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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

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**Reserved on: 19<sup>th</sup> July, 2017**

**Pronounced on: 11<sup>th</sup> August, 2017**

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**CO.PET. 64/2016, CA NO.267/2016**

**SHENZHEN KAIFA TECHNOLOGY CO. LTD. .... Petitioner**

Through Mr.Vijay Nair, Mr.Rahul Malhotra  
and Mr.Varun Garg, Advs.

versus

**PAL MOHAN ELECTRONICS PVT. LTD. .... Respondent**

Through Mr.Amit Sibal, Sr. Adv. with  
Mr.Bishwajit Dubey, Ms.Surabhi  
Khattar and Ms.Radhika Dubey,  
Advs.

**CORAM:**

**HON'BLE MR.JUSTICE YOGESH KHANNA**

**YOGESH KHANNA, J.**

1. The petitioner manufactures the components of hard disc drive, and solid state drive, communication and consumption related products, Medical devices, R&D and sales of Metering System, Payment terminal and Automation equipments, smart meter, electricity meters, water meters, gas meters and other electrical measuring instruments, power automation and new energy access management system for business around the world. It has its registered office in China.

2. The petitioner alleges:

(a) the respondent had approached the petitioner in the year 2004 for purchase of static energy meters manufactured by the petitioner and

placed various purchase orders. All the purchase orders were duly honoured. The invoices were raised and supplies were made in terms thereof. The respondent received the supplies in complete satisfaction and without any demur. The respondent agreed to make payment to the petitioner within 120 days from the date of receipt of the shipment. All shipping/export documents qua such supplies were duly provided by the petitioner to the respondent company and are annexed;

(b) the respondent was under a contractual obligation to make payment against the invoices in a time bound manner but it failed to do so despite repeated requests and demands. The respondent company made part payments in the manner set out in para 12 of the petition and after giving due credit to such payments in part, still a sum of USD 1,525,375.94 remains due and payable by the respondent company on 31.07.2015. The copy of an alleged reconciled summary of accounts highlight the payments made and the amount payable. (Annexure P5);

(c) though the respondent raised objections qua the defects in the goods, such goods was replaced and heavy discounts were given;

(d) till 2012 the respondent had received an amount equivalent to 70% of the supplies made to BSES has failed to clear its outstanding dues.

(e) despite repeated reminders the respondent failed to discharge its liability and hence the petitioner was forced to depute its representative to visit India to meet the officials of respondent company. Each invoice was a separate contract between the petitioner and the respondent and the respondent was under an unimpeachable obligation to honour the same in letter and spirit. The statutory notice dated 4.8.2015 calling upon the

respondent to pay USD1,525,375.94 cents within 21 days, was duly served but the respondent did not reply, hence this petition;

(f) it was only through its e-mail sent in September, 2016 the respondent raised its counter claim for the first time after 8 months of filing this petition;

3. The respondent in its reply has raised various objections viz.

- a) the dispute being governed by an arbitration clause;
- b) defect in the statutory notice ;
- c) concealment qua relations between the parties; and
- d) a disputed debt.

4. As per settled law an arbitration clause in a contract or a technical flaw in the statutory notice does not come in the way of winding up if the notice complies with other conditions. It answers objections (a) and (b) above.

5. The learned senior counsel for the respondent nevertheless has raised a pertinent question qua concealments made in the petition.

6. Though the petitioner has based its claim on principal to principal relationship between the parties, but the learned senior counsel for the respondent referred to an authorization letter dated 07.07.2009 given by the petitioner to BSES for which the electricity meters were being purchased and it notes:-

*“AUTHORIZATION LETTER  
To The Manager,  
C&M Deptt.  
BSES Rajdhani/Yamuna Power Ltd.*

*BSES Bhawan, S & P Deptt.,  
1<sup>st</sup> Floor, Nehru Place  
New Delhi -110019*

*Dear Sir,*

*We Shenzhen Kaifa Technology Co. Ltd. having our registered office and Works at 7006, Caitian Rd. Futian Dist. Shenzhen, P.R.C. hereby conforms that M/s Pal Mohan Electronics Pvt. Ltd. having its registered office at 40, DLF Industrial Area, Kirti Nagar, New Delhi-110015 is our Authorized Indian Representative and Mr.Harpreet Singh Sachdeva of M/s Pal Mohan Electronics Pvt. Ltd. is authorized to sign the offer on behalf of Kaifa for RFQ Nos.METER/SPH/09/01 & METER/TPH/09/01 and to deal in following matters :*

- 1. To Market and sell Kaifa brand Meters and Metering Products in various Government /Private Utilities and in Open Market in India.*
- 2. Product Promotional activities for Meters /Metering and other Products.*
- 3. To participate in various Tenders and Enquiries floated by Indian utilities/customers and further Techno-commercial correspondence with them.*
- 4. To provide Technical and after sales service support to BSES.*
- 5. To perform all sort of functional and correspondence activities with the various customers in India.*
- 6. M/s Pal Mohan Electronic Pvt Ltd. is also authorized to co-ordinate for the needed after sales services for the supplies made / effected by*

*M/s Shenzhen Kaifa for the order placed and M/S Pal Mohan Electronic Pvt Ltd. is also fully authorised to quote on behalf of M/s Shenzhen Kaifa if further RFQs/Tenders issued or order/s placed so as to adopt lean management and short, easy decision paths to expedite the processes.”*

This letter authorizes the respondent to act primarily as an agent on behalf of petitioner, to sell meters, other products, to participate in various tenders, inquiries floated by the Indian utilities/customers, to quote in tender, to enter into correspondence, to provide technical and after-sale service support to BSES.

7. Further an undertaking dated 10.10.2009 of the petitioner company given to BSES Rajdhani/Yamuna Power Ltd. is also relevant & it read:-

*“We undertake all the responsibilities and Guarantee for supply of Quality ISI marked Static Meters as per Tender Specs for 'Kaifa Make-Meters' to be imported and supplied by Pal Mohan in case of placement of Order against the above said Tender on M/s Pal Mohan.*

*We also hereby undertake to supply PCBAs, critical components/ meter kit in SKD for the assembly of meters in case of placement of Order for 'Pal Mohan-Make' Assembled Meters on M/s Pal Mohan. The Meters Assembled, Tested and supplied by M/s Pal Mohan shall meet the Quality and Supply Requirement of International standards .*

*M/s Pal Mohan, are regular Meters suppliers to various Electricity Boards/Utilities such as NESCO, WESCO, SOUTHCO-Orissa, Maharashtra State Electricity Distribution Co. Ltd., JdVVNL-Jodhpur, KESCO-Kanpur etc*

*having supplied more than 10 Lacs Meters assembled under our guidance, control and guarantee by importing Critical Components such as PCBA's etc from us.*

*Though our Partner M/s Pal Mohan are well equipped and have all the necessary infrastructure to assemble, calibrate and Test the Meters, wherever necessary we ensure and provide our complete support for automated tools and fixtures, Calibration Setups, validation & verification equipment, Test Benches Quality Checks, Quality Audit equipments/procedures etc and undertake further equipment as necessary will be further added and maintained to produce Quality Output.*

*We further confirm that:*

*I. All the other key components of Meters such as CT's, Shunt and appropriate Mechanical Part will be approved and or supplied by us.*

*II. Necessary Technical support relative to Assembly, Testing, Calibration, Quality Control Systems, Process Standardization shall in strict guidance and under our control to maintain the at par/better quality standards.*

*This undertaking shall be valid and binding on us upto and including the execution and guarantee period of the product supplied against placement of purchase order.”*

The undertaking clarifies the air that the supply to be made to BSES by the respondent was under the guidance, control, guarantee of the petitioner and it rather refer to the respondent as it partner.

8. To further his argument the learned senior counsel also referred to an email dated 3<sup>rd</sup> May, 2015 of the respondent and it read as under:

*“6. Further let me refresh/remind you about how the quotation was arrived for this project. We were only acting merely as a facilitator for this order, as BSES had expressed their inability to place direct order on Kaifa in USD, as was being done in the past and considering the prevailing market price, the back calculation was done and we were advised by Kaifa to quote the said price to customer although we were not even getting our commission equivalent in it. However, we still quoted the said prices to end customer as advised and on behalf of Kaifa and have suffered immensely in execution of this order.*

*7. The rework report have been shared regularly and the rework material is dispatched from Kaifa accordingly, rather Robin has been continuously in touch and regularly keeps following/reminding for the rework material. Fresh raw material is sent after consumption details have been shared and also considering the field rejection notice sent from end-customer directly to Kaifa and with CC to us.*

*8. Request you to kindly plan to visit Mumbai ASAP, so we can jointly visit and pursue BSES top management to release the withheld payments.*

*9. Once again we request you to kindly give us the final account statement after considering the payments withheld by BSES & accounting-for the debit notes issued by us at our 3-4 Year old negotiated RMA rates for STB & Meters. During the meeting you had confirmed that you shall verify our debit note (quantities) and confirm the credit of same by the end of April, which you would have finished by now.”*

This email show the respondent was not an independent purchaser but was a facilitator appointed by the petitioner to sell its products to

BSES and there were issues (a) qua quoting less prices to BSES thereby reducing the commission of the respondent; (b) the withholding of payments by BSES in view of field rejection notices and (c) request made to petitioner to send its representatives to India to hold tripartite talks to enable BSES to release the withheld payments. In this e-mail the respondent urged the petitioner to send a final account statement after considering the payments withheld by the BSES and after accounting for the debit notes send by the respondent. Hence in May' 2015 itself the respondent raised claim for debit notes and of withholding of payments by BSES due to faulty meters supplied by the petitioner. This email was sent prior to sending of the statutory notice dated 04.08.2015 by the petitioner.

9. The undertaking dated 10.10.2009 above coupled with an e-mail dated 3<sup>rd</sup> May, 2015 send prior to the statutory notice, wherein the respondent confirmed of acting as a facilitator of the petitioner quoting prices on behalf of the petitioner even at the risk of getting lesser commission, requesting the petitioner to visit India to sort out issues with BSES qua quality etc; and of withholding of payments by BSES and to give credit for debit notes on such account do raise a bonafide dispute.

10. The case put forth by the petitioner of a seller and a buyer is sealed by the documents above and relied upon by the respondent. These three documents are not denied by the petitioner in its rejoinder. Annexure R-6 filed by the respondent gives a detail of debit notes since January, 2013 raised by the respondents on expenses incurred for petitioner qua custom



duty, octra charges, testing charges, legal expenses etc. and all this is mentioned in its e-mail dated 3.5.2015 prior to statutory notice.

One may say or assume that debit notes may be created and needs to be ignored but admittedly this email was never answered by the petitioner. Moreover the petitioner though heavily relied upon reconciliation of accounts-Annexure P5 but admittedly it was never signed on behalf of respondent. It is rather strange to note that prior to issuing the statutory notice not a single demand was raised upon the respondent or is filed by the petitioner. Rather its statutory notice is also based upon its own reconciliation of account, admittedly not signed/ or admitted by the respondent. The statutory notice also do not speak of email dated 03.05.2015 send by the respondent.

11. Hence the petitioner has concealed of its having principal-agent like relationship with the respondent; and it failed to disclose of its authorization letter dated 07.07.2009; its undertaking dated 10.10.2009 or the email dated 03.05.2015 of the respondent. It was its foremost duty to bring these facts on record. Though the petitioner time and again has alleged the respondent having received 70% of the payments from BSES by the year 2012 and since parties had back to back arrangement, such amount was released to the petitioner, however the petitioner in its petition did not assert if the respondent had actually received remaining 30% of its payments from BSES and is purely silent on this issue and whereas the respondent has denied having received such payments. Hence even if one assumes of back to back arrangements between the parties as alleged by the petitioner, then also there is no clarity qua

receipt of 30% payments from BSES by the respondent. The petitioner merely assumes that the respondent had received such payments but whereas the respondent denies it even in its email dated 03.05.2015. The petitioner also failed to disclose that it transacted through the respondent with other companies too viz Reliance, Maharashtra State Electricity Board, BSES and Big TV for set top boxes. The petitioner did not disclose the disputes qua its delivery and quality issues with other clients – Reliance, MSEDCL, probably for the reason it was not thought to be relevant.

12. Thus, where admittedly the parties have been dealing with each other since long; giving credits for discounts/debit notes raised from time to time; and where the respondent company alleges to be a facilitator; selling goods at the rates quoted by the petitioner, under its control and guidance and where 30% of the payment is allegedly withheld by BSES because of quality issues in the product supplied by petitioner and where reconciliation is not admitted; such allegations/counter allegations prima facie require evidence and cannot be looked into in summary proceedings. The respondent's failure to reply to statutory notice in these circumstances would not go against the respondent per *Fortune Metals Ltd. Vs. Messrs Kanwar Enterprises Pvt. Ltd.* Co.Pet. 425/2013 decided on 23<sup>rd</sup> February, 2015 wherein the court observed:-

*“21. Further, as regards the position of counsel that the respondent's denial to the petitioner's notice of winding up is a mere bald denial, and therefore, either it should be taken as an admission; or, in any case, any specific defence raised later on in response to the winding up*

*petition filed thereafter, should be considered as an, “afterthought”, and a, “sham defence”, because he had failed to raise it in his reply to the notice, is entirely untenable for the following reasons; - Firstly, because even if a notice of winding up does not elicit any response whatsoever, it is not taken to automatically amount to an admission of the debt, disbarring the respondent from setting down all material particulars in his reply to defend the winding up petition. If a defence raised to the winding up petition, cannot be said to be a sham on the sole ground that no reply at all was given by the respondent to the notice of winding up, then surely, a similar defence cannot be dismissed as a sham on the mere ground that a bald denial was given in reply to an equally bald notice of winding up.”*

13. No doubt a winding up petition could be maintainable if based on accounts between the parties and also if backed by an acknowledgment of debt or admission of liability, but where relations between the parties; the mode of transactions between them and the amount due are disputed, the respondent company could not be directed to be wound up in such circumstance(s).

14. For reasons aforesaid the petition and pending application is dismissed.

15. No order as to costs.

**YOGESH KHANNA, J**

**AUGUST 11, 2017**  
**VLD**