

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**  
**Company Appeal (AT) (Insolvency) No. 1370 of 2019**

[Arising out of Order dated 08.11.2019 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No. IV) in Company Petition No. IB-285/ND/2019]

**IN THE MATTER OF:**

**Mr. Gajendra Parihar**  
**Director of M/s Chandralekha Constructions**  
**Pvt. Ltd.**  
**Through Its Authorised Representative,**  
**Mr. Ganjendra Parihar**  
**Regd. Office at: 119, 1<sup>st</sup> Floor, Sant Nagar,**  
**East of Kailash,**  
**New Delhi- 110065**

**....Appellant/Corporate**  
**Debtor**

**Vs**

**1. M/s Devi Industrial Engineers**  
**A-295, Okhla Industrial Area, Phase-I,**  
**New Delhi-110020**

**....Respondent/Operational**  
**Creditor**

**2. Mr. Deepak Kumar Agarwal**  
**Interim Resolution Professional,**  
**Chandralekha Constructions Pvt. Ltd.**  
**Flat No. 2, Plot No. B-4**  
**Paryantan Vihar, Vasundra Enclave,**  
**National Capital Territory of Delhi-110096**  
**[Dkagarwal.ip@gmail.com](mailto:Dkagarwal.ip@gmail.com).**

**Present:**

**Shri Mukesh Rana, Ms. Mamta and Ms. Tanusha Pali, Advocates for**  
**Appellant**  
**Shri Ahsan Ahmad and Mr. Rajiv Kumar, Advocates for R-1**

## **J U D G M E N T**

[ 18<sup>th</sup> March, 2020 ]

### **Justice A. B. Singh.**

Initially, this Appeal was filed by Appellant in the name of **M/s Chandralekha Constructions Pvt. Ltd. Appellant (Corporate Debtor)** under Section 61 of **Insolvency and Bankruptcy Code, 2016 (Referred to as IBC)** being aggrieved and dissatisfied by the order of National Company Law Tribunal (NCLT) dated 08.11.2019 passed under Section 9 of the **Insolvency and Bankruptcy Code, 2016** read with rule 6 of the **Insolvency and Bankruptcy Rules, 2016** in C.P. No. IB-285/ND/2019 on an application filed by Respondent/Operational Creditor whereby Application for initiating Corporate Insolvency Resolution Process(CIRP) against Corporate Debtor the Learned NCLT admitted the application and Corporate Insolvency Resolution Process started.

2. Subsequently, I.A No. 112 of 2019 was filed under Rule 31 read with Rule 11 of the National Company Law Appellate Tribunal, 2016 seeking substitution of the director of the Corporate Debtor as appellant and impleadment of interim resolution professional as Respondent No. 2 in the present Appeal. In view of the Judgment of Hon'ble Supreme Court in "Innoventive Industries Ltd. Vs. ICICI Bank (2018) 1 SCC 407", and order

dated 31<sup>st</sup> October, 2020 the I.A was allowed and the Appellant was directed to correct the Memo of Appeal.

3. Learned Counsel for the Appellant/Corporate Debtor during the course of argument and also in his written argument filed in this case, and also in his application have stated the brief facts as follows:

“ii. *The Corporate Debtor had placed an even work order dated 09.09.2017 of boom pump 36 meters with all accessories @ Rs. 4,00,000/- per month was agreed that Applicant shall provide Boom Pump in a very good working condition with minimum guarantee of 280 flexi hours working in a month (27 working days) with operator @helper. The aforementioned conditions were the essence of the work order and were therefore sine qua none of the same.*

iii. *That work order commenced from September 2017. The boom pump and the services of the Operational Creditor were deficient, defective and the approach of the Applicant was very unprofessional during the subsistence of the work order since inception.*

iv. *That there were frequent multiple and consistent breakdown of the pump during the operation leading to abruptly stopping the casting process, which took days to mobilize the team thereby causing interruptions and loss of work hours of hired labour at the site of Appellant.*

v. That the disputes regarding the defective and inefficient pump and service were raised by the Appellant during the existence and subsistence of the work order at multiple occasions through various modes, as the same was defective since inception and the same was duly informed the Operational Creditor was requested to be corrected/repaired and replaced vide various correspondences dated 31.10.2017, 25.12.2017, 26.12.2017, 07.01.2018, messages dated 20.09.2017, 21.09.2017, 11.09.2017, 15.10.2017, 29.10.2017, 05.10.2017, 14.10.2017 etc.

vi. That the dispute regarding the inefficient and defective service of the respondent were repeatedly raised by the Corporate Debtor during the subsistence of the work order vide various correspondences including e-mails, calls and messages.

vii. However, the Operational Creditor did not pay any heed to it and even maliciously stopped the machine during the subsistence of the work order to pressurize the Corporate Debtor as a consequence of which the Respondent/ had to suffer losses.

That seeing unprofessional approach on the part of the respondent, the appellant has no potation except to discontinue the work order with respondent firm.

That the invoices raised by the respondent were duly disputed by the appellant from time to time due to deficiency of service and the good, vide various email dated 31.10.2017, 25.12.2017, 26.12.2017,07.01.2018, messages dated 20.09.2017, 21.09.2017,11.09.2017,15.10.2017,29.10.2017,05.10.20

17, 14.10.2017 etc. as soon as the said bills were raised.

That the Operational Creditor being member approached the Construction Equipment Rental Forum (CERA), seeking conciliation and mediation to resolve the existing dispute of deficiency of service, good and the amount vide an e-mail dated 09.01.2018.

That Operational Creditor is a member of CERA, whereas Corporate Debtor is not a member being construction company.

viii. That Appellant received an email dated 28.02.2018 from the rental form CERA in support of their member (Respondent) to release an undisclosed, unjustified, illegal and arbitrary amount towards payments and in violation of the basic principles of natural justice.

ix. The on 05.03.2019 Operational Creditor issued another bill even dated for the period of 01.11.2017 to 12.12.2017 of different amount which was never acknowledged or accepted by the Appellant. It is pertinent to mention that this fact was dishonestly concealed by the respondent in its Section 9 Application, though the same was admitted in its rejoinder.

x. Thereafter, the Respondent issued another (third) bill dated 29.09.2018, of the same period 01.11.2017 to 12.12.2017 for increased amount of Rs. 5,13,109.71/-, which was sent vide speed post on 04.10.2019. That the said third invoice dated 29.09.2018 was cancelled, by the appellant with a remark that "this Bill have been rejected as the service was not provided. Please contact to site"

*The cancelled and the rejected bill was also sent to the Operational Creditor vide speed postdated 08.10.2018.*

*xi. That notice dated 01.11.2018 under Section 8 of the IBC was sent to the Corporate Debtor by the Operational Creditor for an alleged arbitrary and unjustified amount on the basis of invoices dated 01.10.2017, 31.10.2017 and 01.12.2017.*

*xii. That Application under Section 9 of the IBC was filed by the Operational Creditor against based on the invoices dated 01.10.2017, 31.10.2017,29.09.2018 in the month of Feb. 2019.*

*xiii. That Arguments were heard by the Hon'ble NCLT and specific objections highlighting the maintainability of application under Section 9 of IBC as the invoices forming the basis of Operational Debt were different from the invoices in demand notice under section 8 of IBC, Objection regarding pre-existing dispute and the discrepancies in each of the disputed invoices and the order was reserved by Hon'ble NCLT on 11.10.2019.*

*xiv. The Hon'ble NCLT pronounced the order 08.11.2019 and thereby allowed the Section 9 Application and appointed IRP. However, the copy of the same was never received by the Corporate Debtor/Appellant, despite specific mention in the order, neither any order was uploaded despite repeated checking”.*

4. Learned Counsel for the Respondent No. 1/Operational Creditor in Reply Affidavit filed on their behalf have stated as follows:

*“1. That the present appeal is based on the misconceived proposition of law as vide WhatsApp message dated 30.11.2018, in response to the Demand*

Notice dated 01.11.2018, (**at page-24 of reply of the Respondent No. 1**), the appellant/corporate debtor has specifically admitted an amount of Rs. 6,35,000/- due and payable to the Respondent No. 1 which is more than one lakh rupees. Accordingly, the Ld. Adjudicating Authority has rightly initiated corporate insolvency resolution process against the appellant vide order dated 08.11.2019.

2. That a letter dated 09.01.2018 was sent by respondent no. 1/operational creditor to Construction Equipment Rental Forum (CERA) seeking help in recovery of the unpaid operational debt from the appellant/corporate debtor. However, this letter has been painted by the appellant/corporate debtor as alleged dispute knowing full well that CERA is not an adjudicating body and the request by the Respondent no. 1/operational creditor was in the nature of mediation and conciliation in recovery of outstanding amount due from the appellant and the Ld. Adjudicating Authority has rightly observed that CERA vide letter dated 28.02.2018 decided against the appellant/corporate debtor which clearly indicates that the alleged dispute was settled and the appellant/corporate debtor has not challenged or taken any other steps against the decision of CERA, albeit a hypothetical or illusory dispute has been raised by the appellant/corporate debtor and same appears to be a moonshine defence. (**E-mail dated 09.01.2018 sent by the Respondent No. 1 to CERA at page No. 136 of Volume I of Memorandum of Appeal and CERA e-mail sent to the Appellant at page no. 264 of Volume II of Memorandum of Appeal**).

**3. That the Respondent No. 1/operational creditor raised an invoice dated 01.12.2017 for an amount of Rs. 5,13,110/- for the services rendered during the period starting 01.11.2017 to 12.12.2017. However, the appellant/corporate debtor lured the respondent no. 1/operational creditor to believe that the appellant/corporate debtor is suffering from financial hardship and accordingly, the amount was settled at Rs. 1,56,076/- from Rs. 5,13,110/- and a fresh invoice dated 05.03.2018 was issued to the appellant for an amount of Rs. 1,56,076/-. The appellant again failed to honor its commitment and did not make the payment compelling the respondent no. 1 to reissue the original invoice again on 29.09.2018 (Invoice dated 01.12.2017 at page no. 271, Invoice dated 05.03.2018 at page No. 272 and Invoice dated 29.09.2018 at page no. 273 of Volume-II of Memorandum of Appeal). These are the three invoices which the appellant which the appellant/corporate debtor is assailing knowing full well that the three invoices were issued at the instance of the appellant/corporate debtor and the same were issued when the appellant failed its commitment.**

4. That the present appeal is an afterthought knowing full well that the differences whatsoever which were prior to the settlement of amount of unpaid operational debt on 05.03.2018, have been iron out by agreeing to make the payment of the outstanding dues by the appellant/corporate debtor in terms of the settlement



*which was duly communicated by the respondent no. 1 to the appellant/corporate debtor vide e-mail dated 05.03.2018.*

*However, despite clear commitment to release the payment of outstanding amount, the appellant failed to do so. Therefore, now they cannot take advantage of alleged dispute prior to 05.03.2018 as the same has been clearly done away with.*

*Accordingly, the appellant is estopped from raising such alleged disputes on flimsy ground which as no legs to stand. **(E-mail dated 05.03.2018 sent by the respondent no. 1/operational creditor to the appellant/corporate debtor at page no. 269 of Volume-II of Memorandum of Appeal and also page 24 of the reply of the Respondent No. 1/operational creditor).***

*5. That appellant approached the respondent no. 1 in the year 2017 and placed a work order bearing no. CCPL/082 dated 09.09.2017 for deployment of Boom Pump 36 mts. on hire basis, for its site at Godrej Golf Link, Plot No. Rep. 1, Sector – 27, Opp. Bironda Village, Gautam Budh Nagar, Greater Noida. The respondent no. 1 deployed Boom Pump 36 mts. at the project side of the respondent as per the specification of the said Work Order. **(Work Order at page nos. 95-96 of Volume of Memorandum of Appeal).***

*6. That the respondent no. 1/operational creditor raised invoice nos. DEVI/27-18/056 dated 01.10.2017, DEVI/17-18/085 dated 31.10.2017 and DEVI/18-19/143 dated*

29.09.2018 for total amount of Rs. 11,93,375/- against the appellant/corporate debtor for the service rendered by it as **per the log book duly signed and authenticated by the appellant/corporate debtor. (Log Book at page nos. 99 to 121 of Volume I of Memorandum of Appeal)** The appellant made advance payment of Rs. 1,96,000/- to the respondent no./operational creditor. The Operational Creditor sent various e-mails to the Corporate Debtor about the payment due and payable by the appellant and requested for release of the outstanding amount. However, the appellant/corporate debtor failed to pay the unpaid operational debt.

7. That upon failure to pay the outstanding dues by the Corporate Debtor, the Operational Creditor sent a Demand Notice dated 01.11.2018 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the appellant asking them to make the entire payment of Rs. 11,93,375/- (Rupees Eleven Lakhs Ninety-Three Thousand Three Hundred Seventy-Five only) along with interest as per the invoices within 10 days from receipt of the notice failing which the respondent no. 1 shall initiate the corporate insolvency resolution process against the appellant. The Hon'ble Adjudicating Authority vide order dated 08.11.2019 allowed the application filed by the Respondent No. 1”.

5. After hearing the Parties and going through the records and also perusal of the application and Reply filed on behalf of the Respondent No. 1 and their written submissions filed on behalf of the Parties the fact emerges that there was pre-existing dispute regarding the deficiency of goods and services and dispute was raised soon after the work commenced.

6. This was raised on various occasions and it is established through the exchange of Email between the Parties at Page 248 of the Paper Book dated 31<sup>st</sup> October, 2017 sent by the Corporate Debtor to Respondent/Operational Creditor making complaints about the ineffective and insufficient service provided by the Respondent/Operational Creditor.

7. Further at page 250 another Email dated 25<sup>th</sup> December, 2017 sent by the Corporate Debtor disputing the Bill raised by Operational Creditor stating it to be wrong and making complaints about loss of work and consequently leading to loss of work as the Pump in question was removed for a week without intimation.

Similar is the Email at Page 251 dated 26<sup>th</sup> December, 2017.

On the other hand, the Respondent/Operational Creditor sent the Email on 28<sup>th</sup> December, 2017 at page 252 of the Paper Book, denying deficiency of service and further claimed that out of 92 days of service only 8.5 days was consumed for maintenance.

8. Further the email at Page 256 of the Paper Book sent by Corporate Debtor dated 07<sup>th</sup> January, 2018 to Respondent/Operational Creditor claiming that in month of November and December, 2017 there was breakdown of machine and loss of service due to breakdown and also at Page 257 which is the Email dated 07<sup>th</sup> January, 2018 sent by Appellant/Corporate Debtor to Respondent/Operational Creditor informing termination of the contract.

9. The fact also transpires that prior to filing the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 before the Adjudicating

Authority NCLT filed by the Respondent No.1/Operational Creditor has approached the Construction Equipment Rental Forum (CERA), of which only Respondent No. 1/Operational Creditor is a member vide email dated 09.01.2018 at Page 136 of the Paper Book through its official Mr. Mithlesh Kumar for resolving the existing dispute and wherein, it is claimed that the CERA which is only an association arbitrarily vide its e-mail dated 28.02.2018 at Page 264 directed the Appellant to unilateral release/pay an undisclosed, unjustified and arbitrary amount.

10. We take note of these facts and also the Judgment of the Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited vs. KIRUSA Software Pvt. Ltd. reported in 2018 (1 SCC 353 Paragraph 33) Supreme Court has held as follows:

*“33. The scheme under Sections 8 and 9 of the Code, appears to be that an Operational Creditor, as defined, may, on occurrence of a default (i.e. on non-payment of a debt, any part thereof has become due and payable and has not been repaid.), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8 (1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the Operational Creditor the existence of a dispute and/or the record of the*

*pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that existence of the dispute and/or the suit or arbitration proceeding must be pre-existing, it must exist before the receipt of the demand notice or invoice, as the case may be”.*

*“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

*i. Whether there is an “operation debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*

*ii. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*

*iii. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operation debt in relation to such dispute?*

*If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act”.*

11. The exchange of different Email between the Parties as referred above, it clearly establishes that there was pre-existing dispute between the parties regarding services rendered and the Corporate Debtor had continuously

through Emails referred to Page 250, 251 and 252 made complaints regarding the deficiency of service and loss caused to the project and bill raised by the Operational Creditor/Respondent No. 1.

12. In view of the facts emerging on record of this case and the discussion made and the Law laid down by the Supreme Court (Supra), we are of considered view that the Learned Adjudicating Authority (NCLT) New Delhi, Court IV, while passing the impugned order dated 08.11.2019 in Company Petition No. IB-285/ND/2019 has not considered the fact and Law (Supra) which are available on record in its correct perspective.

13. As there was pre-existing dispute between the Parties and the Application under Section 9 of Insolvency and Bankruptcy Code, 2016 filed on behalf of the Operational Creditor (Respondent No. 1) should not have been admitted and the Learned Adjudicating Authority not having considered the entire facts and the law in its correct perspective before passing the Impugned Order dated 08.11.2019 committed error. We therefore, accept the submissions advanced on behalf of the Learned Counsel for the Appellant and set aside the Impugned Judgment passed by Adjudicating Authority (NCLT, New Delhi, Court No. IV) in Company Petition No. IB-285/ND/2019.

In the result, the Corporate Debtor/Appellant is released from the rigor of Corporate Insolvency Resolution Process and actions taken by IRP/RP and Committee of Creditors, if any, in view of the Impugned Order are set aside. IRP/RP will hand back the records and management of the Corporate Debtor to the promoters/directors of the Corporate Debtor.

The matter is remitted back to the Adjudicating Authority to decide the fee and costs of 'Corporate Insolvency Resolution Process' payable to IRP/RP which shall be borne by the Respondent/Operational Creditor.

The Appeal is allowed as above, no costs.

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

[Justice A.B. Singh]  
Member (Judicial)

[Kanthi Narahari]  
Member (Technical)

**New Delhi**  
Basant B.