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

COMPANY PETITION NO. 802 OF 2015

PERMASTEELSIA (INDIA) PVT.LTD ..PETITIONER

Vs

SHETH DEVELOPERS PVT.LTD. ..RESPONDENT.

Mr. Chetan Kapadia i/b A.S. Gautama for Petitioner.
Mr. Vishwajeet P. Sawant a/w Mr. Manish Gitay for Respondent.

CORAM: A.S. GADKARI, J.

DATE: 20 JULY 2017.

P.C.:

1] The present petition under Sections 433(e), 434 read with 439 of the Companies Act, 1956 is for winding up of the respondent-Company namely Sheth Developers Pvt. Ltd.

2] It is the case of the petitioner that, the respondent had issued a work order dated 31.8.2009 in favour of the petitioner for design, fabrication, supply and installation of structural glazing and aluminum works for the proposed projects of the Company comprising of the building known as "Cynergy" at Prabhadevi, Mumbai. The work order stipulates mode of payments at different stages. That the petitioner completed its part of obligation, however, the respondent did not release the last installment of the payment of 5% which was retained by the respondent as the retention amount. The relevant clauses namely Clause Nos.3(iv) and 12 of the work order reads as under:

> **"3. PAYMENT TERMS:**
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> **iv)** 5% retention shall be kept from each R.A. Bill and shall be payable to Contractor upon successful completion of Defects Liability Period or against submission of Bank Guarantee for an equivalent amount valid for a period upto completion of defect liability period.
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> **12. DEFECTS LIABILITY PERIOD:**
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> Defect Liability Period shall be reckoned as 12 months after successful completion & handing over the project. During this period the Contractor has to make good of all the defects of his works with men & materials at his own cost. The Contractor shall execute all such work of repair amendment, reconstruction, rectification and making good of defects & imperfections, shrinkages or other faults as may be pointed out by Project-in-charge during Defect Liability Period. If the Contractor fails to do such rectification work then the Developer shall be entitled to get the job done by other agency at the Contractor's own cost."

It is the further case of the petitioner that the date of completion of the contract/work was 31.5.2011 and in view of the Clause-12 of the work order, the defect liability period of 12 months came to an end on 30.5.2012. As the respondent did not make payment to the petitioner, it issued a statutory notice dated 6.4.2015 to the respondent. The respondent received it and by its reply dated 13.5.2015, disputed the liability on the ground that there were substantial defects in the work and the work carried out by the petitioner was of sub-standard quality.

3] As the respondent did not make payment, the petitioner filed the present petition on 8.5.2015 seeking winding up of the respondent-company. The petition is accepted on 4.8.2015 and in pursuance of the directions issued by the Company Registrar, the petitioner has served the notice of acceptance upon the respondent. After receipt of notice, the respondent has caused its appearance and also filed affidavit-in-reply dated 20.6.2017.

4] Heard the learned Counsel for the Petitioner and the learned Counsel for the Respondent. I have perused the petition and the reply filed by the respondent.

5] Mr. Kapadia, the learned Counsel for the petitioner submitted that, in view of the specific contract between the parties and particularly in terms of clause-12 of the said work order, the defect liability period was for 12 months after successful completion & handing over the project. He submitted that as per the petitioner the date of completion of the project was 31.5.2011 and the period of 12 months of defect liability came to an end on 30.5.2012. He submitted that after the said defect liability period is over, the respondent has no reason to further retain the amount of 5%. That the said amount of 5% is an admitted liability as has been admitted by the respondent in its earlier reply dated 20.11.2013. He submitted that once the respondent admits the liability, and is unable to pay its debts, under Section 434 of the Companies Act, the petitioner therefore is entitled to file the present petition under Section 433(e) of the Companies Act. He submitted that, as the liability to pay the said debts of 5% retention amount is admitted by the respondent, the present petition may be admitted.

Mr. Sawant, the learned Counsel for the respondent submitted that the claim of the petitioner is barred by limitation and with a view to overcome it the present petition is filed. He submitted that since beginning the respondent has consistently intimated the petitioner that the petitioner has carried out sub-standard work and there are substantial defects which are yet to be cured by the petitioner and therefore the respondent has retained the said amount as per the agreement. He further submitted that even in its first reply dated 20.11.2013 to the first statutory notice issued by the petitioner, the respondent has admitted the claim with a covenant that, the respondent will pay the said amount provided the petitioner cures the defects and completes the work. He submitted that on 24.6.2013, a big piece of granite stone which was fixed at the outside of the wall of the Cynergy building at 7th floor, admeasuring 180 mm x 400 mm, fell down on the ground from 7th floor thereby damaging sunshade as well as light fittings. He submitted that this example shows the quality of the work carried out by the petitioner. He further submitted that the respondent has raised bonafide disputes towards the payment of the said retention amount which needs adjudication by leading evidence and in view thereof the present petition may be dismissed.

6] The claim of the petitioner is based on the alleged admission of retention amount of 5% which respondent though liable to pay, did not pay it. The record indicates that during the defect liability period of 12 months, the respondent realized that the work carried out by the petitioner is of sub-standard nature and there are substantial defects. The petitioner therefore issued a letter dated 18.1.2011 (within the said period of 12 months) thereby pointing out the defects in the work carried out by the petitioner. The record further indicates that, since beginning the respondent is consistent with its stand that there are defects in the work completed by the petitioner and work is of sub-standard nature.

7] According to me the defence or dispute so raised by the respondent is bonafide and substantial and the same is not spurious, speculative, illusory or misconceived. The dispute so raised by the respondent is substantial dispute which gives rise for triable issues.

As far as the commercial insolvency of the respondent is concerned, as stated earlier, the respondent has paid about 95% of the contractual amount to the petitioner and only 5% amount i.e. retention amount is outstanding. Thus according to me, the respondent is commercially solvent enough to pay the debts of the petitioner. As stated earlier, the said amount has been retained by the respondent for the defects in work which are to be completed by the petitioner. According to me the dispute so raised by the respondent is bonafide and genuine and the petitioner cannot be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bonafide disputed debt. A useful reference in that behalf can be placed on a decision of the Supreme Court in the case of IBA Health (India) Private Limited Vs. Info-Drive Systems SDN. BHD [(2010) 10 SCC 553]

8] I see no merits in the present petition. The petition is accordingly dismissed.

(A.S. GADKARI, J.)