HON'BLE SRI JUSTICE S.V.BHATT

Company Application No.98 OF 2018
In
Company Petition No.39 OF 2016

ORDER:

Heard Mr.Challa Subba Rao for applicant, Mr.M.Anil Kumar for 1st respondent and Mr.Nekkanti Rama Rao, party in person/2nd respondent.

Simplex Infrastructures Limited, Simplex House 27, Shakespeare Sarani, Kolkata, a thirty party to Company Petition No.39 of 2016, is the applicant. The application is filed under Rule 9 of the Companies (Court) Rules, 1959 (for short 'the Rules') read with Section 457 (b) of the Companies Act,1956 (for short 'the Act') praying for a direction to the Official Liquidator of 1st respondent company to address letter to NTPC Limited, Rammam Hydro Power Project-III, Post Naya Bazaar, BSNL Building Jorethang, South Sikkim permitting the applicant to continue to execute Rammam Hydro Power Project-III of NTPC Limited by Simplex- Apex Encon (Rammam Barrage) Consortium (for short 'SAE Consortium) and also permitting continued remittance of amounts payable to SAE Consortium for the executed work by a SAE Consortium to the credit of the Current Account No.263305000011 opened by SAE Consortium, with ICICI Bank Limited, Jorethang branch, South Sikkim and to permit operation of the Current Account No. 263305000011 solely by representative of applicant company with the cognizance of Official Liquidator representing the respondent company in liquidation.

The averments in brief are as follows:

The third party/ applicant and M/s,.Apex Encon Projects Private Limited (company in liquidation) on 07.10.2013, constituted SAE Consortium a joint venture for the purpose of participating bidding and executing work floated through under NTPC called Rammam Hydro Power Project-III of NTPC. SAE Consortium is the successful bidder. NTPC through work order No.CS-5602-304 (R2)-9CS-LOA-6209-AMDT No.01 dated 30.09.2014 awarded Civil & HM Works of Barrage Complex and HRT Package in favour of SAE Consortium.

On 31.08.2015, M/s. Shell India Markets Private Limited filed Company Petition No.39 of 2016 under Section 433(e) read with Sections 434(a) ad 439(1) (b) of the Act for winding up of Apex Encon Projects Private Limited, the company in liquidation. On 06.07.2017, Company Petition No.39 of 2016 was heard along with Company Petition No.60 of 2013 filed against Apex Encon Projects Private Limited and having regard to the undisputed and admitted liability of M/s. Apex Encon Projects Private Limited, this Court appointed Official Liquidator as Provisional Liquidator of M/s.Apex Encon Projects Private Limited.

The applicant herein having regard to appointment of Provisional Liquidator, has filed the instant application for the reliefs stated above and in effect take over and assume the total technical, financial and managerial responsibility of executing the work order dated 30.09.2014. The applicant alleges that at the first instance one of the reasons for consortium is to utilise the expertise of Apex Encon Projects and the applicant company intends to execute the work order under the supervision of Expertise of Apex Encon Projects Private Limited who are independently paid remuneration by the SAE Consortium. Apex Encon Projects Private Limited is under tremendous financial stress as on date and in view of appointment of Provisional Liquidator the respondent company cannot contribute resources for executing the project. In reciprocation of acceptance of arrangement as prayed for in the application, SAE Consortium will compensate Apex Encon Projects Private Limited at 2% on each running bill created to Current Account No. 263305000011 to Apex Encon. The applicant and the 2nd respondent agree that this is the understanding between them to tide over the crisis and complete contractual obligation to NTPC. Therefore, applicant states that it is obligated to remit 2% to the account of Apex Encon now maintained by Official Liquidator. The applicant further alleges that when the joint venture agreement was entered into between the applicant and the Apex Encon Projects Private Limited, there was no legal hindrance or incapacity in law or fact. Therefore, joint venture was entered into to contribute financial, technical and managerial skills for executing Rammam Barrage Project. On account of appointment of Provisional Liquidator, a few practical difficulties are presented in execution of work order dated 30.09.2014, for the Apex Encon for all purposes has become an inert company. The Provisional Liquidator now appointed may not be in a position to participate in the execution of the project by stepping into the shoes of Apex Encon.

These difficulties ought not to cause NTPC taking more than one view in the implementation of Rammam Barrage Project which is of national importance. Further the fresh process of tendering etc. if undertaken, by NTPC such process will result in enormous financial escalation to NTPC. In spite of stress and strain now faced by Apex Encon with the appointment of Provisional Liquidator the applicant states it is prepared to assume and accept the entire responsibility in execution of work order dated 30.09.2014 to the satisfaction of NTPC and discharge the contractual obligation to NTPC, without liability to the account of Apex Encon or the Provisional Liquidator. It is submitted both by Managing Director who appeared in person and also by the applicant company that a few of the works involving technical competence are still looked after and executed by the staff of company in liquidation and the staff of company in liquidation are paid from the joint venture. Therefore, by accepting the accommodation or arrangement prayed for by the applicant, the legal proceedings pending in Company Petition No.39 of 2016 can go on and the Apex Encon through Official Liquidator receives a sum in the range of rupees eight to ten crores with the execution and completion of the project by the applicant.

The Official Liquidator filed the report and the report does not dispute most of the averments in the affidavit filed by the applicant. One of the objections raised by the Official Liquidator, needs reference is that Official Liquidator does not have information from Apex Encon to presume that 2% assured profit is the reciprocal obligation accepted by the Apex Encon for entrusting exclusive responsibility to applicant. In other words, the Official Liquidator does not have objection for applicant herein to takeover and discharge the contractual obligations of work order dated 30.09.2014 of SAE Consortium provided the amount receivable by the Apex Encon is paid to the account of Apex Encon Projects Private Limited maintained by Official Liquidator. Taking note of the objections raised by Official Liquidator, the 2nd respondent has been impleaded by this Court vide order dated 23.02.2018 and who has explained the circumstances under which a supplemental agreement was entered into between the applicant and Apex Encon. To the pointed query of Court whether these details are brought to the notice of the Official Liquidator by Apex Encon, it is stated by respondent No.2 that the details will be furnished along with the statement of affairs when filed by the company. Respondent No.2 further submits that with a view to completion of obligations undertaken by the joint venture though the Apex Encon Projects Private Limited is under financial tress, still it is extending cooperation and sharing the know-how in execution of civil work. He submits that the 2% if paid to the account of company in liquidation the same can be distributed by Official Liquidator in accordance with law.

Mr.Challa Subba Rao has substantially reiterated these submissions. Since there is no opposition either from the Official Liquidator or the Ex-Managing Director of Apex Encon, this Court is not referring to all the contentions, but precisely stated the effort of applicant and respondent No.2 is to convince this Court to exercise its jurisdiction under Rule 9 of Rules read with Section 457(b) of the Act. He submits that the applicant i.e. Simplex Infrastructures Limited, Kolkotta assumes the total obligations under work order dated 30.09.2014 and will continue to pay at 2% on every running bill received towards consideration for the work executed by applicant. Further to the credit of the Account No.263305000011, staff of Apex Encon working for applicant are paid salaries. Thus in future for engaging the services of staff of Apex Encon, no financial burden is fastened or claims made before the Official Liquidator. For enabling applicant company to proceed to execute the work order, he submits since Provisional Liquidator is appointed, the Official Liquidator may be directed to address a letter to applicant as well as NTPC on the lines stated above.

Mr.Anil Kumar having regard to the stage of execution of NTPC Project, inability of Official Liquidator to participate in the execution of Rammam Hydro Project, and singular circumstances stated by applicant, does not oppose the prayer. But submits that if there is an agreement between applicant and respondent No.2, without financial burden, civil or criminal on respondent now represented by Official Liquidator, can be considered.

I have perused the record and taken note of submissions of learned counsel appearing for the parties and also the 2nd respondent.

Now the short point for consideration is:

Whether the applicant is entitled for the prayers made in the instant application?

As already noted, the application is filed under Rule 9 of the Rules read with Section 457(b) of the Act.

Rule 9 of the Rules reads as follows:

> ***Rule 9: Inherent powers of Court:***
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> Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or **pass such orders as may be necessary for the ends of justice** or to prevent abuse of the process of the Court.
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> (emphasis added)

One of the submissions of the counsel for applicant is that Rule 9 confers power on company Court which is wide enough to include the present situation. The power is not limited or restricted by the other rules, for issuing directions or orders prayed for in the application to meet the ends of justice or to prevent abuse of process of the Court. In the instant application, the prayer is made to meet the ends of justice.

Mr.Anil Kumar while assisting the Court on the jurisdiction of this Court under Rule 9 of the Rules, has brought to the notice of this Court the decision in Bakemans Industries P. Ltd v. New Cawnpore Flour Mills and others[1] .

Now reverting back to the instant prayers, it is noted the joint venture was awarded construction of Rammam Barrage by NTPC. The work order was awarded as early as 30.09.2014 when there was no restraint on Apex Encon. Under the work order, the applicant, as stated above, by taking the services of expertise of Apex Encon in civil works is executing the project. The applicant herein is now

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[1] (2008) 144 Comp Cas 71 (SC)

assuming the entire responsibility of executing the obligations undertaken by the joint venture constituents without financial implication either to Apex Encon or trouble the Official Liquidator in any manner. It is submitted that without further delay, a project of national importance is required to be undertaken and completed. Apex Encon is paid 2% on each running bill received from NTPC for accepting the prayer now made by applicant.

After taking note of relevant circumstances, this Court is of the view that the request of applicant conforms to the scheme of the Companies Act, for with the appointment of Provisional Liquidator for Apex Encon, the applicant has to execute the work with the consent of Official Liquidator. Direct participation by the Provisional Liquidator has both practical, financial and technical difficulties. Therefore, participation in any manner by Provisional Liquidator as rightly pointed out by Mr.Anil Kumar is ruled out. His concern in the execution of work is that no further problem or liability should be fastened on the office of the Provisional Liquidator or Apex Encon. The contention is noted. The prayer if considered and accepted, this Court is of the view that the prayer is more in the nature of furtherance of justice; prevent loss to applicant; joint venture consisting of Simplex Infrastructures Limited, Kolkata and Apex Encon Projects Private Limited; NTPC. The arrangement facilitates receipt of 2% on running bills to the account of Apex Encon. This Court has weighed all the circumstances for and against the applicant. In over all assessment, the prayer if accepted will outweigh benefits than disadvantages. The refusal of prayer may lead to expected and unexpected results at the hands of NTPC finally resulting delay of execution of Rammam Hydro Power Project or execution with additional financial burden to NTPC. This Court prefers to facilitate discharge of obligations by SAE Consortium through applicant, which would be in the interest of justice and finances. Further the applicant accepts every obligation under the present arrangement. Hence the application is ordered. The Official Liquidator is directed to address letter to NTPC Limited, Rammam Hydro Power Project-III, Post Naya Bazaar, BSNL Building, Jorethang, South Sikkim as well as the applicant permitting execution of work order awarded to SAE Consortium by applicant herein and all the remittances are to be credited to the current account No.263305000011 maintained by SAE Consortium. The applicant-Simplex Infrastructures Limited is directed to send statement of account of Current Account No. 263305000011 once in two months to Official Liquidator along with the details of remittances made at 2% on each running bill. The applicant shall not and will not have any claim for assuming the obligations under the work order against Apex Encon or the office of Provisional Liquidator.

The Company Application is ordered as indicted above.

S.V.BHATT, J

Date: 07.03.2018
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