

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

**COMPANY PETITION NO.227 OF 2016
WITH
COMPANY APPLICATION NO.543 OF 2017
IN
COMPANY PETITION NO.227 OF 2016**

M/s. S I Construction

....Petitioner

Vs.

Hotel Horizon Private Limited

....Respondent

Mr. Pranav Sampat a/w. Mr. Haabil Vahanvaty I/b. Khaitan and Co. for petitioner.

Dr. Abhinav Chandrachud I/b. Mr. Sushant D. Chavan for respondent/applicant in CA/543/2017.

Mr. R.B. Shinde I/b. R.A. Shaikh for intervener.

CORAM : K.R.SHRIRAM, J.

DATE : 10th AUGUST 2018

P.C.:

1 This petition is for winding up of respondent company - Hotel Horizon Private Limited (the company) under the provisions of the Companies Act, 1956 on the ground that the company is unable to discharge its debts and is commercially insolvent.

2 The petition came to be admitted on 24th July 2017 and the Court was pleased to pass the following order :

By the present Petition under Sections 433(e), 434 r/w 439 of the Companies Act, 1956, the Petitioner has prayed for winding up of the Respondent Company namely – Hotel Horizon Pvt. Limited.

2. It is the case of the Petitioner that the Respondent awarded a contract dated 1st June, 2013 for execution of civil work namely – internal and external plaster at various locations in Wing 'C' of the Hotel Horizon, situated at Juhu, Mumbai for an amount of Rs.61,79,149/-. As per the terms of the contract, the Respondent was to make the payment to the Petitioner as per certification of RA bills

prepared every month. Accordingly, Petitioner submitted invoice/ bill to the Respondent Company. The Respondent Company in discharge of its liability made part payment to the Petitioner, leaving behind outstanding amount of Rs.35,81,164/-. As the Respondent Company did not pay the balance amount, the Petitioner was constrained to stop the work and vacated the site on 5th October, 2013. It is the case of the Petitioner that the Petitioner has already carried out the extra work for Rs.2,07,295/ and has raised bills/ invoices to that effect. That the Respondent Company has accepted Rs.1,98,676.92/ towards "retention amount" from the Petitioner at the time of execution of the Contract. It is the case of the Petitioner that after taking into consideration the balance amount, the Petitioner is entitled to recover an amount of Rs.41,87,135/ from the Respondent Company. As the Respondent did not make the payment, the Petitioner issued a statutory notice dated 23rd March, 2015 to the Respondent Company. The Respondent Company by its reply dated 17th April, 2015 has raised a dispute pertaining to the quality of the work executed by the Petitioner.

3. As the Respondent did not pay the balance amount, the Petitioner filed the present Petition on 21st January, 2016 for winding up of the Respondent Company. The Petition is accepted on 26th April, 2016 and in pursuance of the directions issued by the Company Registrar, the Petitioner served the Respondent with the notice of acceptance and has filed affidavit of service dated 15th January, 2016 to that effect. Despite service, none appeared for Respondents.

4. Heard the learned Counsel for the Petitioner. Perused the Petition and documents annexed thereto.

It is to be noted here that as the Respondent Company did not make payment to the Petitioner, the Petitioner was constrained to stop the further work. By its reply dated 17th April, 2015, the Respondent Company for the first time has raised a dispute with respect to the quality of work carried out by the Petitioner. The documents on record, prima facie, indicate that at the time of submission of the RA bills/ invoices/worksheet, no dispute with respect to the quality of work carried out by the Petitioner, was pointed out by the Respondent Company and the defence taken by the Respondent in its reply, appears to be an after thought. The said defence further appears to have been taken only with a view to defeat the bona fide claim of the Petitioner and is illusory and misconceived. It prima facie, appears that the Respondent Company is unable to pay the debt of the Petitioner.

5 Hence, the following order:

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3 After the petition was admitted, respondent company took out a company application, which is listed today alongwith the main petition. Dr. Chandrachud, counsel for company/applicant stated that the main petition itself can be disposed and the affidavit in support of the company application can be treated as reply to the main petition. The counsel for petitioner naturally had no objection for the same.

4 Petitioner has approached this Court on the basis that petitioner has not been paid admitted amounts for services rendered by petitioner. By a work order dated 1st June 2013, petitioner was appointed as a masonry and plastering work contractor by the company. The company owned a hotel property in Mumbai which was demolished and is undergoing redevelopment. Petitioner was appointed for providing and constructing blockwork, brickwork as per required thickness and internal and external plaster at various locations in Wing C. As per this work order, the payment was to be done as per the measurement taken and certified based on actual work done, payment was to be made as per certification of running account (RA) bills prepared every month and there was to be a retention of 5% from every RA bill which will be paid after completion of one year of defect liability period.

5 It is petitioner's case that they raised various running account bills and the total amount of bills was Rs.61,79,149/-. Petitioner states that

the company paid only Rs.35,81,764/-. Petitioner also states that it carried out extra work for Rs.2,07,295/- and raised bills to that effect. The company has also retained a sum of Rs.1,98,676.92/- towards retention money from petitioner. The total outstanding, according to petitioner that is payable by the company, is Rs.41,87,135/-. Petitioner states that as this amount was not paid despite repeated reminders, petitioner was constrained to stop the work and vacated the site on 5th October 2013.

6 Petition came to be admitted ex-parte on 24th July 2017 as respondent despite service was not represented or any affidavit in opposition had been filed. The Court proceeded on the basis that first time the company has raised the issue of quality of work was in its reply dated 17th April 2015 to the statutory notice dated 23rd March 2015.

7 In the company application, the company has annexed a plan of the site on which 14 defects allegedly made by petitioner have been noted and there is also an endorsement as serial no.15 whereby petitioner accepts and agrees to redo/rectify the defects and restore quality issues within two weeks failing which the defective work could be demolished and reconstructed at petitioner's risk and cost. It also states "all bills submitted are rejected". At the bottom of the said plan also is an endorsement "accepted as above" and both petitioner's representative and company's representative have signed at the bottom.

8 Dr. Chandrachud, counsel for company/applicant submitted that this document has been suppressed in the petition and if only it had brought to the notice of the Court, the Court would not have admitted the petition. Dr. Chandrachud also submitted that these defects have been mentioned in the reply to the statutory notice dated 17th April 2015. It is stated that as there is no specific reference to the plan or these 14/15 items listed, but the defects in the reply to the statutory notice match the defects listed in the plan annexed to the company application. Dr. Chandrachud submitted that this raises disputed questions of fact and therefore, petition should be dismissed.

9 Mr. Sampat, counsel for petitioner responded by stating that the fact that petitioner has signed the plan, which is relied upon by the company, is not disputed. Mr. Sampat stated that petitioner's partner – Mr. Irfan Khan signed the plan on 20th January 2014 but according to petitioner, the 15 items listed on the face of the plan and the words “accepted as above” have been inserted later to match with the stand taken by the company in its reply to the statutory notice. Mr. Sampat also expresses surprise and states that no Architect would ever write something like those 15 points on the face of any plan. I have to state this is mere speculation. Mr. Sampat also submitted that the company has not produced any evidence that within 15 days, as noted in clause 15 on the plan, the

company demolished and reconstructed the defective portions and the company has not even sent a communication questioning petitioner as to why they did not rectify the defects within those 15 days. Mr. Sampat submitted that the so called defects are vague with no specification and in the reply to the statutory notice, there is no mention of this meeting on 20th January 2014.

10 It is settled law that where there are disputed questions of fact, the company cannot be ordered to be wound up. It is also settled law that where the company's defences cannot be dismissed as moon shine or baseless, the Court should be reluctant to entertain a petition for winding up. In the reply to the statutory notice, the company has raised the following points as defects in work executed by petitioner :

(a) mandatory distances which are required to maintained as per law which were shown in the drawings were not maintained by erecting the works at wrong locations and of wrong dimensions. For example a minimum 1.5 m distance on the staircase landings which were shown in the drawings were not found to maintained in the erection of walls/works carried out by your client;

(b) the shafts/walls constructed by your client did not match the drawing and were constructed incorrectly which were of no use to us;

(c) at many places, where the work was supposed to be done with 150 mm thick block as per the drawing but your client wrongly used 100 mm thick and claimed a bill for 150 mm thick block which was completely unethical on your clients part and wrong engineering practice.

11 The same items have been inserted in the endorsements on the face of the plan. Therefore, I am unable to reject the stand of the company

as baseless or moon shine. In any event, if I have to accept Mr. Sampat's submissions that the endorsements on the face of the plan were introduced later to match the stand taken in the reply to the statutory notice, still evidence will have to be led to that effect.

12 In the circumstances, I am unable to gather myself to conclude that there is a debt owed to petitioner, the company is unable to discharge its debts or is commercially insolvent and requires to be wound up.

13 Company petition dismissed. Company application accordingly stands disposed.

14 The company to advertise the dismissal of the petition in Free Press Journal and Navshakti as per the format prescribed by the Company Registrar and compliance affidavit to be filed within two weeks from today.

15 In my view, petitioner will have to file a suit to recover its amounts and naturally respondent will be entitled to raise all its defences.

16 Mr. Sampat seeks stay of the liberty granted to the company to advertise the dismissal of the petition. Stay refused.

17 Petition to be listed for compliance before the Company Registrar on 27th August 2018.

Gauri
Amit
Gaekwad
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signed by
Gauri Amit
Gaekwad
Date:
2018.08.14
16:14:57
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(K.R. SHRIRAM, J.)