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

COMPANY PETITION NO. 526 OF 2016

EPCOS India Private Limited .. Petitioner
Vs.
Herodex Power Systems Private Limited .. Respondent

Mr.Rohan Rajadhyaksha a/w. Mr.Vivek Shetty, Ms. Cheryl Fernandes and Mr.Pranay Chitale I/b AZB and Partners for petitoner.

Mr.Vikram Sathaye a/w. Mr.Sayeed Mutani I/b Mutani and Co. for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 26TH JUNE 2018

P.C.

1 The petition is filed for winding up respondent company - Herodex Power Systems Private Limited (the company) on the ground that the company is unable to pay its debts, is commercially insolvent and requires to be wound up.

2 The facts in this case are rather complicated. Petitioner is claiming an amount of Rs.12,05,50,411/- due and payable as on December 29, 2015. Petitioner is a company carrying on business, *inter-alia*, of design, manufacturing and selling of capacitor, contactor, controller etc. The company is in the business of servicing, installations, repairs, manufacturing, trading in electrical, electronics, telecommunications and energy saving equipments, mechanical, civil and associated services.

3 On or about January 8, 2011, the Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) issued a notice inviting tenders for supply, installation, testing, commissioning, operation and maintenance of automatic power factor correction panels (APFC panels) and associated material for dynamic reactive power compensation system in various circles within the State of Tamil Nadu. As per the terms of the tender, period of the contract was for 7 years from the date of commissioning of the last batch of the material.

4 On February 24, 2012, petitioner and the company entered into a Memorandum of Understanding (MOU) so as to jointly bid as a consortium for the tender issued by TANGEDCO. This was followed by an Agreement dated January 10, 2013. The relevant clauses under the agreement are clauses, 10, 11, 12, 13 and 14 which read as under :-

> *(10) Arranging to give a written irrevocable letter to TANGEDCO, instructing and authorizing TANGEDCO to make all remittances for the supplies against this tender to a designated Escrow account to be opened with Citibank Mumbai. Further agree to get approval of the format of the letter from EPCOS before giving this letter and arrange to give copy of the acknowledgement confirming receipt of the letter by TANGEDCO. Also arrange to ensure that all remittances from this tender is deposited in the ESCROW account indicated in clause 11.*
>
> *(11) Opening of Escrow Account with CITIBANK, Mumbai branch and arranging to authorize CITIBANK, MUMBAI*

irrevocably to remit 41.22%age of all remittances received from TANGEDCO from time to time, till the total amount remitted reaches Rs.26,11,78,039.00 (which represents the payment of basic value of material supplied by EPCOS) to CITIBANK account No.15158018 of EPCOS INDIA PVT. LTD. Balance amount of 58.78% of each remittance should be transfer to Herodex account No.1368261051443 at Canara bank, Satpur Branch, Nashik-07. Any changes from time to time, in contract with TANGEDCO will be suitably informed to CITIBANK for corresponding changes, in the ESCROW arrangement by means of supplementary joint agreement.

(12) Arranging to pay balance amount towards taxes/duties amounting to Rs.6,42,31,271.42 billed by EPCOS out of the total invoice value in three equal monthly installments commencing from April 2014 through the above mentioned ESCROW account. To pay interest @ 10% per annum on total amount of Taxes and Duties and shall be calculated on bill to bill basis from the date of supply to be paid separately by cheque on submission of debit note by EPCOS by July 2014.

(13) Further CITIBANK hereby authorized to stop remittances to EPCOS after remittance of total amount indicated in clause 11 and 2 above of Rs.32,54,09,310.42

Any changes in the total amount occurred due to variation in the qty of supply and any changes in amount due to change in the Taxes and Duties, shall be brought to the notice of CITIBANK as agreed & confirmed by both the parties jointly and necessary effect shall be given.

After remittance of the above indicated total amount, HPSPL is at liberty to close this ESCROW account.

(14) Arranging to pay Rs.65 lacs, plus applicable taxes to EPCOS towards design and development fees in the month of March 2014."

5 As per the agreement between petitioner and the company, the consortium of petitioner and the company appointed the company as its representative to exercise all or any of powers to be executed on behalf of

the consortium. The consortium submitted the bid to TANGENDCO and on June 2, 2012, TANGEDCO issued a letter of acceptance in favour of the company whereby the value of the proposed contract was Rs.100,13,10,165/-. Thereafter, the company placed three purchase orders on petitioner for executing the project. The first purchase order dated June 24, 2013 was for Rs.26,11,77,495/- plus taxes and duties and the second purchase order was for Rs.7,98,756/- plus taxes and duties on similar terms of payment to that of the first purchase order. The third purchase order was for Rs.1,27,41,600/- plus taxes and duties. The payment terms under the first two purchase orders was the basic value excluding taxes and duties on back to back basis (i.e., on receipt of payment from TANGEDCO at 41.22%) to be paid through Escrow to be opened with CITIBANK and the balance amount towards taxes and duties and unpaid basic amount to be paid in three equal monthly installments starting from April 2014 through the escrow account. The third purchase order was to be paid within 120 days' clean credit. Petitioner supplied various equipments/components to the company as per the purchase orders and raised three invoices for Rs..31,76,83,512/-; Rs.9,83,524/- and Rs.1,58,10,733/-, respectively.

6 In the meantime, on May 17, 2013, an Escrow Agreement was

executed by and between the company, petitioner and the CITIBANK. The TANGEDCO was issuing cheques in favour of the company and not directly remitting into the aforesaid ESCOW account but all these cheques were being deposited by the company into the escrow account.

7 Admittedly, the company, by a letter dated June 18, 2014, informed petitioner that the company is being saddled with the liquidated damages deducted by TANGEDCO of approximately Rs.3,30,00,000/-. It is the case of petitioner that the company wrongfully attributed the same to petitioner and wrongly alleged that petitioner delayed in making supply of goods.

8 Sometime in July 2014, at the request of petitioner, petitioner agreed to company retaining Rs.4,00,00,000/- that was expected from TANGEDCO instead of depositing the same in the escrow account. In view of the assurance from the company that petitioner's share of 41.22% of Rs.4,00,00,000/- will be paid over to petitioner and/or next remittance to be made to the TANGEDCO, petitioner agreed for the company to retain the remittance of Rs.4,00,00,000/-. It is the case of petitioner that the company did not honour its commitment to pay this 41.22% from the subsequent remittance received by the company from TANGEDCO from time to time. At that stage, the amount payable to petitioner was Rs.2,27,39,721/-. The company issued three cheques to petitioner

aggregating to an amount of Rs.2,27,39,721/- with instructions to deposit the cheques only after being instructed/informed by the company to deposit the same. It is stated that the company informed petitioner that the company is facing financial problems and hence petitioner was instructed to wait to deposit the cheques. As the validity of the cheques was coming to an end, the cheques were replaced with fresh cheques with a fresh request not to deposit those cheques unless instructed by the company. It is also stated that there were other dues payable by the company to petitioner which are admitted liabilities and the company was not making those payments also. Petitioner, through its advocates caused a statutory notice dated 29th December 2015 issued to company.

9 The company has replied to this statutory notice. The stand of the company basically is that TANGEDCO had issued work orders to the consortium and if there was any penalty imposed by TANGEDCO, it would fall both on petitioner and the company. Mr. Rajadhyaksha submitted that the role of petitioner and the company in the consortium were totally different and that could be separated. Mr.Rajadhyaksha submitted that there can be no delay that could be attributable to petitioner perhaps it is also arrangement between petitioner and the company but so far as TANGEDCO is concerned, a common work order has been issued to the company and as part of the work order, petitioner was to supply certain

items.

10 It is stated that TANGEDCO has already fined, as on 18th June 2014, the company to the tune of Rs.3,30,00,000/-. It is the company's case that the loss caused is only because of non-performance and delays by petitioner for not performing their part of the contract within the stipulated time period. It is also stated that petitioner is liable to make good this amount of Rs.3,30,00,000/-. Therefore, I cannot brush aside the defence of the company is moonshine or bogus. In fact in the letter dated 3rd July 2014, when petitioner agreed to the company retaining the entire 100%, petitioner itself has stated do not take it as penalty.................". Therefore, even way-back in July 2012, there were some discussions on penalty by TANGEDCO going on. Hence, I cannot conclude that the defence raised as moonshine and bogus.

11 It is also alleged in the reply to the statutory notice that the project is to the extent of Rs.100 crores and if in future, TANGEDCO is going to fasten more penalties on the company before completion of the project, the company will have no option but to claim from petitioner.

These are disputable questions of fact which this Court cannot go into under Section 433 and 434 of the Companies Act, 1956. At the same time, it should be noted that even after the statutory notice was issued and even after the petition was filed, company has made certain payments to petitioner through the escrow account maintained. The company has been deposing the amounts in the escrow account. Shri Rajadhyaksha stated that the company has penalized TANGEDCO when TANGEDCO accused the company of causing delay and therefore as submitted by Mr.Rajadhyaksha, the company itself admits that petitioner was not at fault.

12 In my view, if TANGEDCO raises an issue and penalized the company, possibly the company will be held liable. Again these are questions which cannot be gone into in a winding up petition.

13 In these circumstances, petition dismissed with no order as to costs.

(K.R. SHRIRAM, J.)