NATIONAL COMPANY LAW APPEALLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 412 of 2020

(Arising out of Order dated 03.01.2020 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai in C.P. No. 3113/I&B/2019)

IN THE MATTER OF:

Apya Capital Services Private Limited ....Appellant

Versus

Guardian Homes Private Limited .....Respondent

Present:

For Appellant: **Mr. Abhijeet Sinha, Ms. Bani Dikshit and Mr. Farman Ali, Advocates.**

For Respondent: **Ms. Priya Hingorani, Senior Advocate with Mr. Himanshu Yadav, Advocate.**

J U D G E M E N T

BANSI LAL BHAT, J.

Appellant is aggrieved of dismissal of its application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench vide impugned order dated 3rd January, 2019 subsequently corrected as 3rd January, 2020 on the ground that there was a clear deficiency in the service provided by the Appellant and there was no debt as claimed by the Appellant.

2. To understand the factual matrix in proper prospective a flashback into the events relevant to the filing of application by Appellant under Section 9 for triggering of Corporate Insolvency Resolution Process and germane to its disposal is inevitable. Respondent- 'Guardian Homes Pvt. Ltd.' (Corporate Debtor) engaged in the construction business wanted to raise finance for its operations. The Appellant provided its services to the Corporate Debtor for raising finance as also advisory services for structuring and placement of debt instrument in private transactions. A letter dated 08.11.2017 incorporating the terms and conditions for providing services to the Corporate Debtor came to be issued by the Appellant which was accepted by the Corporate Debtor. Sanction letter dated 16.10.2018 placed before the Adjudicating Authority revealed that certain facilities to the extent of Rs. 280,00,00,000/- Crores were granted to the Corporate Debtor by one 'KKR India Asset Finance Pvt. Ltd.'. The Appellant raised proforma invoices on the Corporate Debtor dated 16.01.2019, 30.01.2019, 27.02.2019 and 20.04.2019 as noticed in the impugned order. In regard to proforma invoice dated 20.04.2019 for an amount of Rs. 2,05,00,000/-, Corporate Debtor addressed communication dated 02.05.2019 to Appellant raising the issue of delay in providing the service which according to the Corporate Debtor had taken 11 months instead of 6 months as per agreed terms. However, the Corporate Debtor, having regard to the efforts put in by the Appellant's team, claimed to have amicably decided to conclude the deal at a fee of Rs. 150 Lakhs out of which Rs. 75 lakhs have already been paid. The invoice was returned to the Appellant with request to submit full and final bill for

balance amount of Rs.75 lakhs to enable the Corporate Debtor to process the same. On 20.05.2019, Appellant issued a demand notice under Section 8 of the 'I&B Code' claiming an amount of Rs.2,41,90,000/- from the Corporate Debtor and when the same was not complied with, the Appellant initiated steps for triggering of Corporate Insolvency Resolution Process.

3. Before the Adjudicating Authority, it was pleaded by the Corporate Debtor that there was delay in arranging the funds on the part of Appellant, in respect whereof an issue was raised by the Corporate Debtor vide letter dated 02.05.2019 and the issue was amicably resolved by settling the fees at a sum of Rs.150 lakhs. It was pleaded that in terms of the sanction letter dated 16.10.2018, funds were required to be arranged by 07.05.2018 but on account of delay on the part of the Appellant, the Corporate Debtor suffered for consequential losses which resulted in amicable settlement of the issue for a fee of Rs.1.50 Crores out of which Rs.75 lakhs were made as part payment towards the proforma invoice dated 16.01.2019. On consideration of the versions put forth by the parties in the light of documents and evidence adduced, the Adjudicating Authority arrived at a conclusion that there was no debt as claimed by the Appellant besides there being deficiency in service provided by the Appellant warranting dismissal of application.

4. It is contended on behalf of Appellant that by availing the Appellant's services, the Corporate Debtor obtained funding to the tune of Rs.280 Crores for its Real Estate Project "Cityscapes" and the Appellant raised invoices for its fees of Rs.2.80 Crores i.e. 1% of Rs.280 Crores of financial

facilities as per Sanction Letter. However, the Corporate Debtor made only part payment of Rs.75 Lakhs on 25.01.2019 and defaulted in making payment of remaining fees which was due and payable to the Appellant. It is further submitted that even as per Corporate Debtor's own admitted case Appellant's fee settled at Rs.1.5 Crores after which Rs.75 Lakh was outstanding and same being due and payable to the Appellant and not having been paid in compliance to the demand notice, the Adjudicating Authority was bound to admit the application under Section 9. It is submitted that the mere assertion on the part of the Corporate Debtor that it is ready and willing to settle the balance of Rs.75 Lakhs would not justify rejection of Appellant's application under Section 9. It is pointed out that Corporate Debtor's letter dated 02.05.2019 was an afterthought to evade its liability though part payment for services rendered by Appellant was made which clearly establishes that there was no pre-existing dispute between the parties. As regards plea of deficiency of services raised by the Corporate Debtor, it is submitted on the behalf of the Corporate Debtor that the Corporate Debtor, in terms of Clause 2.2 of the Engagement Letter was still liable to pay full fees to the Appellant. Learned counsel for the Appellant would further argue that the delay in disbursal of funding was attributable to the Corporate Debtor itself and the Appellant could not be blamed for deficiency of service. Lastly, it is submitted that no settlement had taken place with respect to reduction in fees payable under the Engagement Letter and even the amount of Rs.75 lakhs admittedly lying outstanding as per

Corporate Debtor's assertion has been withheld to coerce the Appellant in accepting in writing the factum of settlement of dispute at Rs.1,50,00,000/-.

5. Per contra, learned counsel for Respondent- Corporate Debtor submitted that the Appellant was required to provide its services to the Corporate Debtor for structuring and placement of its debts instruments with provision of funding amount ranging between Rs.200 Crores to Rs. 400 Crores. It is submitted that the time was of the essence in the delivery of the aforesaid services by the Appellant and it was specifically provided that such services shall be provided within a fixed period of 6 months which never came to be extended. 100% of the agreed professional fees amounting to 1% of the total debt financing facilities was to be paid to the Appellant only if the services were provided by it within the fixed period of 6 months. The Appellant's services involved sourcing and procuring financial arrangements/ funds for the Corporate Debtor from third party lenders through 'Definitive Agreements'. It is submitted that the Mandate Letter dated 03.04.2018 issued to the Corporate Debtor by 'KKR Capital Markets India Pvt. Ltd.' was not a Sanction Letter as claimed by the Appellant. It is submitted that the Appellant failed to provide the financing facilities for the Corporate Debtor's projects and there was no extension of time beyond the fixed period of 6 months. Appellant was able to procure another Mandate Letter dated 03.09.2018 issued by 'KKR India Asset Finance Pvt. Ltd.' but the same was not a Sanction Letter as claimed by the Appellant. It did not provide the Corporate Debtor the financial arrangement. The Appellant was able to secure Sanction Letter from 'KKR India Asset Finance Pvt. Ltd.' in its

capacity of being an 'original lender' only after delay of more than 5 months. The Sanction Letter dated 16.10.2018 was only regarding just one project of the Respondent Company- "Cityscapes" and not the entire project portfolio. It is further submitted that in December, 2018, as the Appellant's company failed to render its services within the fixed time, discussions were held and it was mutually agreed that the Corporate Debtor will pay amount of Rs.1.5 Crores as professional fees towards the deficient services as provided by Appellant as full and final settlement. The Appellant, pursuant to the negotiations, raised the invoice dated 16.01.2019 for Rs.1.5 crores towards the full and final settlement amount, the invoice being towards the 'fees' and not 'part fees". Vide letter dated 19.02.2019, Respondent confirmed the payment of Rs.75 lakhs clearly stipulating that the total professional fees agreed between the parties was Rs.1.5 crores. When the Respondent received incorrect invoice dated 27.02.2019, it requested the Appellant to issue the corrected proforma invoice. It is pointed out that the Appellant did not object to the same nor disputed said emails. Even the demand notice dated 20.05.2019 issued by the Appellant stated that the quantum of debt were disputed by the parties. It is lastly submitted that the dispute admittedly existed prior to the issuance of the demand notice and failure to reply the same would not be entitled the Corporate Debtor to show existence of such pre-existence of dispute. Respondent is willing to pay the balance amount of Rs.75 lakhs to the Appellant provided the Appellant raises the full and final invoice for the same. It is submitted that there being deficiency in services on the part of the Appellant and the corresponding pre-existing

dispute relating to the quantum of the debt as claimed by the Appellant, the impugned order was sustainable.

6. We have given our anxious consideration to the submissions made at the Bar and also examined the record. Facts in regard to contractual relationship *inter se* the parties are not in controversy. Services were provided by the Appellant to Corporate Debtor for raising finance as also advisory services relating to structuring and placement of debt instrument in private transactions. It is also not in dispute that the Appellant had issued engagement letter dated 08.11.2017 incorporating the terms and conditions for providing services to the Corporate Debtor. Admittedly, the Corporate Debtor signified its consent and assent thereto. In terms of clause 1.1.1.2 of the engagement letter, the funding amount was to range between Rs.200 Crores to Rs.450 Crores. Capaegis was to provide services to the Corporate Debtor within six months or any mutually agreed period and in the event of the proposed transaction being concluded by Corporate Debtor within the specified period, it was required to pay 100% of the agreed fees to Capaegis. It is specifically incorporated in Clause 1.3. The Corporate Debtor was required to pay to Capaegis a fee equal to 1% of the total debt financing facilities arranged as per Sanction Letter and a non-refundable advance of Rs.1 Lakh as initiation of transaction besides covering travel related cost. It appears that one 'KKR India Asset Finance Pvt. Ltd.' granted financial facilities to Corporate Debtor to the extent of Rs.280 Crores, in respect whereof the Appellant raised four proforma invoices. Controversy arose in regard to proforma invoice dated 20.04.2019 raised for a sum of

Rs.2,05,00,000/- plus taxes. Appellant in its letter dated 20.04.2019 forming Annexure-10 to appeal paper book raised demand for payment of Rs.2,05,00,000/- for advisory services related to project "Cityscapes" funded by 'KKR India Asset Finance Pvt. Ltd.' stating that only partial payment of Rs.75 Lakh had been released while the amount due was Rs.2,80,00,000/- in terms of the Sanction Letter for arranging funds to the tune of Rs.280 Crores to the Corporate Debtor. A bare look at the letter reveals that the project "Cityscapes" was sanctioned on 16.10.2018 and first disbursement towards the funding was received on 25.10.2018. It is manifestly clear that the fixed period of six months for concluding the proposed transactions in the nature of providing financing facilities as contemplated in the engagement letter had elapsed on 07.05.2018 i.e. after the expiry of six months reckoned from 08.11.2017 when the engagement letter was issued. However, simple reading of Clause 1.3 of the engagement letter leaves no room for doubt that the contemplated period of six months was substitutable by a mutually agreed period and the agreed fee was liable to be paid in full provided the proposed transactions through the Appellant were concluded during the aforesaid term. Admittedly, no suit or arbitration proceedings were pending in regard to any alleged deficiency of service. The fact that another mandate letter dated 03.09.2018 forming Annexure 4 to the appeal paper book was issued in favour of Appellant which was in furtherance of the first mandate letter dated 03.04.2018 forming Annexure 3 to the appeal paper book would *per se* suggest that the original term of six months in terms of Clause 1.3 was not adhered to and Appellant's action in

finding 'KKR Capital Market India Pvt. Ltd.' as an arranger for searching financers was approved. Therefore, it is futile on the part of the Corporate Debtor to raise the grievance that there was a dispute relating to the quality of service. As already noticed no suit or arbitration proceedings were pending on the date of filing of application under Section 7 in regard to quality of service to bring the same within the ambit of dispute as contemplated under Section 5(6)(b) of the 'I&B Code' to disentitle the Appellant- Financial Creditor from initiating Corporate Insolvency Resolution Process. No such dispute was even brought to the notice of the Appellant- Financial Creditor as the demand notice served under Section 8(1) of the 'I&B Code' was not responded to by the Corporate Debtor. Therefore, we have no hesitation in holding that the Appellant- Financial Creditor was entitled to raise the invoice dated 20.04.2019 in regard to the unpaid balance amount of Rs. 2,05,00,000/- in respect whereof default was committed by the Corporate Debtor who admittedly paid only Rs.75 Lakhs as part payment. There is nothing on the record to even suggest that the liability was at all denied by the Corporate Debtor and any agreement or settlement was reached *inter se* the parties for reduction of amount of fee payable in lieu of services provided for the reason that the timelines were not adhered to by the Appellant in arranging financer for the Corporate Debtor's project. The Adjudicating Authority landed in error in observing that there was a clear deficiency in service provided by the Appellant falling within the ambit of Section 5(6)(b) of the 'I&B Code' which cannot be supported.

7. Yet another aspect, which cannot be lost sight of is that the Appellant, on its own showing claimed to have already paid 50% of the amount due in respect of first proforma invoice dated 16.01.2019 thereby leaving an outstanding amount of Rs.75 lakhs which was due and payable. By not clearing the liability in respect of the balance Rs.75 lakhs in compliance to the demand notice served upon it by the Appellant- Financial Creditor and in absence of any dispute raised in regard to deficiency in service in response to the demand notice, there appears to be considerable force in the contention of Appellant that withholding of admitted payable amount of Rs.75 Lakhs by Corporate Debtor emanated out of its design to coerce the Appellant into accepting that the amount of fee payable had been settled at Rs.1,50,00,000/- in terms of a mutual settlement which was not at all forthcoming.

8. In view of the foregoing discussion on merits of the case, we are of the considered opinion that the Adjudicating Authority has landed in error in holding that there was no 'debt' as claimed by the Appellant and there was 'deficiency in service' provided by the Appellant. The findings recorded by the Adjudicating Authority are grossly erroneous and same cannot be supported. Once the liability in respect of Rs. 75 lakh was admitted and the same was not discharged by the Corporate Debtor, dispute in regard to quantum of debt would be immaterial at the stage of admission of application under Section 7 unless the debt due and payable falls below the minimum threshold limit prescribed under law. The impugned order is liable to be set aside as the same is unsustainable.

9. For the reasons recorded hereinabove, we allow the appeal and set aside the impugned order. The Adjudicating Authority is directed to admit the application of Appellant under Section 7 of the 'I&B Code' after providing an opportunity to the Respondent- Corporate Debtor to settle the claim of Appellant, if it so chooses and pass all consequential directions as a sequel thereto. There shall be no order as to costs.

[Justice Bansi Lal Bhat]
Acting Chairperson

[Justice Anant Bijay Singh]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

8th December, 2020

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