

**IN THE HIGH COURT OF DELHI**

**Company Petition No. 10/2008**

**Judgment reserved on : 20<sup>th</sup> March, 2009**

**Date of decision: 15<sup>th</sup> April, 2009**

Indo Alusys Industries Ltd. ... Petitioner  
through: Mr. Rajesh Banati and Mr. Tarun Walia,  
Advocates

VERSUS

M/s Assotech Contracts (India) Ltd. ....Respondents  
through: Mr. Rakesh Sinha, Advocate

CORAM:

**HON'BLE MS. JUSTICE GITA MITTAL**

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|--------------------------------------------------------------------------|-----|
| 1. Whether reporters of local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not?                                | Yes |
| 3. Whether the judgment should be reported in the Digest?                | Yes |

**GITA MITTAL, J**

1. By this petition under section 433 of the Companies Act, the petitioner seeks winding up of the respondent company for the reason that it is unable to pay its admitted debts.

2. The petitioner was awarded two contracts by the respondent for providing and fixing of powder coated aluminium work for doors and windows ventilators and partitions with extruded built up sections. The contract dated 15<sup>th</sup> of November, 2004 in respect of Windsor Greens, Sector 50 was for a total consideration of Rs.142 lakhs while

the contract dated 20<sup>th</sup> of May, 2004 in respect of the work to be undertaken at the Golf Vista Apartments, Plot No. GH-01, Sector-Alpha II, Greater Noida was for a total consideration of Rs.54 lakhs.

Inasmuch as clauses 7 & 8 of the agreement are relevant for the present consideration, the same deserve to be considered in extenso and reads thus:-

“7. Retention Percentage Security Deposit – 10% on every Bill (subject to maximum of Rs.5.00 lacs).

8. Release of Retention Money – 50% to be released after six months after virtual completion and balance 50% after expiry of 12 months of defect liability period but it can be replaced by Bank Guarantee.”

3. In terms of the contract, the petitioner commenced work and raised several bills from time to time with regard to the work undertaken. It is pointed out that so far as the work at the Golf Vista was concerned, the same was satisfactorily completed on 31<sup>st</sup> May, 2005 while the work at the Windsor Greens was duly completed on 29<sup>th</sup> September, 2005. In terms of clause 7 and 8 noted above, the respondent was entitled to retain 10% of the bill amount subject to a maximum of Rs.5.00 lakhs. So far as the defect liability period is concerned, as per clause 7 of the agreement, in respect of the work at Golf Vista, the period got over on 31<sup>st</sup> May, 2006 while with regard to the Windsor

Greens project, the defect liability period got over on 29<sup>th</sup> September, 2006.

4. The petitioner has claimed that a total amount of Rs.13,63,435/- had been retained by the respondent towards the retention amount in both the contracts. The submission is that upon expiry of the defect liability period, this amount became due and payable to the petitioner.

5. The petitioner has contended that after receipt of three part payments in 2007, an amount of Rs.10,40,326/- remains due and payable which has not been paid to the petitioner despite requests. A statutory notice under section 434 of the Companies Act, 1956 dated 1<sup>st</sup> October, 2007 was, therefore, sent on behalf of the petitioner requiring the respondent to make payment of the amount of Rs. 10,40,326 with interest at the rate of 21% in respect of both the contracts. As the petitioner failed to comply with the notice demand, the petitioner filed the present petition under Section 433 of the Companies Act, 1956.

6. Before this court, the respondent has contended that the petitioner has failed to prove that the respondent was unable to pay its debts. It is further contended that the petitioner delayed execution of the work beyond the contractual stipulation. The submission is that the respondent sent two letters to the petitioner, one being a letter dated 25<sup>th</sup> June, 2007 and a second being the letter

dated 6<sup>th</sup> August, 2007 pointing out defects and deficiencies in the work. Despite the deficiencies having been pointed to the petitioner, the petitioner failed to remove the defects. Learned counsel for the respondent has submitted that the respondent is willing to pay the petitioner in case defects are removed.

It has also been urged that the petitioner has filed a suit for recovery of the amount claimed against the respondent and that such suit being pending, the present petition seeking winding up of the respondent company for non-payment of the same debt is not maintainable.

Reliance has been placed by the respondent on the pronouncement reported at ***AIR 2005 SC 4175 Mediqup Systems pvt. Ltd. vs. Proxima Medical System G.M.B.H. and (1994) 2 Com.LJ 50 (SC) Pradeshiya Industrial and Investment Corpn. Of Uttar Pradesh v. North India petro-Chemical Ltd. & Anr.*** in support of these contentions.

7. I have heard learned counsel for the parties at length. So far as the liability and responsibility of the petitioner is concerned, the same is governed strictly by the terms of the contract. There is no dispute that Clause 7 & 8 governs the defect liability period and clause 8 is restricted to a period of 12 months after expiry of the contract. No dispute has been raised that the petitioner completed the work in respect of

Golf Vista on 31<sup>st</sup> May, 2005 and the defect liability period of twelve months in respect of this contract would have come to an end on or around 31<sup>st</sup> May, 2006. Similarly, so far as the Windsor Greens contract was concerned, it was completed on 29<sup>th</sup> September, 2005 and in terms of clause 9 of the contract, the defect liability period came to an end on 30<sup>th</sup> September, 2006. Not a single deficiency or complaint within a period upto end of May, 2006 or September, 2006 has been pointed out to this court. No letters in this behalf have also been placed on record.

8. Before this court, it is an admitted position that after the expiry of the defect liability period, out of the aforementioned amount, the respondent made part payments of Rs.1,50,000/- on 20<sup>th</sup> March, 2007; Rs.73,109/- on 18<sup>th</sup> May, 2007 and Rs.100000/- on 2<sup>nd</sup> July, 2007. It is also an admitted fact that no dispute of any kind with regard to the work which had been undertaken by the petitioner and discharge of its liability under the contracts was ever raised by the respondent.

9. In order to buttress its case, the respondents have placed on record a copy of a purported notice dated 27<sup>th</sup> June, 2007 issued by Dr.Y.P. Singh, Joint Secretary of the purportedly the residents' association in the Golf Vista Apartments calling upon residents for the first time to indicate defects or problems, if any, in the aluminium doors

and window works installed in the flats. This notice clearly stated that the respondent would be notified accordingly so that the problems could be corrected. The language used in this notice clearly indicates that no problem has been faced or communicated prior thereto by the residents.

10. Such position is also manifested from the tabulation of complaints placed on record by the respondent which were purportedly received by the respondents. Interestingly the first complaint in this tabulation filed by the respondent is dated 15<sup>th</sup> of December, 2007. In any case, merely because the petitioner was required to effect some repairs would not by itself render the entire work undertaken by the respondent as being of poor quality. In any case, the same is not corroborated by any contemporaneous complaint or any communication by the respondents within the contract period which could justify retention of the petitioner's amount.

11. The respondent has also placed copies of the two letters dated 2<sup>nd</sup> June, 2007 and 6<sup>th</sup> August, 2007 on record purporting to raise an issue with regard to quality of work done by the petitioner. These letters have to be examined in this background. On a bare perusal thereof, it is evident that the same are bald, unsupported allegations without any details at all. A vague reference has been made to complaints from members without referring to any previous

communication or any detail with regard to failure of the petitioner to discharge its responsibility. Even otherwise, this letter has been issued almost one year after the defect liability period was over. Blanket and bald allegations without any particulars deserve no credence.

Both communications have been replied by the petitioner on 23<sup>rd</sup> August, 2007 wherein it is pointed out that the flats were handed over to the flat owners against receipt and acknowledgment by them and that they were in satisfactory condition. The petitioner has complained at length in this letter that the plea of defective workmanship is being raised as a bogey to avoid making payment of a lawfully due amount to the petitioner. The respondent was clearly notified that even though the petitioner had no liability to do so under the contract, it was willing to rectify deficiency, if any, in the interest of the project and further business relations and had requested the respondents to provide details of the defects. It has been reiterated that it is only after the expiry of the same when the petitioner started asking for its balance security amount that the respondents started making these kinds of assertions.

These communications from the respondents do not further its case at all.

12. So far as the objection that the petitioner has filed a suit disentitling it to maintain the present petition is

concerned, it is well settled that the right to bring a winding up action is statutorily conferred under Section 433 of the Companies Act, 1956. However, no person has a statutory right to winding up of a company incorporated under the Companies Act, 1956. Action to recover amounts and to winding up of the company are two wholly distinct and independent remedies. It is not necessary that every petition under Section 433 of the Companies Act, 1956 ends up in an order of winding up. Several essential factors as public interest, justice and convenience enter into the consideration before the prayed for order results. The nature of the defence and extent of dispute raised by the respondent also impact adjudication in winding up action. At the same time, limitation for seeking the remedy of recovery against the company continues to run. The two remedies are not alternative remedies. More often than not, as a matter of abundant caution, parties do not wait for final decision in one remedy before invoking the other.

13. I find that a similar issue was raised and decided by this court in a judgment reported at **1998 (45) DRJ 522 Rishi Pal Gupta Vs. S.J. Knitting and Finishing Mills Private Limited**. A similar objection taken by the respondent debtor of the company, was decided thus:-

“It is now well settled law that the remedy of recovery of money through a civil suit is distinct from that of the remedy provided for

winding up of a company for non-payment of its debt under Section 434 of the Companies Act. In the winding up proceedings the final order passed is to wind up the company which is not only beneficial for the petitioner but is also beneficial to all the shareholders, creditors or contributories of the companies. The purpose of filing a recovery suit and a winding up petition are separate and distinct and therefore, even when a civil suit for recovery of a debt is filed, there is no bar for the creditors to file a petition in the Company Court for winding up of the defaulting company. Therefore, in my considered opinion the company petition filed by the petitioner is maintainable.”

14. In view of the above, mere filing of the suit by the petitioner in order to protect its right and by way of abundant caution certainly would not prohibit filing of the winding up petition or preclude the petitioner from maintaining the same.

15. I find that there is not a word of explanation as to why the respondent made the three payments on 20<sup>th</sup> March, 2007, 18<sup>th</sup> March, 2007 and 2<sup>nd</sup> July, 2007 if the work undertaken by the petitioner was so defective so as to entitle the respondent to withhold payment of the balance amount. There is also not a word of explanation as to why the respondents did not write a single letter after the agreement dated 20<sup>th</sup> May, 2004 came into effect and made payment of all amount as were billed by the petitioner without any grievance or complaint.

16. So far as the defence of deficiency in the work of the

petitioner is concerned, the case set up by the respondent does not inspire any confidence. The respondent admits receipt of the statutory notice. It raised no dispute to the contents thereof. No reply was admittedly sent to the notice. The respondent also failed to make payment of the amounts claimed by the petitioner resulting in the filing of the present petition.

The respondent company has made bald and vague allegations in the counter affidavit which are unsupported by any material which would enable this court to hold that the amount was not due or payable to the petitioner.

On taking a comprehensive view of the entire facts, it has to be held that the dispute sought to be raised in answer to the present petition is totally bogus and sham and has been raised only in order to create a semblance of a defence to the present winding up proceedings.

17. So far as the debt and extent of liability is concerned, I find that there is no dispute to the quantification of the amount. The respondent has admitted part payment out of the amount which was retained in terms of Clauses 7 & 8 of the contract as noticed hereinabove. No dispute was raised even in answer to the legal notice dated 1<sup>st</sup> October, 2007. In this background, it has to be held that prima facie an amount of Rs.10,40,326/- is due and payable to the petitioner and the respondent company has neglected to pay

its debt to this extent despite statutory notice. The view I have taken is supported by the principles laid down by the court in **2005 IV AD (Del.) 410 Image Meditech. (P) Ltd. Vs. Jay Rapid Rollers Limited** and **1994 II AD Delhi 471 Shri N.K. Verma Vs. Pushpa Builders Limited**.

18. An issue has been lastly raised that even if the petitioner owed a debt to the respondent, the petitioner has to satisfy that the respondent was not in a position to pay the same. It has been urged that the respondent is ready and willing to pay if defects are removed.

So far as this submission is concerned, the same is completely devoid of legal merit. There is no dispute with regard to relationship as a creditor and a debtor between the petitioner and the respondent.

19. It is well settled that a bogus or a sham dispute, contrived or concocted as a defence for a genuine and bona fide claim by a creditor, is not permitted to be utilised as a defence to a winding up action. It has been held above that there is no substantial defence to the petition. I have also found that a debt is prima facie due and payable by the respondent to the creditor. In this background, the binding principles laid down by the Apex Court in **AIR 2005 SC 4175 Mediqup Systems Private Limited Vs. Promixa Medical System G.M.B.H.** and **(1994) 2 Comp. LJ 50 (SC) Pradeshiya Industrial & Investment Corporation**

**of Uttar Pradesh Vs. North India Petro-Chemical Limited & Arn.** relied upon by the respondent, have no application to the present case.

20. In view of the above, the petition is admitted.

Citation be published in the "Statesman" (English edition) and "Jansatta" (Hindi edition) in accordance with Company (Court) Rules, 1959.

However, publication of the citation and appointment of the provisional liquidator is deferred and one opportunity is given to the respondent company to pay the amount found already due and payable to the petitioner with interest at the rate of 8% per annum with effect from 1<sup>st</sup> October, 2007 when the legal notice was served on the respondent company. The amount be paid within one month failing which the petitioner shall be entitled to publish the citation and apply for appointment of the provisional liquidator.

List for further directions on 20<sup>th</sup> May, 2009.

**(GITA MITTAL)**  
**JUDGE**

April 15, 2009  
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