NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT)(Insolvency)No. 779 of 2019

IN THE MATTER OF:

M/s Fairwood Infra & Services Pvt. Ltd. ...Appellant

Vs

M/s Wave Megacity Centre Pvt. Ltd. ....Respondent

Present:

For Appellant: **Mr. Ujjwal Jha, Advocate**

For Respondent: **Mr. Sudhanshu Batra, Sr. Advocate along with Mr. Aman Nandrajou, Ms. Aarzoon Aneja, Ms. Suditi Batra, Mr. Sumeer Sodhi and Mr. Aditya Mishra, Advocates.**

O R D E R

16.01.2020 This appeal has been filed by the Appellant- Operational Creditor against Respondent-Corporate Debtor in view of the order passed by the Adjudicating Authority (NCLT, New Delhi- Bench No. 3) dismissing CP. IB-406/(ND)/2018 which was filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short **IBC**). The Impugned Order is dated 14.06.2019.

2. The Appellant claims that Section 9 Application was required to be filed as Appellant rendered Project Management Consultancy services and there were unpaid invoices which were raised in accordance with contract/agreement between the parties executed on 09.09.2015. The project could not proceed further due to financial constraints of the Respondent and the Appellant had made claim of contractual dues and demand was raised for Rs. 1,51,54,735/-. It is stated, the Respondent made false claim of Rs. 32 lakhs in e-mail dated 16.12.2016. The Respondent grossly mis-calculated contractual term as the claim was made on the basis of per Square feet, which term on plain reading provided to upper limit or providing the cap on final payment. The Appellant

claims that the clause 10.1.1 of the Agreement (Page 58) was never meant to be mode of calculation. It was patently wrong on the part of the Respondent when the claims were calculated as seen in the e-mail dated 16.12.2016 (page 201). The Appellant claims and it is argued that the payments were invoice based and all the invoices in which claim is based are admitted. Earlier accepted and paid invoices could not be undone by erroneous calculation and the reasoning of calculation of per square feet basis which was raised by the Respondent for the first time in its e-mail dated 16.12.2016 was rejected by mail dated 08.02.2017. It is further argued by the learned Counsel for the Appellant that in spite of notices sent in 2017, Respondent did not comply and did not make payments and thus Section 8 notice dated 21.12.2018 (page – 274) was sent to which the Respondent gave reply (page- 282) on 13.03.2018 that it was invoking arbitration.

3. Learned Counsel for the Respondent is opposing the claims made by the Appellant- Operation Creditor. It is stated that Agreement Clause 10.1.9 had laid down the manner of payment of fees and considering the said clause, the Respondent had done the calculation and claimed that it had to recover money from the Appellant and for this purpose the e-mail dated 16.12.2016 was sent as can be seen at page 201.

4. We have gone through the record and Impugned Order and we have heard learned Counsel for both the sides. The e-mail dated 16.12.2016 sent by Corporate Debtor reads as under:

> *"All of your statements made in the trailing mail are unacceptable to us since the same are not in*

conformation of the contract which was signed by both the parties unconditionally and the same being the entire agreement, no discussion or communication out of the agreement stand valid. As per contract, you were responsible to review the progress of the work assigned to you and suggest the corrective measures including reviewing the manpower deployed by you.

We would like to draw your attention to our request to you in the same meeting as referred by you, to calculate your fees based on actual Built Up area constructed under your tenure as per contractual provisions but the same has not been done by you till date. Now to expedite settlement we have calculated your dues in accordance with the contractual provisions i.e. on BUA basis and the same has been elaborated in the attached sheet. All recoveries as per contractual provisions are also shown clearly and the net amount payable /recoverable to/from Fairwood mentioned in your sheet.

In order to sign a MFA we would like to have meeting which can be fixed mutually in coming weeks."

The e-mail then has a chart giving particulars, which the Respondent claimed, were to be recovered from the Appellant and calculated the same to the extent of Rs. 32,82,404/-.

5. Learned Counsel for the Respondent is submitting that even Arbitration Award has been passed in favour of the Respondent and proceeding as per Section 34 Application is pending. It is stated that the Award has been passed which has stayed in the Section 34 Application under The Arbitration and Conciliation Act, 1996.

6. Going through the records and the e-mail reproduced above which was admittedly sent much before Section 8 Notice, it is apparent that there is pre-existing dispute.

7. When this is so, the Adjudicating Authority rightly did not interfere considering the averments made by the parties and the rejection of Section 9 Application could not be faulted with. There is no substance in the Appeal.

8. The Appeal is dismissed. No orders as to costs.

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

(Kanthi Narahari)
Member(Technical)

Akc/ GC