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

APPEAL (L) NO. 497 OF 2018
WITH
NOTICE OF MOTION (L) NO. 1186 OF 2018
AND
NOTICE OF MOTION (L) NO. 1187 OF 2018
IN
COMPANY APPLICATION NO. 261 OF 2018
IN
COMPANY PETITION NO. 756 OF 2014

Oil and Natural Gas Corporation … Appellant
V/s.
Axis Bank Ltd. & Ors. … Respondent

Mr. S.U. Kamdar, Senior Counsel with Mr. S.P. Bharti for the Appellant / Applicant.
Mr. Bhalchandra Palav with Ms. Shreya Jha I/b M/s. Cyril Amarchand Mangaldas for the Respondent Nos. 1 and 2.

CORAM: B.R. GAVAI, &
RIYAZ I. CHAGLA, JJ.
DATE: 6TH DECEMBER, 2018.

ORAL JUDGMENT (Per Gavai,J.)

1. This Appeal challenges an order dated 26th April, 2018 passed by the learned Company Judge (S.C. Gupte,J.) in Company Application (L) No. 86 of 2018 in Company Petition No. 756 of 2014.

2. One GOL Offshore Ltd was awarded a contract for laying down sub-sea pipelines by the Oil and Natural Gas Company Ltd. (hereinafter for short “ONGC”). It appears that the Respondent

Axis Bank as well as I.C.I.C.I. bank had given performance guarantees for completion of the work by GOL Offshore Ltd in favour of the ONGC.

3. It appears that the Export and Import Bank of India which had to recover past dues against the said GOL Offshore Ltd. Filed a Company Petition No. 756 of 2014. In the said Company Petition, the learned Company Judge appointed the Official Liquidator vide order dated 6th March, 2017 to take charge of the assets of the Company and by a further order dated 4th December, 2017 the company was directed to be wound up.

4. Since substantial work of the said contract awarded by ONGC in favour of GOL Offshore Ltd was completed and only a small part of work was remaining, and since on account of non-completion of the project, Axis Bank and ICICI bank were required to continue their performance guarantees and since there was also a threat for encashment of said bank guarantees, Axis Bank and ICICI Bank had filed application before learned Company Judge for directions. Certain directions were issued by the learned Company Judge vide orders dated 23rd March, 2018 and 13th March, 2018, whereby the Official Liquidator was directed to hold meetings with ONGC and also with some of the sub-contractors

engaged by the Company in liquidation, for carrying out the remaining contract work of Respondent No.2. The meetings were also directed to be held with the ex-directors of the Company in liquidation, so as to assess the possibilities of expeditiously completing the remaining work within the framework of the original contract. It appears that in the said meeting the sub-contractors had communicated to the Official Liquidator that unless the past dues are paid, they were not in position to commence and complete the balance work.

5. This situation was recorded by the learned Company Judge, in his order dated 19th April, 2018. The learned Company Judge also recorded that the Official Liquidator would require about a week's time to communicate the exact position of outstanding claims found due in favour of the sub-contractors engaged by the Company in liquidation, for the ONGC contract. The learned Company Judge had issued various directions to all the parties including ONGC to communicate to the Court, the exact amount of outstanding payable by the Company in liquidation towards the pending project. The information was also directed to be communicated to the Official Liquidator beforehand, so as to enable the liquidator to take appropriate instructions and formulate his response. This Court also observed that on the next date, it

would consider as to whether the balance work of the contract can be assigned either to the sub-contractors or any other outside agencies that may be identified by Respondent No.2 – ONGC.

6. The matter was again listed before the learned Company Judge on 26th April, 2018. The learned Company Judge in his order passed on the said date observed that under the orders passed by the Company Judge from time to time, the parties including Respondent No.2 – ONGC , the official liquidator and the sub-contractors engaged by the Company in liquidation for the contract work, as well as ex-directors of the company in liquidation, have made several attempts to work out modalities for completion of the ongoing project. The Court observed that the project was of vital importance for the ONGC.

7. The learned Company Judge in his order has observed that the ex-directors of the Company in liquidation, have identified M/s. Mathew Associates Hook-UP and Weld Services (hereinafter for short “Mathews”) to act as Project Management Consultants (hereinafter for short “PMC”) for carrying out the balance work. The Court further observed that the agency was also acceptable to ONGC. The agency had addressed a communication to the Official Liquidator on 23rd April, 2018 identifying *inter alia* the

various punch points for execution of the balance work. The said Mathews has offered to provide all site assistance with the requisite skilled manpower and tools and tackles for attending to these punch points and ensure formal closure of the project through CA/TPI/ONGC. It had estimated a tentative schedule of 5-6 months for completing the entire project.

8. The perusal of the order would further reveal that the ex-directors of the Company in liquidation, had also addressed a letter to the Official Liquidator, communicating the status of the unfinished ONGC project and the procedure for completion of all pending jobs. The communication had also enclosed two outstanding lists, i.e. one of the names and descriptions of vendors and related works and the other of the outstanding amounts payable to the various vendors and other pending costs and time implications for completion of the balance project.

9. After considering all the material placed before the learned Company Judge by the official liquidator, the learned Judge found that there is an outstanding amount of about Rs.16.88 Crores payable to the various vendors of the Company in liquidation, towards the ONGC project. The Court found that if the vendors were paid 75% of their outstanding payment upfront, they can take

up the balance work and complete the same in accordance with the project specifications. It was found that the ONGC was to pay an amount in the region of Rs.30 Crores, to the Company in liquidation towards the project. The Court further observed that as indicated by Mathews, the project can be completed within a period of six months at an estimated cost of about Rs.3,35,94,440/- plus the project management cost of Rs.91,50,000/-.

10. Paragraph 4 of the order passed by the learned Company Judge would reveal that though the learned counsel appearing on behalf of the Respondent No.2 – ONGC was in broad agreement with the proposal, but had expressed apprehension that since amounts have to be paid to the various vendors with a view to enable them to take up and complete the balance work, this will be in the nature of advance payment and therefore requested that ONGC may be permitted to charge interest in accordance with its prevailing policy and adjust the same towards the final amount payable to the vendors or the company in liquidation. While considering the aforesaid objection, the learned Company Judge observed that, the payment is directed to be made by ONGC as part of its past dues and not as an advance payment. The learned company Judge, therefore, specifically observed that there is no

question of ONGC charging any interest towards amount paid under the orders of this Court.

11. In this premises and taking into consideration the positive response of all stakeholders including ONGC, to the arrangement proposed, the learned Company Judge issued the following directions:-

> ***6 In the light of what is discussed above and the positive response of all stakeholders to the arrangement proposed, the following order is passed :-***
>
> ***(i) M/s Mathew Associates Hook-Up & Weld Services are appointed as Project Management Consultants for completion of the balance project of ONGC under their contract with the company in liquidation;***
>
> ***(ii) ONGC shall pay an amount of Rs.12.66 crores towards 75 per cent of outstanding dues of the vendors as indicated in Appendix-'A' to the communication of P.C. Kapoor, Ex-Chairman of the company in liquidation, dated 24 April 2018;***
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> ***(iii) These amounts shall be paid to M/s Mathew Associates Hook-UP & Weld Services, identified to act as Project Management Consultant, who in turn would pay to the***

vendors named in Appendix-'B' to the communication dated 24 April 2018 and proportionate to the respective outstandings indicated against their names;

(iv) Immediately after payment of these amounts, the individual vendors shall proceed with the balance work of the project and complete the same in accordance with over all directions and under the supervision of Mathew Associates Hook-Up & Weld Services;

(v) Further dues of the vendors towards the completion of the balance work as well as towards 25 per cent of their past dues shall be paid only after the particular project work to the account of the individual vendor is accomplished by such vendor. Such payment shall be made by ONGC upon instructions in that behalf by the Official Liquidator. The Official Liquidator in turn shall certify such payment after seeking appropriate instructions from Mathew Associates Hook-Up & Weld Services;

(v) The Applicants shall extend the present counter guarantees described in paragraphs 5 and 9 of the affidavit in support of the company application by a further period of six months and communicate such renewal / extension to ONGC as well as the Official Liquidator;

(vi) All payments made by ONGC to Mathew Associates Hook-Up & Weld Services in pursuance of the orders of this Court shall be a complete discharge of the liability owed by ONGC to the company in liquidation to the extent of the amounts paid to Mathew Associates Hook-Up & Weld Services;

(vi) Rajesndra Prasad Mada, the representative of Mathew Associates Hook-Up & Weld Services, gives an undertaking to the Court that the entire balance work, subject to ONGC honouring payments in accordance with this order, shall be completed within a period of six months from today;

(vii) It is made clear that these orders shall be construed as special directions of the Court under Section 537 of the Companies Act, 1956;

(viii) Company Application is disposed of accordingly.

12. It appears that subsequent to the orders passed by the learned Company Judge, a series of correspondence was exchanged between Mathews on one hand and ONGC on the other hand. However, it appears that the amount which was to be paid pursuant to the order dated 26th April, 2018, was not paid to the said Mathews. Therefore, Mathews filed Company Application

(L) No. 598 of 2018. The learned Company Judge (Justice K.R. Shriram) vide order dated 29th October, 2018 directed ONGC to deposit Rs.30 Crores with the Prothonotary and Senior Master of this Court on or before 5th November, 2018. After the said order was passed by the learned Company Judge on 29th October, 2018, the Appellant ONGC filed two Appeals. The Appeal No. 496 of 2018 is filed challenging the order passed by the learned Company Judge (Justice K.R. Shriram,) dated 29th October, 2018, whereas the present Appeal is filed challenging the order passed by the learned Company Judge (Justice S.C.Gupte) dated 26th April, 2018.

13. The Appeals came up before this Court (A.S. Oka and M.S. Sonak, JJ), on 2nd November, 2018. The Division Bench vide order dated 2nd November, 2018 directed that order dated 29th October, 2018 passed by the Company Judge will remain stayed till the next date subject to the appellant depositing with the Prothonotaray and Senior Master a sum of Rs.12.66 Crore within a period of two weeks from today.

14. Both the Appeals were listed before us on 29th November, 2018 and on which date the matter was heard at length. Mr. Kamdar, learned Senior Advocate appearing on behalf of the

Appellant had submitted that, there is no privity of contract between the ONGC and Mathews, the directions issued by the learned Company Judge (S.C.Gupe, J.) vide order dated 26th April, 2018 and learned Company Judge (K.R. Shriram,J) vide order dated 29th October, 2018, were not permissible in law. He submitted that unless there was privity of contract between the Appellant ONGC and Mathews, no such directions could have been issued by the learned Company Judges. He further submitted if Mathews have any claim, the same could be raised only against the Company in liquidation. As such it was submitted that, the orders passed by the learned Company Judges are liable to be quashed and set aside. Shri Kamdar further submitted that the statement which was made by the ONGC before the learned Company Judge on 26th April, 2018 with regard to the dues payable by the ONGC was erroneous and subsequently in the month of September, it was found that no amount was payable by the Respondent No.2 – ONGC to the Company in liquidation. After hearing the parties, we *prima facie* observed that when the order dated 26th April, 2018 was passed by the learned Company Judge, recording the consent of all the stake holders and when the order had the effect of protecting the interest of ONGC as well as the other stake holders, it was improper on the part of ONGC to have challenged the order dated 26th April, 2018. We had also expressed that it was in the interest of all the stake holders that the orders passed by the learned Company Judge dated 26th April, 2018 were given effect to. We had therefore asked Mr. Jain appearing on behalf of the Mathews, as to whether the said Mathews was willing to file an undertaking that it will complete the work within a period of six months as directed by the learned Company Judge in his order dated 26th April, 2018, and also an undertaking that in the event the work was not completed in the six months, he would refund the amount to the ONGC. We had therefore adjourned the matter to the next day so as to enable Mr. Kamdar to take instructions from ONGC as to whether it was willing to accept the order dated 26th April, 2018 and Mr. Jain as to whether Mathews was willing to file an undertaking as aforesaid. We had also made it clear that, in event the ONGC accepts order dated 26th April, 2018, we would set aside the order passed by the learned Company Judge on 29th October, 2018.

15. When the matter was listed on 30th November, 2018, Shri Kamdar submitted that *prima facie* the ONGC was inclined to accept the suggestions of the Court and accept the order dated 26th April, 2018. He submitted that, however, a final call will have to be taken from the higher authorities, who are in Delhi and

therefore, some time is required for the same. He therefore requested for some time, so as to get intimation from higher authorities. Mr. Jain, appearing on behalf of the Mathews stated that Mathews was willing to give an undertaking that if the amount of Rs.12.66 Crores is paid to them, they will comply with all the directions issued by the learned Company Judge on 26th April, 2018. He further stated that, Mathews was also willing to give an undertaking that in the event the contract was not completed within a period of six months, they will refund the entire amount to the ONGC. As such we adjourned the matter for today.

16. Today, when the matter is called out Shri Kamdar stated that he has not been able to take instructions from the ONGC's higher authorities at Delhi and therefore requested to pass the order on merits.

17. We find that, in so far as Appeal No. 497 of 2018 is concerned which challenges the order dated 26th April, 2018, it deserves to be dismissed on the short ground of the conduct of the Appellant ONGC. The said Company is a State owned company and therefore, a “State” within the meaning of Article 12 of the Constitution of India. It cannot approbate and reprobate. The perusal of the record would reveal that the learned Company

Judge and the Official Liquidator have spent their considerable time so that all the parties agree to a workable arrangement which would sufficiently safeguard the interest of ONGC as well as the vendors. The orders passed by the learned Company Judge would reveal, that the said outside agency was also acceptable to the ONGC. Not only that, the amount as was found to be due and payable was also not disputed by the ONGC. The only dispute that was sought to be raised before the learned Company Judge was that the amount, that would be required to be paid by ONGC would be towards the advance payment and as such ONGC claimed that they would be entitled to charge interest for the amount of advance so paid. The said contention was rejected by the learned Company Judge in his order dated 26th April, 2018. The perusal of the material on record would further reveal that, thereafter there has been a series of communication between the Mathews and the ONGC. The perusal of the record would reveal, that the said Mathews was serious in complying with the directions issued by the learned Company Judge in his order dated 26th April, 2018. However, it appears that since for a period of six months the ONGC had not made any payment as per the directions issued by this Court, he filed the Company Application (L) No. 598 of 2018, wherein the learned Company Judge passed the order on 29th October, 2018 directing to deposit an amount of Rs.30 Crores.

18. It appears that at that point of time the ONGC woke up from deep slumber and decided to challenge the order dated 29th October, 2018 as well as the order dated 26th April, 2018. We fail to appreciate the submission made by Shri Kamdar that after the passing of the order dated 26th April, 2018, the Respondent – ONGC found that the amount as directed was not due and payable. The perusal of the order dated 26th April, 2018 would reveal that as a matter of fact ONGC had broadly accepted the arrangement as is directed by the learned Company Judge not only that but in pursuance to the order dated 26th April, 2018, the ONGC has also acted upon the same as is evident from the correspondence exchanged between Mathews and the ONGC. Even prior to order dated 26th April, 2018, the matter was heard on various dates. The liquidator has also conducted various meetings and at no point of time, the ONGC raised an objection to the outstanding dues payable by to the Company in liquidation. Though it is the contention of ONGC that in September, 2018, it found that no dues were payable by it to the Company in liquidation nothing was done by it to point out this to the learned Company Judge. It is for the first time now that the ONGC is trying

to wake up from deep slumber. We are therefore of the considered view that it is not open now to the Appellant – ONGC, to say that what is reflected in the order dated 26th April, 2018 passed by the learned Company Judge is not correct. We are therefore of the considered view, that the Respondent ONGC has challenged the order dated 26th April, 2018, after a long period, only because by subsequent order dated 29th October, 2018, it has been directed to deposit the amount of Rs.30 Crores.

19. It is a different matter that we are inclined to stay the order dated 29th October, 2018, since no reasons are given by the learned Company Judge, as to why he has enhanced the amount from Rs.12.66 Crores to 30 Crores.

20. In pursuance to the oral submission made by Mr. Jain, learned counsel for the Respondent, Mr. Rajendra Prasad Mada, Managing Partner of the Respondent No.1 – Mathews has filed undertaking to this Court. It will be relevant to refer to the said Affidavit-cum-Undertaking.

> ***1. I say that by an order dated 26th April, 2018 passed in Company Application No.261 of 2018 in Company Petition No. 576 of 2014, Respondent No.1 was appointed as Project Management Consultant for completion of the balance project under the contract between Respondent No.2 Company and Appellant.***

2. By the said order Appellant was directed to pay an amount of Rs.12.66 Crores towards 75% of outstanding dues of the vendors. This Hon'ble Court further directed that the said amount shall be paid to Respondent No.1 and who in turn will be to the vendors mentioned in the list.

3. I, the Managing Partner of Mathew Associates Hook-up and Weld Services hereby undertakes to this Hon'ble Court that:-

(a) The entire balance work shall be completed within a period of six months from date of realisation of the aforesaid amount in favour of Respondent No.1.

(b) In the event of any delay in completing the work within a period of six months from the date of realisation of the aforesaid amount in favour of Respondent No.1, Respondent No.1 shall deposit the aforesaid amount in this Hon'ble Court.

4. The Appellants will co-ordinate with Respondent No.1 in completion of the balance project under the contract between Respondent No.2 Company and the Appellant.

21. We are of the considered view that the said undertaking filed by Shri Mada on behalf of Mathews sufficiently takes care of interest of ONGC as well as other stake holders. In that view of the matter, we do not find any merit in the Appeal challenging order dated 26th April, 2018. The Appeal is, therefore, dismissed.

22. The learned Company Judge as well as learned Official Liquidator to take steps in accordance with the order passed by the learned Company Judge dated 26th April, 2018 including the disbursements of payments to Mathews, within a period of one week from today.

23. At this stage Shri Kamdar on behalf of the Respondent ONGC prays for stay of the order passed by this Court. Taking into consideration, the conduct of the ONGC which is a 'State' within the meaning of Article 12 of the Constitution of India, the said prayer is rejected.

24. In view of the dismissal of the Appeal, both Notices of Motion do not survive and are disposed of.

(RIYAZ I. CHAGLA J.) **(B.R. GAVAI,J.)**