NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.167 of 2019

[Arising out of Order dated 11th January, 2019 passed by National Company Law Tribunal, Bengaluru Bench in C.P.(IB)No.143/BB/2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Aalborg CSP A/S (Represented through its Authorised Representative) K-16, RLGF, Jangpura Extension New Delhi – 110014	Applicant/ Operational Creditor	Appellant
Versus		
Solar Atria Cleantech Private Limited (Represented through its Authorised Representative) No.1, Palace Road, Bengaluru – 560 001	Respondent/ Corporate Debtor	Respondent

For Appellant: Shri Puneet Singh Bindra, Ms. Simran Jeet and Shri Akash Singh, Advocates

For Respondent: Shri Manik Dogra, Shri Sidhartha Das and Shri Dhruv Pandey, Advocates

Company Appeal (AT) (Ins) No.168 of 2019

[Arising out of Order dated 11th January, 2019 passed by National Company Law Tribunal, Bengaluru Bench in C.P.(IB)No.144/BB/2018]

(Cause Title same as in Company Appeal (AT) (Ins) No.167 of 2019)

For Appellant: Shri Rajiv Ranjan, Sr. Advocate with Shri Puneet Singh Bindra, Ms. Simran Jeet, Shri Akash Singh,

Ms. Aliya Durafshan, Shri Upinder Singh and Achintya Dvivedhi, Advocates

For Respondent: Shri Manik Dogra, Shri Sidhartha Das and Shri Dhruv Pandey, Advocates

J U D G E M E N T

(22nd January, 2020)

A.I.S. Cheema, J. :

1. The Appellant - Aalborg CSP A/S (Aalborg /Operational Creditor – in short) filed Application under Section 9 of Insolvency and Bankruptcy Code, 2016 having CP(IB)No.143/BB/2018 before the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench) claiming that there was operational debt outstanding against Respondent - Solar Atria Cleantech Private Limited (Atria /Corporate Debtor – in short). The Application was based on claim of operational debt arising out of contract dated 16.03.2016 executed between the parties (Annexure A-9 - Company Appeal (AT) (Ins) No.167 of 2019). The same refers to what is stated to be 'Aurum Project'.

2. The Operational Creditor filed yet another Application under Section 9 of IBC against the Corporate Debtor having CP(IB) No.144/BB/2018 before the same Adjudicating Authority claiming outstanding operational debt and default. This Application was passed on similar Supply Contract executed between the parties (Annexure A-5 – Page 124 – Company Appeal (AT) (Ins) No.168 of 2019). This Agreement may be referred as 'Karnataka Project'.

3. Both the matters were heard by the Adjudicating Authority and have been disposed by separate Impugned Orders dated 11th January, 2019 whereby both the Applications came to be rejected for reasons recorded by the Adjudicating Authority. Thus, these two Appeals.

4. We have heard Counsel for both sides in these Appeals together. The parties are same and the Agreements relevant are similar although they referred to two different projects. The correspondence relied on is similar in both the matters.

i) The Karnataka Project relates to supply of 1 x 11 MWe Steam Generating Heat Exchanger Line consisting of one reheater, one evaporator unit and one superheater with spares.

ii) The Aurum Project relates to supply of 2 x 11 MWe Steam Generating Heat Exchanger Line consisting of one reheater, one evaporator unit and one superheater with spares.

The contracts are in the nature of design, manufacture and delivery. The Operational Creditor is the supplier and the Corporate Debtor is the purchaser.

6. The difference between these two matters is that in the matter of Aurum Project, although parties signed the Agreement, the down payment which was referred in the agreement as H1 – milestone itself was not paid while in the Karnataka Project, the same came to be paid and the

Operational Creditor proceeded further in that project to reach the further two milestones referred as H2 and H3 in the concerned Agreement and raised invoices.

7. Unless mentioned otherwise, we will be referring to the pleadings and documents from the record of Company Appeal (AT) (Ins) No.168 of 2019.

8. The learned Counsel for the Appellant submitted that in the Karnataka Project, the Agreement was entered into between the parties on 16.03.2016 and the Agreement was relating to (1) design, (2) manufacture and (3) delivery/supply of one train generator system which would consist of one Evaporator, one Steam Drum, one Superheater, one Reheater, supply of main-door gasket, spares and other items as mentioned in Clause 8(1) of the Supply Contract (Annexure A-5). It is argued referring to the payment schedule that the Respondent was liable to pay $165,000 as down payment when the Agreement was executed which was to be paid within 7 days. There is no dispute that such payment was indeed made by the Corporate Debtor. According to the Appellant, thereafter, the Appellant – Operational Creditor proceeded further with fulfilling the Contract. Clause 2.2.2 provided that the supplier shall be considered as given full Notice to proceed at the time of receiving down payment. It is stated that accordingly, the Operational Creditor proceeded to execute the contract so as to achieve further milestones under the Agreement which have been referred as H2 and H3.

9. The concerned milestones may be reproduced as under:-

"

Milestone	Related event description	Amount	Method of payment
H1	Signature & downpayment	15% 165,000 USD	Bank transfer within 7 days
H2	at preliminary specified documents • P&ID • General arrangement drawing	15% 165,000 USD	Bank transfer received before 15.04.2016
H3	at unpriced Purchase Orders to sub-suppliers for • Superheater • Evaporator • Steam Drum • Reheater	20% 220,000 USD	Bank transfer received before 15.04.2016

"

The Agreement has further H4 as milestone and it is stated that the delivery would have been part of H5 milestone.

10. The Appellant points out that on achieving H2 and H3 milestones, the Appellant vide e-mail dated 21st April, 2016 sent to the Corporate Debtor H2 package. Efforts were taken with regard to H3 package and e-mail on this count was sent at Annexure A-7 on 29th April, 2016. Copies of the invoices are pointed out at Annexure A-8 colly with regard to milestone payment H2 as $165,000 and with regard to milestone payment H3 (at Page – 158) for 220.000. At Pages - 159 and 160 are invoices raised by the Appellant – Operational Creditor with regard to interest referring to

paragraph 15.4 of contract and it is stated that in respect of invoices, the payment was not made in time.

11. It is the case of the Appellant – Operational Creditor that in respect of achieving H2 and H3 milestones and raising invoices, the Corporate Debtor did not pay and thus, there was default. It is stated that after exchange of messages on WhatsApp and e-mails, the Appellant sent Notices under Section 8 on 15th March, 2018 in both the transactions which was followed by Replies and Counter Replies exchanged between the parties and ultimately the two Applications were filed claiming operational debts.

12. In the matter of Aurum Project, the Application was based on non-payment of down payment itself.

13. The learned Counsel for the Respondent in both the Appeals submitted that the correspondence exchanged between the parties showed pre-existing dispute. He referred to the concerned e-mails and referring to e-mail dated 13.12.2017 (Page 193 – Annexure A-12) and e-mail dated 26.02.2018 (Page – 195). It is claimed that there was existing dispute and so the Adjudicating Authority rightly rejected the Section 9 Applications.

14. We have perused the two Impugned Judgements. In Company Appeal (AT) (Ins) No.167 of 2019, which relates to Aurum Project, the learned Adjudicating Authority after referring to the cases put up by the parties and after reproducing portion of Judgement from Judgement in the

matter of **"Mobilox Innovations Private Limited Versus Kirusa Software Private Limited"** – (2018) 1 SCC 353 has referred also to Judgement in the matter of **"Pramod Yadav v. Divine Infracom Pvt. Ltd."** – 2017 SCC OnLine NCLT 11263 and concluded in Para – 12 as under:-

> "12. The demand for payment of the secured down payment under the contract falls completely within the scope of contractual obligations. Evidently, it is not established by the Operational creditor that the nature of debt is "a operational debt" as defined under section 5(21) of the code on the part of the Corporate Debtor. On the basis of the material on record, the present case is not covered under Sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 and accordingly, this petition is dismissed. No order as to costs."

In Company Appeal (AT) (Ins) No.168 of 2019 with reference to the Karnataka Project, after making similar reference to Judgements in the matter of Mobilox Innovations and Pramod Yadav (supra), the Adjudicating Authority observed in Para - 15 as under:-

> "15. The demand for payment of the milestones under the contract falls completely within the scope of contractual obligations. The jurisdiction of this Tribunal is summary in nature and hence cannot go into the nitty-gritty of contractual obligations and chasing of payments and the extent of performance of the contract by the Parties. Evidently, it is not established by the Operational creditor that the nature of debt is an "operational debt" as defined under section 5(21) of the code on the part of the Corporate Debtor. On the basis of the material on record, the present case is not a fit case under Sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 and

> accordingly, this petition deserves to be dismissed and is dismissed. No order as to costs."

15. It would be appropriate to reproduce Para – 51 of the Judgement in the matter of Mobilox Innovations (supra) referred for the convenience of reading and complying the law. It reads as follows:-

> "**51.** It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

It is clear from the Judgement of the Hon'ble Supreme Court that it is duty of the Adjudicating Authority to see whether there is plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to

reject a spurious defence which is mere bluster. We are not required to be satisfied that the defence would succeed or examine the merits of the dispute. If the dispute truly exists and is not spurious, hypothetical or illusionary, the Application under Section 9 would require to be rejected. Thus, it is necessary to see if the dispute truly exists in fact. On this basis, it would be appropriate to now see if the Respondent is able to show that dispute truly exists.

16. We have also referred to two invoices which were sent by the Operational Creditor in April, 2016 and two invoices seeking interest in December, 2016 based on the Agreement. The milestones of the Agreement referred above show that the milestones H2 and H3 were to be achieved and the bank transfers were to be made by 15th April, 2016. The Appellant had accordingly, raised the invoices. After such invoices sent in April, 2016, the Counsel for Appellant had pointed out WhatsApp message (Page – 163) sent by Karthik Raju who represents the Corporate Debtor to Svante who was corresponding on behalf of the Operational Creditor. In the Message, Corporate Debtor mentioned:-

> "Hi Svante, apologies for my delay in getting back to you. I had been travelling and I'm in Dubai at the moment. We are trying to get the bank to allow disbursement again. I should be able to get some timelines by end of the week. We are pushing them and what the team told me was that we could have disbursements again by mid July.
>
> Let me confirm that with you asap. Our outstanding payment to Aalborg is a priority and I'll ensure that

> we can get things back on track once the issue with banks is sorted out."

Learned Counsel referred to yet another message sent on WhatsApp dated 4th September, 2017 (Page – 166) which was sent by the Karthik Raju to Svante and read as under:-

> "Hi Svante
>
> We are still trying to resolve the disbursement issue with the bank. They have a new MD who was recently appointed. We are waiting for some clarity on the timelines. Hope to have some news this week. I'm also discussing with the team to see if we can find alternative solution to get things moving.
>
> Apologies for my delayed response we've been running around a lot for our other projects as well.
>
> Best.
>
> Karthik"

There is then e-mail dated 21st November, 2017 sent by the Corporate Debtor to Operational Creditor (Annexure A-10 – Page 188) which reads as under:-

> "We've been going through quite a few discussions internally to try and resolve outstanding issues.
>
> We value our relationship with Aalborg and want to continue to work together. This is important for us.
>
> As you know we've had tremendous difficulties coming up with various issues and on multiple fronts which has landed us to the situation we are in today. We have mentioned these to you in our discussions. As you are aware renewables in general in India are facing a difficult situation with utilities and regulations back-tracking on signed PPAs which has

led to a ripple effect causing issues for developers like Atria. Banks are also putting everything on hold for various projects. We face a similar situation for our CSP project.

Putting the above aside we want to find a solution to settle our current issue and require your help.

As discussed yesterday one suggestion we had was for us to mutually terminate the agreements and ascertain costs of Aalborg. This I believe could help both parties in the current situation.

As soon as we have clearly on revival of the project, we would like to resume the work under the existing contract.

We truly appreciate your support with regards to the above and we want to assure you that we are making our best efforts to settle the issues at the earliest.

Best regards,

Karthik Raju"

Thus, by this e-mail, the Corporate Debtor referred to difficult situation with utilities and regulations which the Corporate Debtor was having problems with and proposed mutual termination of the Agreement ascertaining costs payable to the Operational Creditor - Aalborg. The e-mail did not state that the H2 and H3 stages had not been achieved by the Operational Creditor or that the invoices raised were not payable. The e-mail shows the Corporate Debtor having issues with regard to utilities and regulations as well as banks which were being faced by the Corporate Debtor. However, then there is e-mail dated 23rd November, 2017 (Page – 189) which was sent by the Operational Creditor to the Corporate Debtor empathizing with the situation Corporate Debtor was in but for solutions

sought prior payment of minimum $150,000 of the $825,000 as precursor for the discussions. At Annexure A-11 and Page – 190, there is e-mail dated 2nd December, 2017 from the Operational Creditor to the Corporate Debtor referring to non-resolution of pending issues and thus, forwarded Notice of Termination for Contract of Karnataka Project and Aurum Project. The Notice is dated 1st December, 2017 (wrongly printed as 2016) (Page – 192). The Notice referred to non-payment and Clause 15.1 of the Contract that if the amount due is not paid in 3 months, the supplier would be entitled to terminate the contract. The Notice stated that the termination would be effective from 8th December, 2017.

17. The Corporate Debtor then sent e-mail dated 13th December, 2017 (Annexure A-12 Page – 193). The learned Counsel for the Respondent is relying on this e-mail to state that the Corporate Debtor had raised a dispute. We proceed to examine this e-mail which reads as follows:-

> "Dear Svante,
>
> In reference to your termination notice dated December 1, 2017 in terms of the Supply Agreements dated March 16, 2016, we state as follows:
>
> 1. In relation to the Karnataka Project, after the execution of the Supply Agreement we had already paid USD 165,000 as per the contract milestone H1 which reasonably covers the expenses you have incurred on the project.
>
> 2. In relation to the Aurum Project we were required to issue a notice to proceed in terms of Clause 2.2.1 of the relevant agreement which notice to proceed has not been issued by us till date. Therefore,

the contract in the relation to the said project is non-effective as of date and you have no basis to make any claims thereupon.

3. As communicated earlier, we are facing certain regulatory and technical challenges on the project front, once we resolve the said challenges we would be happy to provide you exclusivity in relation to the said projects on terms and conditions mutually acceptable to both the parties.

Let us discuss this at the time convenient to you. Please note that this email is without prejudice to rights and entitlements under the contract (executed with Aalborg), law and equity.

Best regards,

Anand"

The other e-mail relied on by the learned Counsel for Respondent to say that dispute was raised is dated 26th February, 2018 (Page Nos.– 195 and 196) which reads as follows:-

Dear Svante,

Sorry for not being able to get back to you earlier. I had been travelling the last few weeks and just got back to India today.

As mentioned during our last meeting in Dubai, there seems to be a disconnect in terms of payments made by Atria with regards to documents received versus the costs incurred by Aalborg.

You had mentioned that you would be able to share additional documentation that could help both parties to be on the same page in terms of costs incurred for the Projects so far.

We look forward to hear back from you on the same.

Best regards

Karthik Raju"

With regard to the Karnataka Project, it would be relevant to refer to the Reply to Section 8 Notice which Reply was sent by the Counsel for Corporate Debtor. It is Annexure – A-15 (Page – 211). Para – 16 of the Reply reads as under:-

> 16. Our Client vide email dated 13.12.2017 specifically apprised your Client that our Client already paid USD 165,000 (United States Dollar One Hundred and Sixty Five Thousand Only) in term of Clause 13.3 (H1) of the Contact to your Client. Our client further specifically stated that the amount of USD 165,000 (United States Dollar One Hundred and Sixty Five Thousand Only) is more than enough to meet the expenses bear by your Client in providing the preliminary Piping and Instrumentation Diagram (P&ID) and preliminary General Arrangement Drawing in terms of Clause 15.3 (H2) and un-priced purchase orders to sub-suppliers for the main equipment to our Client in terms of Clause 15.3 (H3) of the Contract. Your Client has not provided any goods and services to our Client in terms of the Contract as such our Client is not liable to pay any further amounts to your Client."

18. After going through the e-mails available to which we have referred above as well as Para – 16 of the Reply Notice sent by the Corporate Debtor, the positon which is evident from the record itself is that there is no dispute raised that the Operational Creditor had achieved H2 and H3 milestones and raised the invoices. No dispute has been raised that the services assigned were not rendered or that the money did not become due. What is sought to be stated by the Respondent – Corporate Debtor is that the

payment made as at the stage of H1 itself was sufficient to cover the expenses incurred by the Operational Creditor and that the same was more than enough. This is reflected from the e-mail dated 13th December, 2017 as well as the Reply Notice given by the Corporate Debtor. The e-mail dated 13th December, 2017 itself mentioned that the Corporate Debtor was facing certain regulatory and technical challenges on the project front and once the same is resolved, they would be happy to provide exclusivity to the Operational Creditor on the said projects. The e-mails show that because Corporate Debtor after entering into the Agreements, had regulatory and other challenges with regard to the project it wanted to mutually terminate the Agreements but the Operational Creditor did not agree to waiving or reducing the dues. Looking to the defence put up, we are not convinced that the Respondent is able to show that dispute truly exists with regard to the Operational Creditor achieving milestones H2 and H3 for which invoices were raised. There is no dispute regarding this. Thus, the defence is patent feeble argument on the basis of e-mails to show that the parties were trying to settle the issues. What appears from the documents is that Corporate Debtor wanted to get out of the Agreement and was trying to get the accounts payable reduced or waived.

19. It being an Agreement to design, manufacture and deliver, if the Operational Creditor had taken steps towards designing and manufacturing, the operational debt was due. There is default and there is liability to pay on the part of the Corporate Debtor.

20. We thus find that the Adjudicating Authority wrongly rejected CP(IB) No.144/BB/2018. The said Application was required to be admitted.

21. As regards, the Aurum Project, however, which is subject matter of Company Appeal (AT) (Ins) No.167 of 2019, there is no dispute with regard to the fact that the down payment itself was not made and Clause 2.2.2 of the Agreement made provisions that the supplier shall be considered as given full Notice to proceed at the time of receiving down payment. When down payment itself was not made, there was no full Notice to proceed for the Operational Creditor. The machinery of IBC cannot be used to enforce a contract which may have been entered into but did not take off for want of taking the first step itself. For Section 9 of IBC to be invoked, it would be necessary to show that services have been rendered or goods have been provided for. It would also be necessary to show that there was a demand and default with regard to non-payment of price for goods or services rendered. If the contract did not take off, there could not have been any services provided and thus Section 9 could not have been invoked. There is no reason for us to interfere with regard to Judgement in CA (IB) 143/BB/2018.

22. For the reasons, we pass the following orders:-

ORDER

A) Company Appeal (AT)(Ins) No.167 of 2019 is dismissed. Impugned Order in CP(IB) No.143/BB/2018 is maintained.

(B) Company Appeal (AT) (Ins) No.168 of 2019 is allowed. Impugned Order dated 11th January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Bengaluru Bench) in CP(IB) No.144/BB/2018 is quashed and set aside.

Parties are directed to appear before the Adjudicating Authority on 17th February, 2020. The Adjudicating Authority will admit the said Section 9 Application and pass further Orders required to be passed for initiating CIRP process unless before Order of admission is passed, Corporate Debtor settles the dues of the Operational Creditor in CP(IB) No.144/BB/2018. Till the Adjudicating Authority passes Order of admission, the Corporate Debtor will maintain status quo with regard to its assets and will not transfer, encumber, alienate or dispose of its assets or create any legal right or beneficial interest in its properties.

Both the Appeal are disposed accordingly. No Orders as to costs.

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

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md