHALLA KODANDA RAM, J

Date:03.08.2017.
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THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

COMPANY PETITION No.73 OF 2014

Date:03.08.2017

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