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

% **Reserved on: 24th January, 2018**
Date of Decision: 15th February, 2018

+ **Co. Appeal No. 11/2017**

UNIQUE ENGINEERS PVT. LTD. Appellant

Through: Mr.Rajiv Shankar Dvivedi,
Mr.Praveen Kumar Singh,
Mr.Utkarsh Singh, Md. Ziauddin
Ahmad & Mr. Avi Batra, Advocates

Versus

NITYA ELECROCONTROLS PVT. LTD. Respondent

Through: Mr.Rajesh Banati & Mr.Vikram
Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

1. Present appeal under Section 483 of the Companies Act, 1956, prays for setting aside order dated 4.8.2017 passed by the learned Single Judge in Co. Pet. No.896/2016, whereby the winding up petition has been admitted and direction for publication of citation and appointment of provisional liquidator has been passed. Prayer is that the aforesaid company petition be dismissed.

2. Briefly, facts and allegations in the petition filed by the respondent herein (petitioner before the learned Single Judge) are that the appellant herein (respondent before the learned Single Judge) had placed purchase orders from time to time for the supply of fan starter panel, control console panel, ventilation panel, main HVA panel and terrace panel, for different projects at separate sites. The respondent supplied the material as per purchase order from time to time. The details of 43 invoices starting from 17.08.2012 to October, 2013 are referred to in para 8 of the petition. The supplies were duly acknowledged by issuance of C Forms. The appellant had made part payments for the goods received as per details given in para 10 of petition. The appellant had paid a sum of Rs.2,65,89,932/- against the total liability of Rs.2,93,57,829/-; thus leaving a balance of Rs.27,67,897/- as outstanding. The appellant also issued a cheque bearing No.615748 dated 15.03.2014 for Rs.24,29,728/- for part payment, which was dishonoured for the reason that 'payment stopped by the drawer'. The payments later made were adjusted in the earlier invoices. The respondent served the statutory notice dated 04.08.2016 claiming the balance of Rs.27,67,897/- with interest @ 18% p.a., but the appellant failed/ neglected to make the payment.

3. The appellant admitted the issuance of the purchase orders; invoices and part payments made, but has alleged that the respondent did not supply the entire material against the purchase orders despite requests from time to time. The appellant admitted the amount of Rs.2,65,89,932/-, paid against invoices of Rs. 2,93,57,829/- but denied any amount, much less Rs.27,67,897/-, was outstanding. The appellant alleged that debit notes worth Rs.20,33,046/- towards short supply/non-providing of the services had

been ignored by the respondent. The appellant claimed credit of Rs.20,33,046/- towards the short supplies made at its different sites and admitted that an amount of Rs.7,34,851/- was payable. It was asserted that the claim being a disputed debt, the petition was not maintainable. The appellant relied upon its email dated 15.06.2016 and also further relied upon the Warranty Clause contained in the purchase order dated 10.07.2013.

4. We have heard the learned counsels for the parties and have also perused the record. Learned counsel for the appellant, at the outset, has referred to the Warranty Clause contained in the purchase order dated 10.07.2013, which reads as under:-

“Warranty: The material supplied by you shall be under your warranty for any manufacturing defect, bad workmanship or quality for a Period of 15 months from the date of supply or 12 month from the Date of commission, whichever is earlier.”

5. Learned counsel for the appellant submitted that in view of the above clause the appellant had issued debit notes, not immediately, but within the period as stipulated in the Warranty Clause. Learned counsel has also relied upon several debit notes dated 31.3.2016 amounting to Rs.15,00,000/- and Rs.5,33,046/-, raised on the respondent. It was submitted that these amounts were to be deducted from the pending payments towards short supply of materials at CPMF, Greater Noida Site. Learned counsel for the appellant has submitted that the debit notes were sent on 2.6.2016 along with three C-Forms dated 30.5.2015, 1.6.2015 and 26.8.2015. The respondent had acknowledged receipt of the C-Forms. However, in the winding-up petition, the respondent did not refer to the debit notes issued by the appellant on

them, which were sent in the same courier.

6. A bare reading of the aforesaid Warranty Clause clearly demonstrates that the same was applicable only for any manufacturing defect, bad workmanship or quality for a period of 15 months from the date of supply or 12 months from the date of commission, whichever was earlier. The Warranty Clause does not in any manner cover the short supply. The Warranty Clause would not explain issuance of debit notes dated 31.3.2016 after the supplies were made between August, 2012 and October, 2013. Appellant has failed to place on record or refer to any correspondence after 17.08.2012/31.07.2013 or within 15 months after any alleged short supply. Issue of debit notes was a mere deception and cover up.

7. Credit and debit notes have been used in trade for a long time as acknowledgment of dues and debt; and are often relied on in commercial cases. Issue of credit and debit notes is convenient when the transaction between two commercial entities is not episodic or discrete but continuous, and adjustments in ledgers with settlement effects are made at intervals. However, the Court has to look into the notes with circumspection when they are disputed and raised after great delay because there is every possibility of the same being raised frivolously and falsely to deny the claim of the other side. Hence, whenever dispute regarding debit note is raised, more specifically in defence to a claim, the Court is bound to look into the manner, the time as well as the mechanism of raising such debit notes along with the correspondence, objections if any, acknowledgment, bills, receipts, account books etc., since false, fictitious and sham debit notes not only deny the rightful claim of the other party, but also shake and effect commerce.

8. A bare perusal of the debit notes of the appellant clearly demonstrates that all of them bear the same date 31.3.2016. Debit notes mention a round figure, without any details of the short supply or the defective goods. There is no explanation on record as to why the respondent was not intimated about the short supply in the material immediately and why these debit notes were not raised when supply was made. The defence of the appellant, that in view of the Warranty Clause contained in the purchase order, debit notes were not raised immediately, is untenable and an after-thought. Warranty Clause cannot justify belated issue of debit notes. Warranty Clause had a different purpose. Warranty claims had to be made within 15 months, with details. Short supply was within the purview of the Warranty Clause.

9. Sections 41 and 42 of the Sale of Goods Act, 1930 ('Act') give a right to the buyer to inspect the goods before accepting them and if he or she does not have any objection *qua* its quality or short supply within a reasonable time, the buyer is deemed to have accepted the goods without demur. Reasonable time is a question of fact, as per Section 63 of the Act, and cannot be as long as claimed by the appellant, and as rightly held by the learned Single Judge. In view of the aforesaid discussion and the fact that the appellant has raised the plea of debit notes after about 2½ years clearly proves that the debit notes raised are false and sham. Aforesaid defence regarding debit notes has been raised by the appellant in the Court to deny its liability regarding the balance due to the respondent. Hence, we fully agree with the findings of the learned Single Judge that the appellant has neglected to pay the balance due to the respondent without any cogent,

substantial or genuine cause. Therefore, it cannot be said that the appellant has the ability to pay but has chosen not to pay or that it has a lesser liability to pay.

10. Accordingly, we do not find any flaw or infirmity in the impugned order dated 4.8.2017.

11. Learned counsel for the appellant, at the end, submitted that the appellant is ready to comply with the directions of the learned Single Judge to pay to the respondent company the amount, as directed vide the impugned order dated 4.8.2017. Learned counsel for the appellant has also submitted that the appellant has already handed over a cheque of Rs.7,97,182/- to the respondent, in compliance of the order of this Court, as is evident from the order sheet dated 15.9.2017. Learned counsel for the appellant further submitted that the balance outstanding amount of Rs.22,05,493/-, inclusive of interest @ 8% p.a., stands deposited by the appellant with the Registry of this Court which may be released in favour of the respondent. Learned counsel for the appellant submitted that there was a stay from this Court against the impugned order of the learned Single Judge. On payment, nothing would be due from the appellant towards the respondent. Thus, the appellant has made the payment within time in compliance with the impugned order dated 4.8.2017 passed by the learned Single Judge. Hence, the citation may not be published and direction for appointment of the provisional liquidator may be cancelled. The respondent may withdraw the amount as stated hereinabove by the learned counsel for the appellant.

12. The appeal is accordingly disposed of, leaving the parties to bear their own costs.

CHANDER SHEKHAR, J

SANJIV KHANNA, J

FEBRUARY 15, 2018/tp/ka