

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

COMPANY PETITION NO. 249 OF 2011.

M/s. Arun Kumar Engineer and Contractors,
a Proprietary Concern having address at 23/19,
Old Rajinder Nagar, New Delhi-110 060.. ..Petitioner.

vs.

Finolex Cables Limited,
having its registered office at 26-27,
Mumbai-Pune Road,
Pimpri, Pune-411 018. ..Respondent.

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Mr. Rakesh K. Agarwal, for Petitioner.
Mr. Vishal Kanade, a/w. Mr. Himanshu V. Pradhan, i/b. Chitnis & Co.,
for Respondent.

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**CORAM :- ANOOP V. MOHTA, J.
DATE :- 10TH OCTOBER, 2012.**

ORAL JUDGMENT :

Heard Finally.

2. The Petitioner has invoked under section 433 and 434 of the Companies Act, 1956, based upon the invoice so raised in the Petition for Rs. 33,79,914 and 76 paise.

3. The Petitioner was assigned the work of land development (filling of ground) at Rooree, by work order dated 11th August 2006. The time was the essence of the work. The agreed date was 15th September 2006. The Petitioner proceeded accordingly. The bills

were raised from time to time. The Petitioner also received part payment.

4. The work could not be completed in time. Therefore, on same terms and conditions, revised work order dated 13th October 2006 was issued. The work ultimately completed by 26th December 2006. The Petitioner accordingly forwarded its bill on 14th March 2007. The Petitioner received payment of Rs. 26,10,411/- on 6th April 2007. The balance was Rs. 25,87,895/-. The Respondent Company after due negotiations and discussion, admitted the liability to the tune of Rs. 13,05,654/- and disputed the liability to pay balance of Rs. 12,82,241/- by letter dated 22nd October 2007. There is no dispute that the Petitioner received Rs. 13,05,654/- by endorsing it as full and final payment.

5. The issue was raised later on and basically of the deduction of liquidated damages of Rs. 8,49,185/- which the Respondent Company calculated from 15th September 2006, that was the date of the completion of the work as per the first work order.

6. The Petitioner therefore, filed the present Petition, apart from claiming due and payable amount as per the bills, the deducted amount and 24 per cent interest from 14th March 2007. This itself, in my view, cannot be stated to be admitted and/or crystalized amount for the purpose of passing any order under the Company Petition. By treating this amount as due and payable, the demand notice issued and served, by itself, is not sufficient to accept the case of the

Petitioner. In the present case in view of the above facts and circumstances, there is nothing on record to show that the Respondent Company at any point of time agreed and/or accepted the demand so raised. The agreed amount admittedly paid and received by the Petitioner. The rest of the amount so claimed have based upon disputed facts and the interpretation of the land development agreement in-question.

7. The other submission that the invocation of liquidated damage costs was contrary to the agreement as the revised work was awarded in October, though it was based upon the same terms and conditions, the date of completion remained to be 15th September 2006, is also need trial.

8. The justification of awarding the revised contract and the fact that the work was completed in December and the invocation of the liquidated damages by the Respondent Company, is again a matter of evidence.

9. The submission was also made that the Petitioner accepted the amount under pressure and as they were in need of money. The acknowledgment and/or acceptance of the admitted amount, received by the Petitioner towards the full and final settlement concludes the issue for the purpose of winding up petition. Therefore, having one settled the matter, the averment and/or allegations given of coercion and or undue influence just cannot be gone into the Company Petition.

10. I have gone through the various documents and referring to the dates. The claims are beyond limitation even as per the submission of the learned Counsel for the Respondent. At this stage, not inclined to go into the details in view of the above admitted position on record. The Petitioner is at liberty to take the other remedy, if available.

11. So far as the present Petition is concerned, the scope and the purpose of the provisions and as the disputed questions of facts are raised and as the amount is not crystalized and it is difficult to accept the case of the Petitioner that the amount is due and payable on the date of the demand notice and/or as on the date of the filing of the Petition, therefore, there is no case made out by the Petitioner. The Company Petition is dismissed.

12. All points are kept open.

(ANOOP V. MOHTA, J.)