

(2011) 09 AP CK 0088

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 241 of 2010

Areva T and D India Limited

APPELLANT

Vs

Bheema Cements Limited

RESPONDENT

Date of Decision : 09-09-2011

Acts Referred:

Companies (Court) Rules, 1959 — Rule 95
Companies Act, 1956 — Section 433, 433(I), 434(1), 439

Citation : (2011) 09 AP CK 0088

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Advocate : C.R. Sridharan, for the Appellant; V. Srinivas, for the Respondent

Final Decision : Dismissed

Judgement

B. Seshasayana Reddy, J.—This company petition has been taken out by Areva T & D India Limited u/s 433(e) & (f) and 439(c) of the Companies Act, 1956 read with Rule 95 of the Companies (Court) Rules, 1959 for winding of BHEEMA CEMENTS LIMITED on the ground that it failed to discharge its liability to a tune of Rs. 1, 57, 01, 080/- due and payable to the Petitioner.

2. The case of the Petitioner, in brief, is:

(a) AREVA T & D INDIA LIMITED ("Petitioner") is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at E-48/7, Okhla Industrial Area, Phase-II, New Delhi-110 020, SHEWETH. It is engaged in the business of manufacturing Power Transmission and Distribution Equipments and Solutions. BHEEMA CEMENTS LIMITED (Formerly known as Ckoramaandel Cements Limited) ("Respondent-company") was incorporated on 21-7-1978 with corporate identity No. L26942AP1978PLC002315. It is engaged in production of cement and allied products. The registered office of the Respondent-company is situated at 6-3-652/C/A, Flat No. 5A, 'Kautilya', Amrutha Estates, Besides Medinova, Somajiguda, Hyderabad-500 082, Andhra Pradesh.

2(b) The Respondent-company requested the Petitioner for supply of 1 No. 25/30 MVA, 132/6.9 KVA Transformer for its operations and future expansions to its Plant located at Ramapuram, Nalgonda District, Andhra Pradesh and issued a Purchase Order No. 10800074 dated 26/05/2008 worth of Rs. 1,80,00,000/- plus applicable taxes etcetera. M/s. Entech, Consultant of the Respondent-company conducted routine test on the Transformer and thereupon, the Respondent-company's Project Consultant by e-mail dated 18-12-2008 requested the Petitioner to dispatch the same immediately. The Respondent-company addressed letter dated 19-12-2008 to the Petitioner enclosing road permits to enable the Petitioner to dispatch the Transformer and its accessories. Pursuant to the said letter, the Petitioner dispatched the Transformer and its accessories from its work site at Naini (UP) to the work site of the Respondent-company at Nalgonda on 30-12-2008 through "Premier Transport Ltd." and issued appropriate invoice. The Respondent-company received the said consignments and against the said supply, it made part payments of Rs. 18,00,000/- in the month of May, 2008 and Rs. 15,00,000/- in the month of July 2009 and Rs. 12,50,000/- in the month of March 2010 as against Rs. 2,02,51,080/- leaving a balance of Rs. 1,57,01,080/-.

2(c) The Petitioner made repeated requests to the Respondent-company to clear the outstanding dues. The Respondent-company forwarded e-mail dated 23-4-2009 to the Petitioner requesting for a ledger extract in respect of dues outstanding for the purpose of reconciliation of accounts. In response to the above, the Petitioner sent account extract through e-mail dated 23-4-2009 mentioning that an amount of Rs. 1,84,51,080/- plus taxes is still due and payable by it till then. On persistent follow up by the Petitioner's representations to clear the outstanding dues, the Respondent-company addressed a mail dated 14-9-2009, regretting for the delay caused and cited certain reasons for the delay in clearing the outstanding dues and promised to clear the same by October 15, 2009. The Respondent-company failed to make further payments, despite their assurance under e-mail dated 14-9-2009. Therefore, the Petitioner issued a statutory notice dated 24th September 2010 under the provisions of the Companies Act, 1956 calling upon the Respondent-company to pay the admitted and undisputed outstanding dues of Rs. 1,57,01,080/- along with interest at 18% per annum from the date of default till realization. The Respondent-company received the notice and issued reply dated 25-10-2010. According to the Petitioner, the pleas taken by the Respondent in their reply notice are beyond the scope of the terms of the purchase order dated 26-5-2008. Since the Respondent failed and neglected to pay the outstanding amount of Rs. 1,57,01,080/-, the Respondent-company has become commercially insolvent warranting an order of winding up. Hence, this petition with a prayer stated supra.

3. Notice to the Respondent came to be ordered on 29-10-2010. The Respondent entered appearance and filed counter. The counter affidavit, in brief, is: Supply of Transformer by the Petitioner, pursuant to the purchase order dated 26-5-2008 is

not disputed. The Petitioner abruptly stopped the installation and erection works of the transformer and thereby caused much delay in the expansion programme, which caused great loss and irreparable damage to the Respondent-company. The Petitioner stopped all the works since March, 2009. The Petitioner has not fully erected the transformer and not commissioned the Transformer for service and therefore, the Petitioner is not entitled for the amounts as claimed in the legal notice. In the meeting held on 21-7-2010, the Petitioner agreed and accepted to take back the Transformer and the Petitioner having failed to take back the Transformer got issued legal notice dated 24-9-2010 with all false allegations. Since the Petitioner approached this Court suppressing material facts, the petition is liable to be dismissed. It is also stated in the counter that as the Petitioner issued legal notice dated 26-2-2011 invoking arbitration clause in the Purchase Order, the present petition is premature and has become infructuous.

4. The Petitioner filed reply affidavit. It is stated in the reply affidavit that the purchase order and work order are distinctive and amounts claimed by the Petitioner are relatable to Purchase Order No. 10800074 dated 26-5-2008. The scope of the purchase order was only towards manufacture and supply of the Transformer with specific dimensions, which is suitable for the operations of the Respondent-company. The Respondent company failed to give the particulars of the site address, contact person at the site and the Telephone numbers, so as to enable the Petitioner to make appropriate arrangements to lift/pick up the Transformer. Paragraphs 17 to 19 of the reply affidavit need to be noted and they read thus:

17) In view of the above, the Petitioner has been communicating with the Respondent from time to time regarding the outstanding dues, as there was no proper response, the Petitioner was constrained to address an e-mail dated 12/08/2010, requesting the Respondent to give the particulars of the site address, contact person at the site and the Telephone numbers, so as to enable them (Petitioner) to make appropriate arrangements to lift/pick up the Transformer and also stated that on getting the above details, it (Petitioner) would inform the Respondent for the necessary documentations to be made by them. The copy of the above said e-mail is filed herewith as Annexure P-13.

18) The Respondent has neither cleared the undisputed outstanding nor furnished the particulars as sought for in the above said e-mail. It is submitted that the attitude of the Respondent is only to defraud the Petitioner. The Petitioner has reliably learnt that the Respondent is not in a position to discharge its liability. The other contents of the Paragraph are denied and the Respondent is put to strict proof of the same.

19) As regard Para-6 of the Counter Affidavit, it is true that the Petitioner got issued a legal notice dated 26/02/2011, invoking Clause 14 of the Work Order dated 28/05/2008 (Detailed Design, Engineering, Fabrication, Supply, Erection and Commissioning of 132 KV Switch Yard along with Equipments) which is a

different and independent contract and it is play on the part of the Respondent to prejudice the mind of this Hon"ble Court by mixing up the same with that of the Purchase Order issued for manufacture and supply of the Transformer. The present Company Petition has been filed since the Respondent failed to pay the undisputed admitted amount as against the manufacture and supply of the Transformer, which was received by them. The Respondent is put to strict proof of the same that the Purchase Order (supply of the Transformer) and Work Order (Detailed Design, Engineering, Fabrication, Supply, Erection and Commissioning of 132 KV Switch Yard along with Equipments) are one and same.

5. Heard Learned Counsel appearing for the Petitioner and Learned Counsel appearing for the Respondent.

6. Learned Counsel appearing for the Petitioner submits that the Respondent-company received the Transformer supplied by the Petitioner and admitted its liability to pay the outstanding dues towards the value of the Transformer under e-mail dated 14-9-2009. The Respondent-company having admitted the outstanding dues cannot be permitted to contend that the amount claimed by the Petitioner is a disputed amount. In a way, his contention is that the dispute raised by the Respondent-company with regard to its liability is not sustainable and the defence pleaded by the Respondent company in denying its liability is moonshine. Learned Counsel took me to the e-message emanating from the Respondent, which read as hereunder:

At the outset we thank you very much for the timely supplies made/services rendered. We value your support and gratefully say that your contribution has gone a long way in our cement plant capacity expansion project.

In this context we inform you that it is never our intention to delay payments and put the suppliers in trouble. As we said earlier we value your long standing contribution in the growth of the company to this level. The main reason for the delay has been due to the issues related to the multiple banking documentation. Thus even though the term loan sanctions are in place, unfortunately due to the various procedural wangles between the term lending banks, the disbursement of term loan has not taken place. In the process of sorting out such problems, we have been given by the banks various dates from time to time which in turn our staff has been communicating to you. This is the reason for our multiple failures in clearing the outstanding dues to you. You will appreciate that we too are in a hurry to complete the project at the earliest; otherwise we too face the risk of interest and instalment burden to the term lending banks.

We inform you that from the information we have from the banks the likely date of disbursement of loan will be in the second week of October 2009. We are hopeful that this time there may not be delay beyond the date. Based on this information we will clear your dues from October 15 to the possible extent.

We now request you to mail/courier our statement of account in your books for processing the payment.

We request you to kindly bear with us till such time

7. Learned Counsel would further contend that though the Respondent-company has taken a plea that it made some part payments other than Rs. 45,50,000/-, but it failed to place on record any material to substantiate the same. Therefore, it is to be inferred that the plea taken by the Respondent-company with regard to part payments other than Rs. 45,50,000/- falls to the ground. Learned Counsel by referring the minutes of the meeting dated 21st July 2010 submits that it is the Respondent-company which failed to give the particulars of the site address, contact person at the site and the telephone numbers, so as to enable the Petitioner to make appropriate arrangements to lift/pick up the Transformer and the Respondent-company being a defaulting party cannot be permitted to contend that there is no liability on its part to pay the outstanding amount.

8. In support of his submissions, Learned Counsel placed reliance on the following decisions:

- 1) Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.,
- 1) Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd.,
- 2) IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd.,
- 3) Fibex Inc. Vs. A.B.K. Publications Ltd.,
- 4) Oswal Minerals Vs. Mysore Calcides and Chemicals Pvt. Ltd.,
- 5) Marsons Ltd. Vs. Mundhra Bright Steel
- 6) Prime Century City Developments Pvt. Ltd. v. Ansal Buildwell Limited 2003 (2) ARBLR 127 (Del)
- 7) Ellenbarrie Tea Co. Ltd. Vs. Vivek Kejriwal,
- 8) Vaishali Aromatic (India) (P) Ltd. Vs. Deogiri Nagri Sahakar Bank Ltd.,
- 9) Jayaswals Neco Limited Vs. Rita Machines (India) Ltd.,
- 10) JMD Medicare Ltd. Vs. Siemens Aktiengesellschaft,
- 11) Juneja Chemical Industries (P) Ltd. Vs. Alam Tannery (P) Ltd.,
- 12) Sound Fibre Vs. B.K. Duplex Ltd.,
- 13) Phosphate Chemicals Export Association Inc. v. Southern Petrochemical Industries Corporation Ltd. (2009) 150 Comp Cas 524 (Mad)
- 14) Harmony Multimedia F. Ltd. Vs. Parag Prints P. Ltd.,
- 15) Tata Iron and Steel Company Limited rep. by its Power of Attorney Holder K.E. Srinivasan (Regional Accounts Manager) v. Omega cables Limited (2009) 149 CompCas 457 (Mad)
- 16) Rahul Inter-Dyes (P) Ltd. v. Anand Tissues Ltd. (2010) 99 SCL 80 (All)

9. I do not wish to burden the judgment by referring the propositions of law laid down in all the above-referred cases. In *Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another*, the Supreme Court held as hereunder:

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.

...

The above mentioned decision was later followed by this Court in *Madhusudan Gordhandas and Company v. Madhu Woollen Industries Pvt. Ltd.* (supra). The principles laid down in the above mentioned judgment have again been reiterated by this Court in *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, wherein the Supreme Court held that the defence raised by the Appellant-company was a substantial one and not mere moonshine and had to be finally adjudicated upon on the merits before the appropriate forum. The above mentioned judgments were later followed by the Supreme Court in *Vijay Industries Vs. NATL Technologies Limited*,

The principles laid down in the above mentioned cases indicate that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(I)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability u/s 433(e) read with Section 434(1) (a) of the Companies Act, 1956.

10. The Supreme Court in *IBA Health (I) (P) Ltd.* case (supra), held that if the creditor's debt is bona fide disputed on substantial grounds, the Court should dismiss the winding-up petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt. A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at the stage of winding-up petition is not expected to hold a full trial of the matter. It must decide whether the ground appear to be substantial. The grounds of dispute must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle.

11. Per contra; Learned Counsel appearing for the Respondent-company submits that the Purchase Order and Work order go together and it is the responsibility of the Petitioner to install and commission the Transformer and as the Work is not

completed, the Respondent-company suffered huge loss and ultimately, the Petitioner undertook to take back the Transformer and the Petitioner having failed to lift the Transformer to its place, cannot make a demand of the value of the Transformer. In a way, his contention is that the parties have arrived at a mutual understanding whereunder, the Petitioner agreed to take back the Transformer, in which case there is no obligation on the part of the Respondent-company to pay the amounts demanded by the Petitioner in the legal notice dated 24-9-2010. Learned Counsel would contend that the liability of the Respondent-company towards the Petitioner is not crystallized in view of it's invoking arbitration clause for settlement of the disputes. Learned Counsel refers the notice dated 26-10-2010 issued by the Petitioner invoking the arbitration clause in the work order.

12. It is not in dispute that the Petitioner invoked the arbitration clause in the work order and nominated Shri D.V. Ramana Murthy, a District Judge (retd.) as an arbitrator and sought for consent of the Respondent-company. It is to be noted that there are two indents emanating from the Respondent-company. One is Purchase Order and another is Work Order. Pursuant to the Purchase order, the Petitioner supplied the Transformer. The Respondent-company received the Transformer and the Transformer is presently lying in the premises of the Respondent-company. Indeed the Respondent-company in its e-mail message dated 14-9-2009 accepted the receipt of the Transformer and also its liability to pay the amount. Though the Respondent-company pleaded that it paid some more amount other than Rs. 45,55,000/-, it has not placed any material on record to substantiate the same. As on this day, against the Purchase Order worth of Rs. 1,80,00,000/-, the Respondent-company paid only Rs. 45,55,000/-. Therefore, the amount claimed by the Petitioner cannot be said a disputed amount. Exchange of e-mails between the parties clearly establish that the Respondent-company accepted its liability to pay Rs. 1,57,01,080/- towards the value of the Transformer supplied by the Petitioner. A plea has been taken by the Respondent-company that the Petitioner agreed to take back the Transformer in the meeting held on 21-7-2010 and therefore, there is no obligation on the part of the Respondent-company to pay the balance amount. The Photostat copy of the minutes of the meeting finds place at page No. 9 of the material papers filed along with the counter. It is useful to refer the minutes of the meeting, which read as hereunder:

Minutes of Meeting held at Bheema Cements Ltd., Hyderabad Office on 21st July, 2010 regarding the outstanding payment against supply of 25/30MVA 132/6.9kv Transformer bearing Sl. No. D-8215 on 30th December-2008, by Areva T & D India Limited.

Attended by:

For Areva T & D Limited For Bheema Cements Limited

1. Mr. Aruni Dasgupta 1. Mr. A. Uma Maheswara Rao

1. M/s. Areva has requested M/s. Bheema Cements Ltd. to clear all outstanding of Rs. 15,701, 080/- (Rupees One Crore Fifty Seven Lacs One Thousand and Eighty Only), at the earliest as the same is outstanding for more than last 18 months.

2. M/s. Bheema Cements Ltd., has confirmed to release this outstanding payment within 20th August, 2010 i.e., within 1 month from the date of this Minutes of Meeting.

3. M/s. Areva has pointed out, that in case full payment cannot be made within 20th August, 2010; they shall take back the transformer. M/s. Bheema Cements Ltd., has requested for finalization of such return of transformer with mutual discussion only after 21st August, 2010 and within 30th of August, 2010

For Areva T&D India Limited For Bheema Cements Limited.

13. The Petitioner requested the Respondent-company under e-mail message dated 12-8-2010 to furnish the particulars of the site address, contact person at the site and telephone numbers, so as to enable the Petitioner to lift/pick up the Transformer. Copy of the e-mail message has been placed on record along with reply affidavit. It is not the case of the Respondent company that it responded to e-mail message dated 12-8-2010 and furnished the particulars. As on this day, the Respondent company neither furnished the particulars sought for in the e-mail message dated 12-8-2010 nor paid the value of the Transformer. Therefore, the defence pleaded by the Respondent-company has no substance. The amount claimed by the Petitioner cannot be said to be a disputed amount. The Respondent-company at no point of time prior to responding to the statutory notice, disputed its liability to pay the amount. All through the Respondent-company has been expressing satisfaction with the facility allowed to it and requested extension of time for payment of the amount. Therefore, I am of the view that denial of the liability by the Respondent-company is not bona fide. The failure of the Respondent-company to pay the admitted amount constitutes a prima facie ground for admission of the winding up petition. A feeble contention has been advanced by the Learned Counsel appearing for the Respondent-company that the Petitioner invoked arbitration clause and since the disputes between the parties are required to be resolved by an arbitrator, the company petition filed by the Petitioner seeking an order of winding up is not maintainable.

14. It is well settled that the power to order winding up of a company is contained under the Companies Act and is conferred on the Court. An Arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company, vide decision in Haryana Telecom Limited v. Sterlite Industries India Limited (supra). In view of the settled proposition of law, existence of arbitration clause is not a ground to dismiss the application seeking an order of winding up of the Respondent-company.

15. In view of the above discussion, I find that the Petitioner has made out a prima facie case for admission of the winding up petition against the Respondent-

company. Accordingly, the Company Petition is admitted. The Petitioner shall advertise in all editions of THE HINDU, English daily and ANDHRA JYOTHI, Telugu daily regarding the admission of the company petition.

Post the Company Petition on 24th October 2011 for filing proof of publication.