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

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Date of decision: 10.01.2018

+ CO.PET. 974/2016, CO.APPLs. 3899/2016, 4916/2016, 421/2017,
911/2017 & 1545/2017

LINK ENGINEERS PVT. LTD.

..... Petitioner

Through Mr.Rajesh Talwar and Mr.Abhay
Gupta, Adv.

versus

POWER MACHINES (INDIA) LTD

..... Respondent

Through Mr.Kirti Uppal, Sr.Adv. with
Mr.Alishan Naqvee, Ms.Rupal Bhatia
and Ms.Sneha Siddharth, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. The present petition is filed under Sections 433 (e) 434(a) and 439(a) of the Companies Act, 1956 for winding up of the respondent company.
2. Learned counsel for the petitioner has pointed out that a rejoinder has been filed. However, the record of this court shows no rejoinder has been filed. Learned senior counsel for respondent submits that a copy of the rejoinder filed by the petitioner has been received by the respondent. The petitioner has placed on record a copy of the rejoinder. The same is taken on record. Registry may scan the same and place it on record.
3. The case of the petitioner is that sometime in 2001, NTPC was planning to set up power plants in India to further increase their power generation capacity. The respondent company was planning to expand its base in India. The parties accordingly entered into a consultancy agreement

dated 20.08.2003 whereby the petitioner company agreed to provide professional services for advising the respondent company regarding the NTPC contracts. Clause 4 of the agreement provided a consultancy fee of Rs.12,65,69,100/-. Fifty per cent of the amount was payable in the beginning. This amount has admittedly been received by the petitioner. The dispute pertains to the balance 50 per cent fees. As payments were not received by the petitioner despite the fact that the respondent have received their payments from NTPC, the petitioner issued a demand notice under Section 434 of Companies Act on 05.07.2016 seeking payment of outstanding amount of Rs. 6,32,84,566/-. The respondent did not pay. Hence the present winding up petition.

4. I have heard the learned counsel appearing for the petitioner and learned senior counsel appearing for the respondent.

5. The learned senior counsel has while relying upon the reply of respondent made the following submissions as to why the present petition is liable to be dismissed:

- (i) He firstly pleads that the claim of the petitioner is barred by limitation.
- (ii) He pleads that the cause of action in the present case is said to have arisen some time in 2005 whereas the winding up petition has now been filed in 2016. He relies upon invoice dated 06.09.2013 said to have been raised by the petitioner claiming an amount of Rs.16,96,02,637/- It is pointed out that the amount is claimed along with interest @ 18 per cent per annum w.e.f. June, 2004. It is pleaded that in view of the said demand it is manifest that as per the petitioner, the cause of action arose

in June, 2004 and that is why interest is being claimed from the said date. To support his contention, reliance is also placed on the statutory legal notice sent by the petitioner on 05th July, 2016 where again the petitioner has sought interest @ 18 per cent per annum from 2005 till date on receipt of payment. Learned senior counsel for the respondent has also submitted that it is for the petitioner to file a suit for recovery and take advantage of section 14 of the Limitation Act as per law.

- (iii) It is pleaded that the agreement was valid only upto 2008. Reliance is placed on clause 4 of the agreement which states that the agreement between the parties is valid for a period of 5 years from the date of its signing. It is pleaded that as the agreement itself expired in or around 2008, the claim of the petitioner which is now sought to be pressed in this winding up petition in 2016 is barred by limitation.
- (iv) It is further pleaded that nothing is payable to the petitioner and the dues claimed are disputed. Reliance is placed on the submissions made in the counter affidavit filed by the respondent where a categorical averment has been made that the petitioner have failed to perform their duties in terms of the agreement. Reliance is also placed on communication dated 14.05.2009 sent by the respondent where it is stated that the respondent have denied that any amount is payable. This communication was sent pursuant to a letter dated 01.04.2009 said to have been sent by the petitioner.

6. Learned counsel appearing for the petitioner has vehemently denied the submissions on the issue of limitation. He has relied upon the clause 4 of the agreement between the parties stating that the said clause was quite clear. The balance 50 per cent amount was to be paid on pro-rata against received stage payments. He submits that merely because in some communications or legal notices the interest was sought w.e.f. 2004 or 2005 does not change the date the cause of action would arise. The limitation period would only start running when the balance payment became due and payable by the respondent in terms of the agreement between the parties. As far as the communication dated 14.05.2009 is concerned, the learned counsel states that no such communication was received by the petitioner. He further pleads that in any case, the said communication dated 14.05.2009 is not a categorical rejection of the claim of the petitioner.

7. I may now see the agreement between the parties. Clause 4 of the agreement dated 20.08.2003 as follows:

“4. CONSULTANCY FEE AND PAYMENT

For the services rendered by the consultant under the present Agreement the Customer is to pay a total fee amounting Rs.126,569,100 (one hundred twenty six million five hundred sixty nine thousand one hundred only) payable after the receipt of the money from the final Customer against an invoice submitted by the Consultant. The above amount shall be paid 50 % after the receipt of an advance from the final customer and balance 50 % shall be paid pro-rata against the received stage payments.”

8. Hence, the balance 50 per cent of the amount was to be paid on pro-rata against the receipt of the said payment.

9. Admittedly, the petitioner has sent an invoice dated 06.09.2013 for

the balance 50 per cent amount. While claiming the balance 50 per cent amount of Rs.6.32 crores, the petitioner seeks interest @ 18 per cent per annum from June 2004. A similar stand has been taken by the petitioner while sending the legal notice dated 05.07.2016. The legal notice states that the staggering of the subsequent 50 per cent was only as a commercial courtesy, though all the work and services stood completed on the part of petitioner. It is further pleaded in the legal notice that the petitioner have been repeatedly demanding their balance dues being 50 per cent of the agreed consideration. It is also pleaded that only recently they have come to know that the project has been recently commissioned by the respondent. However, the petitioner again demands payment with interest w.e.f. 2005.

10. It is settled legal position is that limitation is a mixed question of law and fact. The Supreme Court in **Ramesh B.Desai & Ors. v. Bipin Vadilal Mehta & Ors., AIR 2006 SC 3672**/(MANU/SC/2996/2006), held as follows:

“16. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order VII Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two Judge Bench of this Court to which one of us was a member (Ashok Bhan J.) in Civil Appeal No. 4539 of 2003 (Balasaria Construction Pvt. Ltd. v. Hanuman Seva Trust and Ors.) decided on 8.11.2005 and it was held: -

After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an

issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time.

This principle would be equally applicable to a Company Petition. Therefore, unless it becomes apparent from the reading of the Company Petition that the same is barred by limitation the petition cannot be rejected under Order VII Rule 11(d) CPC.”

11. The conduct of the petitioner in repeatedly seeking interest in his communications/legal notice w.e.f. 2004-05 does raise a disputed question of fact as to whether the limitation period for claim of the petitioner would commence from the date as stated by the petitioner i.e. from the date of payments have been received by the respondent from NTPC or from 2004/2005 when the petitioner claims to have completed its task, as stated by the petitioner. It appears that till lately it was never the case of the petitioner that he was to be paid the balance 50% only on receipt of payment from NTPC. In fact, he was never aware of the date of receipts by the respondent from NTPC. It is pursuant to directions of this court to the respondent to place on record details of payment received from NTPC that petitioner has even got knowledge of date of receipt of payments by the respondent from NTPC. The issue of limitation is a disputed fact that requires adjudication. It is not for this court to adjudicate this disputed question of fact in the present proceedings.

12. As far as the second aspect is concerned, namely, the communication of 14.05.2009, the said communication reads as follows:

“We are in receipt of the statement of account vide your above cited letter and our comments according to our books are as

under:

- a) Total amount of Rs.63,284,534 received by the Link Engineers is matching with our books. The balance amount of Rs.63,284,566/- claimed as due is not matching with our books and accordingly nothing more is due and payable, the same being nil. Further, there is no document to support the same.
- b) Payment of USD 150,000 claimed as due for additional services is not correct. We do not find any document or contract in our records to substantiate your alleged claim.
- c) Payment of Rs.126,569,100 against consultancy services for imported portion is also not correct. We do not find any contract with PMIL for the same.

In view thereof, nothing more is due and payable from the Company to Link Engineers.”

13. It is quite clear from perusal of the above communication that firstly it is in reply to the communication dated 01.04.2009 sent by the petitioner. In the letter dated 01.04.2009, the petitioner is again asking for balance 50 per cent dues plus additional amount for other services. Interest has also been sought for the delayed payment. The respondent has categorically denied that the said amount does not match their books of accounts. On a plain reading of the said communication it is manifest that they have disputed the said dues of the petitioner.

14. I may note that it is the stand of the petitioner that they have never received this communication dated 14.05.2009. The dispatch of this communication has been duly stated by the respondent in his counter-affidavit. However, in the rejoinder petitioner have not dealt with the plea of the respondent about non-receipt of this communication. They have hence failed to counter the plea of the respondent disputing its liability made in 2009. Further as the respondent has denied its liability in 2009, the issue of

limitation would also arise as this petition is filed in 2016.

15. The Supreme Court in *Amalgamated Commercial Traders (P.) Ltd. vs. A.C.K. Krishnaswami*, [1965] 35 CompCas 456 (SC) /MANU /SC /0369 /1965, held as follows:

“13. It is well-settled that "a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

16. The Supreme Court in *Madhusudan Gordhandas & Co. vs. Madhu Wollen Industries Pvt. Ltd.*, AIR 1971 SC 2600/ (MANU/ SC/0033 /1971), held as follows:

“21. Two rules are well settled. First if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed.

22. Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the

defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.”

17. In my opinion, the respondent has been able to raise a bona fide dispute about the liability of the respondent to pay the said amount. There is no merit in the present petition. Accordingly, the present petition is dismissed. It is however clarified that nothing said herein will in any manner tantamount to prejudice the case of the petitioner in case the petitioner chooses to start any alternate proceeding as per law.

JANUARY 10, 2018

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JAYANT NATH, J