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

% *Date of decision:11.12.2017*

\+ CO.PET. 936/2015 and CA 3694/2015

S. K. ENGINEERING CO. ..... Petitioner
Through Mr.Sunil Prakash Sharma, Adv.

versus

SIRI RAM SYAL HYDRO POWER PVT. LTD...... Respondent
Through Mr.Samar Bansal, Mr.Kartik Nagarkatti and Ms.Aditi Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This company petition is filed under Sections 433 (e) read with section 434 (1)(a) of the Companies Act, 1956 seeking to wind up the respondent Company.

2. The case of the petitioner is that it entered into an agreement on 20.07.2007 with the respondent for erection of pipes for Horizontal and Vertical works in respect of 1.8 MW Hydro Electric Power Project at Kullu, Himachal Pradesh for Rs. 1,33,00,000/-. On 16.12.2009, a revised contract was entered into. As per the revised terms, Rs.15 lakhs was to be held by the respondent as retention money which was to be released by the respondent to the petitioner after one month from the date of the commissioning.

3. The case of the petitioner is that the said project was commissioned on

23.01.2014. It is urged that in terms of the agreement between the parties dated 16.12.2009, an amount of Rs.15 lakhs remains due and unpaid by the respondent. It is urged that a demand notice was sent to the respondent on 21.07.2014 which came back with the report refused. Thereafter, a notice for winding up was sent to the respondent on 17.03.2015. The respondent company replied to the said notice on 16.04.2015 denying their liability to pay and stated that the petitioner failed to complete the work. Hence, it is prayed that as the respondent is unable to pay its dues and an appropriate order of winding up be passed against the respondent.

4. The respondents have filed their reply. In reply, reliance is placed on correspondence which is said to have been sent to the petitioner. Reliance is placed on a letter dated 12.08.2011 where the respondent is said to have pointed out about the delay in completion of the work and a request was made to the petitioner to send manpower to the site of the project otherwise the respondent Company will claim loss and damages. Similar reliance is also placed on a communication dated 20.03.2012 which is said to have been sent to the petitioner pointing out that the entire contract was to be completed before March 2010 but till date neither the work has been completed nor any effective measures have been take to complete the work. The petitioner was requested to depute labour at site on or before 25.03.2012 and complete the work without any further delay failing which the contract would stand cancelled. Reliance is also placed on a work order dated 15.12.2012 placed on M/s Ganapati Engineering Services for completion of the alleged balance work.

5. I have heard the learned counsel for the parties.

6. Learned counsel for the petitioner has relied upon the reply dated

16.04.2015 sent by the respondent to contend that an admission of unpaid dues of Rs. 15 lakhs still exists. It is also stated that the communications being relied upon by the respondent were never received.

7. I may first look at the legal position. Section 433 and 434 of the Companies Act, 1956 read as follows:-

> "[433. Circumstances in which company may be wound up by court. A company may be wound up by the court,-
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> ......
>
> (e) if the company is unable to pay its debts;
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> ......
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> 434. Company when deemed unable to pay its debts.
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> (1) A company shall be deemed to be unable to pay its debts-
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> (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;
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> ...."

8. In ***Mediquipsystems (P) Ltd. vs. Proxima Medical System GMBH, (2005) 7 SCC 42*** the Supreme Court held as follows:-

> "18. This Court in catena of decisions held that an order under Section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately

> or at a future date and that the inability referred to in the expression 'unable to pay its dues' in Section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realising debts due from a company.
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> 19. The respondent is not a creditor and the appellant is not a debtor in so far as US $ 11000 is concerned. The defence raised by the appellant is a substantial one and not mere moonshine which is to be finally adjudicated upon on merits before the appropriate Forum."

9. Some of the facts here are not in dispute. There was a retention clause in the agreement on account of which Rs.15 lakhs was payable to the petitioner on commissioning of the project. The project has been commissioned on 23.01.2014. The retention amount of Rs. 15 lakhs was retained by the respondent.

10. The respondent has taken a stand that the said amount of retention money is not payable on account of the failure of the petitioner to complete the contract. It is urged that on account of the failure, the respondent had to engage the services of M/s. Ganapati Engineering Services on 15.12.2012. Hence, it is stated that no amount is payable by the respondent. Reliance is also placed on the reply sent to the statutory legal notice which document has been admittedly received by the petitioner where it has been pointed out by the respondent that the petitioner has failed to complete the work and is not entitled to the amount that has been claimed.

11. The case of the respondent to support this contention that the work was not complete is based on the communications sent to the petitioner,

namely, communications dated 12.08.2011, 20.03.2012 and 07.09.2012 where it has been clearly pointed out that the petitioner has not completed the work.

12. I may look at the rejoinder filed by the petitioner. It is no doubt that in the reply to the preliminary objections it is denied that the petitioner had failed to execute the work or has received the communications dated 02.09.2009, 09.10.2009, 12.08.2011, 20.03.2012 and 07.09.2012. However, I cannot help noticing that other than a mere bald denial, there is no attempt to explain as to how and when the petitioner completed the work. On completion of the work in all contracts normally a completion certificate or other document is issued by the architect or the engineer in charge indicating that the work has been completed. No such document or any other like document is available on record to support the contention of the petitioner that the work was completed to the satisfaction of the concerned architect/official of the respondent. In the absence of any such document on record, keeping in view the nature of the present proceedings, it is appropriate that the petitioner be left to take steps under the civil proceedings, as per law.

13. For the purpose of the present petition it cannot be said that there exists any debt which the respondent is unable to pay. There is no merit in the preset petition and same is dismissed.

14. All pending applications also stand dismissed.

(JAYANT NATH)
JUDGE

DECEMBER 11, 2017/rb