

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 213 of 2020

[Arising out of Order dated 23rd January, 2019 passed by National Company Law Tribunal, New Delhi Bench, Court-II in Company Petition No. (IB)-1238 (ND)2019]

IN THE MATTER OF:

**Mr. Praveen Kumar Sharma
KH-264, Kavi Nagar
Ghaziabad-201001
Uttar Pradesh**

...Appellant.

Versus

**1. Arcee Trading Corporation
2860, Behind G.B. Road
New Delhi - 110006**

...Respondent No. 1

**2. Vinay Kumar Jairath
Interim Resolution Professional
Dev Landcon Private Limited
185/15-A, Krishna Gali No. 4
Maujpur, Delhi-11005**

...Respondent No. 2.

Present:

For Appellant: Mr. SK Sharma, Advocate.

For Respondent: Mr. Basant Kumar Gautam, Advocate for R-1.

ORAL JUDGMENT
(Virtual Mode)

Heard Mr. SK Sharma for the Appellant. The Appellant is the Director of the Corporate Debtor M/s. Dev Landcon Private limited. The Appeal has

been filed being aggrieved by orders passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court –II) in (IB)-1238 (ND)2019. The said application under Section 9 of Insolvency and Bankruptcy Code, 2016 (I & B Code-In Short) was filed by Respondent No. 1-M/s. Arcee Trading Corporation claiming to be Operational Creditor. After hearing the parties, the Application came to be admitted by Impugned Order dated 23rd January, 2019 and ‘Corporate Insolvency Resolution Process’ (CIRP) was initiated for Corporate Debtor appointing Respondent No. 2 as ‘Insolvency Resolution Professional’.

2. It is stated that ‘CIRP’ is at the stage where ‘CoC’ has decided to change the IRP.

3. The Operational Creditor claimed that the Corporate Debtor had assigned work of civil structures vide work order dated 13.11.2017 which was required to be carried out at Hiteshi Heights. The Operational Creditor claimed that the work was started at the site without wasting time and with good intention to get work completed, the Operational Creditor had further sub-contracted the work to M/s Adstee Construction Company as per its work order dated 08th April, 2018.

4. The Operational Creditor claimed that against the work done the amount outstanding was Rs. 1,07,55,942/- plus interest. The amount was due as the Operational Debt was not paid, and the Operational Creditor sent

Demand Notice under Section 8 of I.B.C. on 14th January, 2019 (as at page 120 of the Appeal Paper Book). As the amount was still not paid, the Application under Section 9 came to be filed.

5. The Impugned Order shows that the Adjudicating Authority heard the Parties and admitted the Application.

6. The Learned Counsel for the Appellant is claiming that before Demand Notice dated 14th January, 2019 was sent, the Operational Creditor had sent Notice dated 05th December, 2018 to the Corporate Debtor copy of which is filed at page 135 of the Appeal Paper Book. In the Notice reference was made to be work done and the Operational Creditor claimed that on 13th October, 2018 the Operational Creditor had come to know that the addressee had illegally and unlawfully given fresh contract to some other contractor of the same work as contained in work order dated 13th November, 2017 without revoking the work order of the Operational Creditor and called upon the Corporate Debtor to stop the Construction/Project being carried out by other person. The Operational Creditor also claimed that he had to recover Rs. 1,07,55,942/- as per bill dated 24th August, 2018 and other dues.

7. The Learned Counsel for the Appellant has then pointed out Reply which was sent by the Corporate Debtor to such Notice on 20th December, 2018. The Reply was sent in Hindi copy of which is at Page 138. The translation is available at Page 141 and Learned Counsel referred to

Paragraphs 3 and 4 of this Reply which was sent by Corporate Debtor. The contents read as under:

“3. As per Notice Para No. 3 is wrong as above stated work was allotted on 11/11/2017, but after that no construction of work was started by your client at the site, instead without the consent of my client the work was sub let to Shoaid Builder and building material supplier and work was to be done by Shoaib Builder and building material supplier. After that none of the construction was carried at the site. After 6 months your client allotted the work to M/s Adstee Construction Company due to which the project was unnecessarily delayed, and due to no construction activity at site the bookings were stopped, due to which my client suffered a loss of approximately Rs. 2 cr.

4. As per the registration certificate, UP RERA has instructed my client to complete the project by March 2020. As your client has not done the construction work in time, because of that it is impossible to complete the project by March 2020 as per UP RERA. As per UP RERA if the project is not completed in the stipulated time we are liable for Monetary Fine. Therefore, whatever fine will be imposed by UP RERA will be the responsibility and recovered from your client.”

8. It is argued by the Learned Counsel for the Appellant that in spite of such evidence available on record which showed that there was already a pre-existing triable dispute between the Parties, the Adjudicating Authority went on to enquire from ex-employee of the Corporate Debtor and referring to some measurement sheets the Adjudicating Authority recorded that the ex-employee of the Corporate Debtor identified the signatures on the measurement sheets. The Adjudicating Authority then went on to observe in Para 18 of the Impugned Order as under:

“18. After hearing submissions of both the parties, this Bench is of the view that the plea taken by the Corporate Debtor regarding non-execution of the work does not merit any consideration as the then employee of the Corporate Debtor has himself identified his signatures on the Measurement Sheets before this Bench. Further, the Ld. Counsel for the Corporate Debtor did not dispute that the Petitioner firm had undertaken and carried out the construction work. In addition to this, the Corporate Debtor has failed to bring anything on record which could corroborate the allegations made in its letter dated 20.12.2018. Further, the defense taken by the Corporate Debtor that it has suffered a loss and has a claim of Rs. 2 Crore because of the Operational Creditor cannot be treated as the pre-existing dispute by the parties as held by the Hon’ble NCLAT in case of Ahulwalia

Contracts (India) Pvt. Ltd. vs. Raheja Developers Limited, Company Appeal No. 703 of 2018:

“20. From the aforesaid findings, it is clear that ‘claim’ means a right to payment even if it is disputed. Therefore, merely the ‘Corporate Debtor’ has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute, in absence of any evidence to suggest that dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.”

9. The Learned Counsel for the Appellant submits that the Reply Notice sent by the Corporate Debtor raised various issues and the Adjudicating Authority referring to one argument regarding non-execution went on to make observations as above to say that the Application can be admitted even if the amount has been disputed, the Application came to be admitted. According to the Learned Counsel reliance on the Judgment in the matter of *Ahulwalia Contracts (India) Pvt. Ltd. vs. Raheja Developers Limited* referred to by the Adjudicating Authority is erroneous as Para 20 reproduced by the Adjudicating Authority itself shows that the observations could be resorted to if there was absence of any evidence to suggest that the dispute was raised prior to the issuance of the Demand Notice under Section 8 (1) or invoice.

10. The Learned Counsel for the Respondent/Operational Creditor has been heard and it is submitted by the Learned Counsel for the Operational

Creditor that it had put the necessary documents before the Adjudicating Authority and the Adjudicating Authority after examining the documents and hearing the learned Counsel for the Operational Creditor and after talking to the ex-employee of the Corporate Debtor referred to the measurement sheets and rightly came to a conclusion that the dispute being raised by the Corporate Debtor regarding non-execution of work did not merit any consideration. The Learned Counsel for the Respondent/Operational Creditor is supporting judgment of the Adjudicating Authority and according to him the judgment is well found and Appeal deserves to be dismissed.

11. Having heard the Counsel for both sides, we find that it is apparent from record that there was a Pre-Existing Dispute between the Parties.

Paragraphs 14 to 16 of the Impugned Order read as under:

“14. During the course of the hearing on 22.08.2019, it was submitted by the Corporate Debtor that no work was conducted by the Operational Creditor. It was further submitted that the work was further assigned by the Corporate Debtor to the third party and was not as per the guidelines of RERA.

15. That on 20.09.2019, the Directors of the Corporate Debtor along with Sh. Mukesh Sharma, who had filed the measurement of the running bills were asked to present before this Bench on 25.09.2019 to verify as whether Sh. Mukesh Sharma has signed the

measurement sheets or not. However, it was not disputed by the Ld. Counsel for the Corporate Debtor that the Operational Creditor had undertaken and carried out the construction work.

16. That on 25.09.2019, Sh. Mukesh Sharma, Ex-employee of the Corporate Debtor appeared before this Bench and identified the signatures on the measurement sheets at Annexure D from Page 23 to 26 as his signatures. The same was noted by this Bench. The Measurement Sheets as signed and identified by Sh. Mukesh Sharma are reproduced below:

.....”.

12. The Adjudicating Authority then photocopied the measurement sheets and subsequently went on to make observations as seen in Para 18 referred supra. When the above developments before the Adjudicating Authority are considered it is apparent that the Adjudicating Authority took upon itself the responsibility of calling & cross-examine witness and giving a finding with regard to the argument which was raised by the Corporate Debtor that no work was conducted by the Operational Creditor. The Adjudicating Authority appears to have ignored the disputes which were already raised in Paragraphs 3 and 4 of the Reply Notice dated 20.12.2018 which included the dispute that the Operational Creditor had without consent sub-contracted the work and that because of the delay the Operational Creditor was liable to Monetary Fine

under UP RERA. It is nobody's case that the Measurement Sheets showed execution of complete work. Notice dated 05.12.2018 of Operational Creditor itself showed that the Corporate Debtor was getting work completed from some other Contractor for which Work Order dated 13.11.2017 was issued to Operational Creditor.

13. According to us, when there were clear documents raising disputes, it was not appropriate for the Adjudicating Authority to enter into procedure in the nature of Trial of Civil Suit. It was a matter which would require adjudication before the appropriate Court. The Impugned Order itself shows that the Operational Creditor was aware regarding the dispute relating to sub-contract and pleaded before the Adjudicating Authority that it was with good intention to get the work completed, that the Operational Creditor had sub-contracted work. Whether or not Operational Creditor could sub-contract was issue for appropriate Court to decide. Nature of Proceedings under Section 9 of IBC are summary & disputed questions of facts already raised before Notice under Section 8 of IBC, cannot be investigated.

14. At the time of arguments, the Learned Counsel for the Respondent/Operational Creditor incidentally took us to Page 229 of the Appeal Paper Book which is typed copy of a handwritten document showing that the Corporate Debtor had issued letter to the Director of Operational Creditor regarding the termination of contract due to negligible progress. The

Photocopy of the handwritten document is at Page 228 and is difficult to read the handwritten document.

The Learned Counsel for the Respondent/Operational Creditor stated that this document did not have any date. The Learned Counsel for the Appellant/Corporate Debtor however submitted that the letter was dated 7th February, 2018 but he has also not been able to show any date. As such we will not dilate on this document any further.

15. We find that there was a pre-existing dispute in this matter when Demand Notice under Section 8 was issued and we find that it was not appropriate for the Adjudicating Authority to have proceeded in a manner as if a trial is being conducted. We proceed to accept this Appeal.

Order

- (a) The Appeal is allowed.
- (b) The Impugned Order dated 23rd January, 2019 passed by National Company Law Tribunal, New Delhi Bench, Court-II is quashed and set aside. The Application filed by Respondent No. 1-Operational Creditor under Section 9 of IBC is dismissed.
- (c) The Corporate Debtor is released from the rigour of moratorium and is allowed to function through its Board of Directors. The Interim Resolution Professional/Resolution Professional will hand back the management of the

affairs of the Corporate Debtor along with records. The IRP/RP will submit particulars regarding the 'CIRP' costs and fees of IRP/RP to the Adjudicating Authority and the same shall be liable to be paid by Respondent No. 1- Operational Creditor. The Adjudicating Authority is requested to initially direct Corporate Debtor to pay the CIRP costs and fees of IRP/RP and then direct Operational Creditor to reimburse the same to Corporate Debtor.

[Justice A.I.S. Cheema]
Member (Judicial)

[Justice Anant Bijay Singh]
Member (Judicial)

New Delhi
09th October, 2020
Basant B./md.