NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 622 of 2018

[Arising out of order dated 13th August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, in CP(IB) No. 104/9/HDB/2018]

IN THE MATTER OF:

Karpara Project Engineering Private Limited,
Room No. 405, SNS Platina,
Near Reliance Mall, Behind J. H. Ambani School,
Vesu Road, Surat - 395007.
Gujarat.

....Appellant

Vs

BGR Energy Systems Ltd.,
Registered Office at:
Plot 5, Pannamgadu Industrial Estate,
Ramapuram Post, Sullurpet (T),
Nellore District – 524401,
Andhra Pradesh.

....Respondent

Present:

For Appellant: Mr. Suryanarayan Iyer, Ms. Garima Bajaj and Mr. Sanskar Agarwal, Advocates.

For Respondent: Mr. Devansh Mohta, Mr. Ashwin Kumar D. S. and Ms. Aditi Dani, Advocates.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant (Operational Creditor) – 'Karpara Project Engineering Private Limited' filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor - 'M/s BGR Energy Systems Ltd.'. In terms of its order dated 13th August, 2018 the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad rejected its application on the ground that there existed a dispute even before the issuance of demand notice and the said dispute had been brought to the notice of Operational Creditor by the Corporate Debtor in the form of reply notice. Aggrieved thereof the Appellant has filed the present appeal assailing the order dated 13th August, 2018 on the grounds that the impugned order was passed by the Adjudicating Authority ignoring the fact that the Corporate Debtor never raised the issue of delay and the consequent claim of liquidated damages during the course of fifteen revisions of the work orders extending the final completion date from time to time finally to 31st May, 2015 and that the Corporate Debtor could not agitate the claim of liquidated damages against the Operational Creditor after the release of two bank guarantees towards the performance

guarantee. According to Appellant, the disputes raised by the Corporate Debtor are spurious, designed only to harass the Appellant.

2. Heard learned counsel for the parties and perused the record.

3. Initiation of Corporate Insolvency Resolution Process at the instance of an Operational Creditor is provided for under the provision engrafted in Section 9 of the I&B Code, whereunder an Operational Creditor may file an application before the Adjudicating Authority for initiating a Corporate Insolvency Resolution Process after complying with the statutory requirements of Section 8. Dwelling on the scope of this provision in "***Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407**", the Hon'ble Apex Court observed as under:

> ***"29.*** *The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which*

is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

In a later judgment titled *"**Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.,*** (2018) 1 SCC 353", the Hon'ble Apex Court further observed as under:-

*"**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."

4. The undisputed facts leading to initiation of Corporate Insolvency Resolution Process may briefly be noticed. The Operational Creditor was awarded a contract for the collection of material from stores of the Corporate Debtor, loading, transportation to work site, unloading of materials, erection, testing, commissioning of steam generator comprising boiler with all necessary wherewithal's, etc. The work was awarded under Work Order dated 19th August, 2009 for execution of pre-assembly, erection, testing and commissioning of boiler and other plants in respect of 'Kalisindh Thermal Power Project, Rajasthan'. Delivery date was fixed for 31st October, 2009. This was followed by another Work Order dated 10th January, 2013 relating to erection, testing and commissioning of auxiliary steam piling and clear oil painting of the same project with completion date fixed as 30th July, 2013. According to the Operational Creditor, the Corporate Debtor failed to adhere to the terms of Work Order as the erection materials, crane facilities as also electricity were not provided at the work site at the relevant time. The total tonnage of the project was increased in February, 2011 and February, 2014.

This necessitated periodical revisions being issued by the Corporate Debtor from time to time. Final revision made by Revision No. 15 dated 5th March, 2015 extended the completion time to 31st May, 2015. The Operational Creditor claims to have completed the work awarded to it on 28th March, 2015 culminating in issuance of 'completion certificate' by the Corporate Debtor. The Operational Creditor raised retention bill dated 11th August, 2014, final bill dated 27th February, 2016 and retention bill dated 10th March, 2016 besides claiming overrun compensation (ORC) of Rs.5,49,22,446/- vide its email dated 11th February, 2014. The Operational Creditor had provided two bank guarantees for Rs.1,90,00,852/- and Rs.41,80,585/- towards a performance guarantee/ security deposit to the Corporate Debtor which were extended from time to time due to extension in the contract period. While the Corporate Debtor sought extension of the two bank guarantees, the Operational Creditor, vide its letter dated 18th March, 2017, explained the amounts due to the Corporate Debtor and sought release of the bank guarantees as contractual conditions had been fulfilled. Responding thereto, the Corporate Debtor vide its letter dated 20th March, 2017 to SBI Baroda withdrew its requests for extension of the two bank guarantees. According to Corporate Debtor, the Corporate Debtor sent an email dated 17th July, 2017 admitting dues of Rs.3,07,62,493/- to the Operational Creditor subject to decision on liquidated damages for alleged delay in execution of work by the Operational Creditor. The Operational Creditor issued demand notice dated 3rd October, 2017 for amount of Rs.8,56,84,939/-together with amount of Rs.3,07,62,493/- as interest

besides ORC claim of Rs.5,49,22,446/-. The Corporate Debtor, in its reply dated 17th October, 2017 disputed the dues and made counter claim of Rs.1,81,78,699/-. This led to filing of application under Section 9 of I&B Code by the Operational Creditor which came to be dismissed at the hands of Adjudicating Authority for reasons assigned in the impugned order and adverted to hereinabove.

5. Learned counsel for Appellant, while assailing the impugned order submitted that the Adjudicating Authority erred in passing the impugned order without considering whether the dispute regarding liquidated damages raised by the Corporate Debtor was an afterthought, spurious, hypothetical or illusory. It is further submitted that no liquidated damage for any revision has been imposed or quantified by the Corporate Debtor even once during fifteen revisions of the Work Order spanning 2009 to 2015. It is further submitted that the mandatory provision in Clause 2.6(c) for levy of liquidated damages has not been followed and the counter claim of the Respondent does not survive as a defense against the Operational Creditor's claim. It is further submitted that since completion certificate has been issued unconditionally on 5th March, 2015, claim on account of liquidated damages cannot lie. It is further submitted that the Corporate Debtor cannot be allowed to raise a mutually destructive plea in view of the fact that it has deposited TDS towards dues of Rs.2,33,74,173/- to the Corporate Debtor. Thus, it is contended that the plea of pre-existing dispute is nothing but a fraud designed to finish off the Operational Creditor.

6. Per contra learned counsel for Corporate Debtor submitted that the Corporate Debtor's claim for liquidated damages was raised and discussed between the parties as is admitted in writing by the Operational Creditor in its letter dated 1st February, 2017 i.e. well before the issuance of the demand notice. Thus, the same constituted a pre-existing dispute. It is submitted that completion certificate has nothing to do with settlement of dues. It is further submitted that the parties are in dispute over the liability of the delay and without resolution of the same provisions of I&B Code cannot be invoked. It is further submitted that the release of bank guarantee does not amount to acceptance of Operational Creditor's claim by the Respondent. It is submitted that the Corporate Debtor in its email dated 17th July, 2017 has clearly stated that the pending payment is subject to decision on liquidated damages imposition by the Corporate Debtor as per agreement between the parties. Therefore, same could not be construed as an admission. It manifested that the amounts were disputed and there was no admission of any debt. It is further submitted that there existed some dispute between the parties in regard to completion of work and computation of liquidated damages. It is further submitted that the amount claimed by the Operational Creditor is a disputed claim and the application under Section 9 of I&B Code is not maintainable.

7. We have given our anxious consideration to the arguments advanced at the Bar. It is the settled position of law that the existence of a pre-existing dispute is a bar to initiation of Corporate Insolvency Resolution

Process at the instance of an Operational Creditor. The Adjudicating Authority is required to ascertain whether the Operational Creditor has received the notice of dispute pursuant to service of notice of demand on the Corporate Debtor within the specified time or a dispute emerges from the record of information utility. A suit or arbitration proceeding relating to a dispute may be pending between the parties or the dispute raised qua the claim or the invoices may emerge from the record of information utility or correspondence and communication between the parties. The Adjudicating Authority is not required to conduct a roving enquiry or examine the merits of dispute in a manner as if he were going to decide the issues on merit. The Adjudicating Authority exercises a limited jurisdiction and cannot dwell upon the pros and cons of the claim or merits of dispute. The limited exercise required to be undertaken by the Adjudicating Authority extends only to sift the material for separating the grain from the chaff with a view to reject a palpably *spurious defense*. Likelihood of such defense succeeding or failing is not the concern of Adjudicating Authority. If the dispute exists in fact, is a pre-existing dispute and is not spurious, hypothetical or illusory, the Adjudicating Authority must reject the application.

8. Clause 2.6 (c) of Annexure-I of Work Order dated 19th August, 2009 at page 191 of the paper book provides that the time schedule shall not be liable for extension without levy of liquidated damages unless under the exceptional circumstances specified in the contract. It also provides that no compensation shall be payable for any time overrun of two months beyond

the time schedule, if same is caused due to reasons attributable to the Corporate Debtor. Clause 2.7 provides for levy of liquidated damages in the event of delay in handing over of the unit. It is gatherable from the Work Order that time schedule of 24 months had been fixed for Boiler Package Unit-1 w.e.f. October, 2009. On a plain reading of the covenants in the Work Order it is manifestly clear that extension of the time schedule without levy of liquidated damages was not contemplated unless same was covered by the exceptional circumstances specified in the Contract. The compensation for any time overrun of two months beyond the time schedule was not admissible for delay caused due to reasons attributable to the Corporate Debtor. It is the admitted case of the parties that the Work Order had to be revised fifteen times and the time schedule got extended beyond proportion. Letter dated 8th October, 2014 (at page no. 317 of the paper book) from Operational Creditor to the Corporate Debtor is with respect to overrun compensation worked out at Rs.5,49,22,446/- as on 14th June, 2014 but the same has not been included in the claim. In reply thereto, the Corporate Debtor sent reply dated 11th December, 2014 (at page no.319 of the paper book) saying that the issue was under consideration and same would be settled alongwith final bills. Therefore, there can be no quarrel with the proposition canvassed by learned counsel for the Operational Creditor that there was no dispute as regards claim of Operational Creditor for overrun compensation, as the issue was agreed to be settled alongwith final bills. However, the matter does not end there as the issue of liquidated damages raised by the Corporate Debtor is distinct

from the issue of overrun compensation and operates in different circumstances. From letter dated 1st February, 2017 (at page no. 310 of the paper book) from the Operational Creditor to the Corporate Debtor, it is clearly gatherable that the Corporate Debtor had staked its claim for liquidated damages under the 'LD Clause' referred hereinabove and the Operational Creditor resisted the same on the ground that the contract was extended from date of its trial operation in October, 2011, periodically, not due to any delay attributable to Operational Creditor. The only conclusion deducible from this letter is that the Corporate Debtor had raised issue as regards levy of liquidated damages much prior to service of demand notice dated 3rd October, 2017, which was disputed by the Operational Creditor. Viewed in the context of revision of Work Order umpteen times viz. fifteen, it is manifestly clear that levy of liquidated damages in terms of the Work Order is directly and proximately linked with delay in execution of the project for which both parties squarely blame each other. Keeping in view these considerations it cannot be said that the dispute raised by the Corporate Debtor was spurious, hypothetical or illusory. Release of Bank Guarantees towards Performance Guarantee/ security and issuance of completion certificate have no bearing on such pre-existing dispute. Arguments advanced on this score by learned counsel for Operational Creditor are rejected.

9. For what has been discussed hereinabove, we are of the considered opinion that the issue of pre-existing dispute raised by the Corporate Debtor

much prior to service of demand notice under Section 8(1) of I&B Code requiring adjudication by a competent judicial forum brings the case out of the clutches of Corporate Insolvency Resolution Process. We are of the considered view that in the given circumstances triggering of Corporate Insolvency Resolution Process at the instance of Operational Creditor was uncalled for and unwarranted. The impugned order does not suffer from any legal infirmity or factual frailty. The appeal is accordingly dismissed. There shall be no order as to costs.

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

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
14th May, 2019

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